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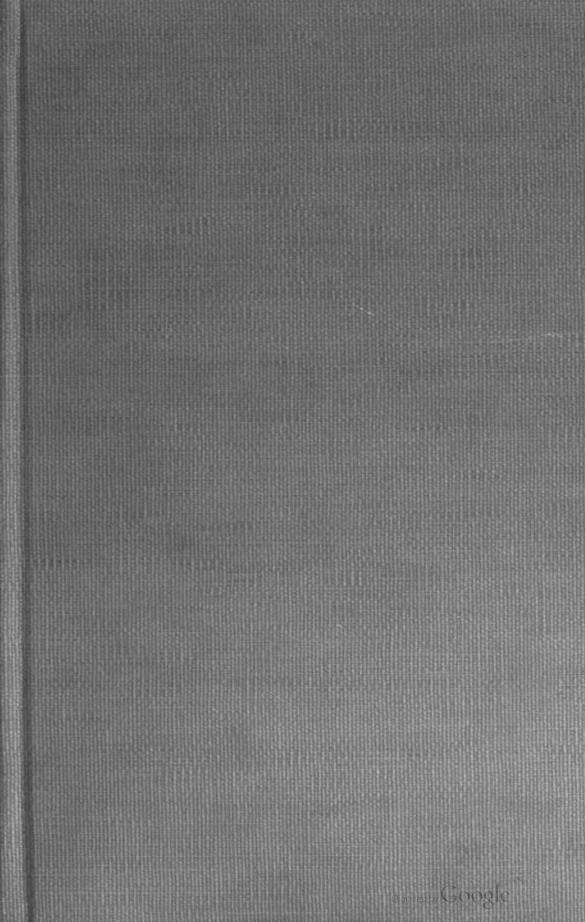
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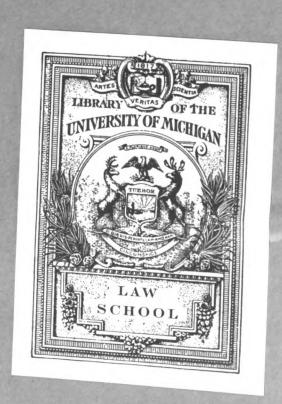
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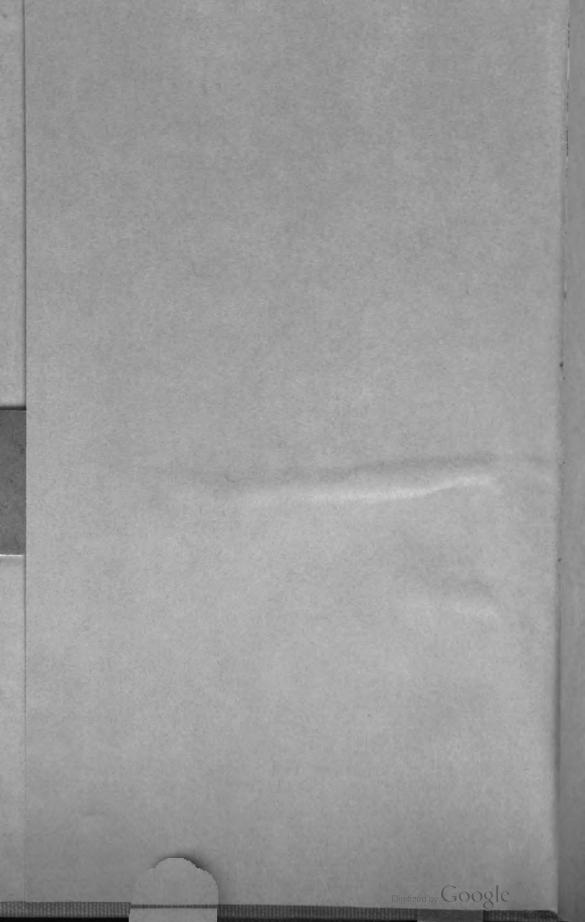
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CYON PRACTICAL TREATISE

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BILLS OF EXCHANGE,

CHECKS ON BANKERS.

PROMISSORY NOTES,

BANKERS' CASH NOTES.

AND

Bank Notes.

WITH REFERENCES TO

THE LAW OF SCOTLAND, FRANCE AND AMERICA.

BY JOSEPH CHITTY, ESQ.,

AND

JOHN WALTER HULME, ESQ.,

THE MIDDLE TEMPLE, BARRISTERS AT LAW.

TEN THE AMERICAN FROM THE NINTH LONDON EDITION,

CONTAINING THE AMERICAN NOTES OF FORMER EDITIONS, BY JUDGE STORY, E. D. INGRAHAM, THOS. HUNTINGTON, AND P. O. BEEBEE, ESQS.

TO WHICH ARE NOW ADDED,

THE CASES DECIDED IN ALL THE ENGLISH COURTS, IN THE COURTS OF THE UNITED STATES, AND OF THE SEVERAL STATES,

TO THE PRESENT TIME.

BY O. L. BARBOUR,

SPRINGFIELD:
PUBLISHED BY G. & C. MERRIAM.
1842.

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TO

WILLIAM TIDD, ESQ.,

THIS TREATISE IS DEDICATED,

AS A

TESTIMONY OF RESPECT FOR HIS TALENTS.

AND AN

ACKNOWLEDGMENT OF THE

GREAT OBLIGATIONS WHICH HIS FRIENDSHIP

AND

HIS PROFESSIONAL INSTRUCTIONS,

HAVE CONFERRED ON

HIS PUPIL AND FRIEND,

THE AUTHOR.

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TO THE

TENTH AMERICAN EDITION.

THE ninth London Edition, from which the present is printed, was published in September, 1840, and embraces all the English decisions on the subject, down to that time. In the preparation of that edition, the learned Author was assisted by Mr. Hulme, of the Middle Temple, Barrister at Law. The result of their joint efforts has been, the production of decidedly the best work upon the subject of which it treats, that has ever been given to the Profession. For comprehensiveness of design, clearness of arrangement, precision of style, and accuracy of detail, it is un-The present Editor has not attempted to improve the text of such a work. He has contented himself with appending to it the references to American Reports, made by former Editors—expunging such references to English Cases, as are now incorporated into the text, and adding Notes of American Cases decided since the publication of the ninth American Edition in 1839—and of the English and Irish Cases decided since the London Edition, from which the present Edition is taken was published.

The Notes of the present Editor are designated by brackets \ \ \.

Saratoga Springs, August, 1842.

PREFACE

TO THE NINTH EDITION.

Since the publication of the last Edition of this work several important Acts have been passed relating to Bills of Exchange; namely, the 2 & 3 Will. 4, c. 98, regulating the Place of Protest in certain cases; the 6 & 7 Will. 4, c. 58, declaring the Time when Presentment for payment to an acceptor for honour, or referee in case of need, is to be made; the 5 & 6 Will. 4, c. 41, making bills and notes given for a Gaming or Usurious consideration valid in the hands of a bonâ fide holder; and the 3 & 4 Will. 4, c. 98, s. 7—7 Will. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 37, for the exemption of certain bills and notes from the operation of the Usury laws. And it is to be observed that the 2 & 3 Vict. c. 37, which has since been continued by the 3 & 4 Vict. c. 83, till the 1st of January 1843, is not confined to bills and notes, but extends to all contracts for the loan or forbearance of money above the sum of 101.

The 2 & 3 Will. 4, c. 123, and 7 Will. 4 & 1 Vict. c. 84, abolish capital punishment in cases of *Forgery*.

Of the various decisions which have taken place on the subject of Bills of Exchange, perhaps the most important are those which establish in contradiction to the doctrine laid down by Lord Tenterden, that the claim of a bonâ fide holder of a bill or note which has been lost, or fraudulently obtained, is not to be defeated by his having taken it under circumstances which ought to have excited the suspicion of a prudent man; but that in order to destroy the holder's title he must be shewn to have taken the instrument MALA FIDE. The rule thus established not only relieves bills and notes from the clog which a contrary doctrine is calculated to impose on their negotiability, but presents at once a clear and intelligible question for the consideration of a jury; while to leave it to a jury to determine as to the degree of caution which a prudent man would exercise on taking such an instrument, leads to much perplexity and frequent injustice.

The cases as to the sufficiency of a notice of dishonour, though numerous, are far from being uniform, notwithstanding the manifest inclination of the Courts to put a liberal construction on such notices; and it is highly desirable that a question of so much commercial importance, and of such daily occurrence, should be settled by the intervention of the Legislature.

Several additions have been made to the tables of *Usances* and *Days of Grace*, and no pains have been spared to render the present Edition worthy of the continued approbation of the profession.

J. C. J. W. H.

1, Pump Court, Temple, September, 1840.

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PART OF THE PREFACE

TO THE

FIRST EDITION.

Considering the great circulation of Bills of Exchange and Promissory Notes in this Kingdom, and the loss to which the parties are subject, if they neglect to observe the rules affecting these securities, together with the frequency of litigation respecting them, there is no branch of the law so important to the merchant as well as to the lawyer as that relating to these instruments. An intimate acquaintance with the commercial law in this respect is particularly essential to the trader, who, too frequently, for want of being sufficiently apprised of the rules affecting bills, &c. loses the benefit of the security in his hands. It is also of the greatest importance to every professional man, because more ready and immediate advice is required from him in regard to bills and notes than on almost any other point; and the Pleader in particular is called upon for the utmost expedition in advising and framing the legal proceedings. These considerations have induced the Author to offer the following work to the public.

In order to facilitate reference to the particular parts of The Treatise, it has been considered expedient, in addition to the General Index at the end of the work, to give an Analytical Statement of the Contents immediately preceding the Alphabetical Table of Cases.

TEMPLE, September, A. D. 1799.

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ABBREVIATIONS USED IN THE PRESENT EDITION.

Adol. & El.	Adolphus & Ellis'	Reports.	К. В.
Bai.	Bailey's South Carolina	••	
Bald.	Baldwin's U. S. Circuit Court	44	
Blackf.	Blackford's Indiana	44 .	
Brev.	Brevard's So. Carolina.	66	
Brock.	Brockenbrough's U. S. Cir. Court	**	
R. M. Charl.	R. M. Charlton's Georgia	**	
Cont. or Conn.	Connecticut	44	
Dev. Eq.	Devereux's N. Carolina Equity	**	
Fairf.	Fairfield's Maine	44	
Gill. & John.	Gill & Johnson's Maryland		
Ham.	Hammond's Ohio	64	
Нат.	Harrington's Delaware	4.6	
Harr.	Harrison's N. Jersey	"	
How.	Howard's Mississippi	44	
Jebb & Sy.	Jebb & Symes	**	
Leg. Obs.	Legal Observer, Loud.	**	
Mee. & Wels.	Meeson & Welsby's	"	
N. Hamp.	New Hampshire	**	
Pick.	Pickering's Mass.	"	
Port.	Porter's Alabama	44	
Shep.	Shepley's Maine	**	
Stew.	Stewart's Alabama	44	
" & Port.	" & Porter's	46	
Sum.	Sumner's U. S. Circuit Court	44	
Verm.	Vermont	44	
Wend.	Wendell's N. Y.	"	
Whart.	Wharton's Pennsylvania	••	

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TREATISE

ON

BILLS OF EXCHANGE, &c.

PART FIRST.

THE RIGHT ACQUIRED BY BILLS, &c.

CHAPTER I.

THE GENERAL NATURE, UTILITY, AND HISTORY OF BILLS OF EXCHANGE, &c.

This subject may be properly considered under the following subdivisions.

I.	ETYMOLOGY, DEFINITION, AN	D	IV. HISTORY OF BILLS AND NOTES	10
	GENERAL NATURE OF BILL	s,	Foreign Bills	10
	&c.	1	Inland Bills	12
II.	GENERAL UTILITY	8	Checks on Bankers	12
Ш.	PECULIAR PROPERTIES	5	Promissory Notes	12
	Numerous Parties	5	Bank Notes	12
	Assignable Quality	6	Bankers' Notes	12
	Presumption of Consideration	9		

A bill of exchange derives its name from "billet de change," or "lettre 1. Etymolde change," and, in its origin, was the mode of completing a previous dis- ogy, Defitinct contract of exchange or bargain between A. and B. at one place, that general na-A. would cause money to be paid to B. or his assign at another place by ture of a C., a third person a debtor to A. or complied by him with the place by ture of a C., a third person a debtor to A. C., a third person, a debtor to A., or supplied by him with value to the Bill of Examount (a) It is defined to be an open letter of request from and order by amount(a). It is defined to be an open letter of request from, and order by, &c. one person on another to pay a sum of money therein mentioned to a third

⁽a) See Pardessus, Cours de Droit Commer- trat de Change, 1 Tom. 21, 22, 327 to 344, cial. "Des operations de Change." Du Con- 1st edit.

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1. Etymol-person(b)(1). It operates as an assignment to a third person of a debt due ogy, Defi- to the person drawing from the person upon whom it is drawn(c)(2).

nition, &c. There is this personal property and according to the personal property and according to the personal property and according to the personal personal property and according to the personal perso

There is this peculiarity, that in other contracts and securities there are generally only two parties, or at most a third as a guarantee; whereas, on account of the assignable and negotiable quality of a bill *of exchange there may be and usually are many more parties severally liable for the due acceptance or payment of the bill. The person who makes or draws the bill is termed the drawer; he to whom it is addressed is, before acceptance, called the drawee, and afterwards the acceptor; the person in whose favor it is drawn is termed the payce, and when he indorses the bill, the indorser; and the person to whom he transfers it is called the indorsee or holder; and a person accepting, or paying in default of acceptance, or payment by the drawee, is termed acceptor supra protest, or payer supra protest, or for honour; and in foreign countries it is not unusual for persons to become parties "au besoin" or "per aval."

Though this security is entitled to peculiar privileges, yet it is to be considered as a simple contract in the course of administration, which an executor or administrator cannot discharge, until after satisfying debts by bond, and other specialty claims, without being guilty of a devastarit(3); and for the same reason, a bill of exchange is considered as following the person of the debtor, and as bona notabilia where he resides at the time of the creditor's death, whereas a bond or other specialty is bona notabilia wherever it may be at the time of such death(d). And though a bond or bank note may be delivered in prospect of death, and be a good donation mortis causa, bills of exchange, promissory notes, and checks on bankers, seem incapable of being **3 1 the objects of such donation(e)(2). A bill of **exchange also being merely

(b) 3 Bla. Com. 266; Gibson v. Minet, 1 Hen. Bla. 586; Stock v. Manson, 1 B. & P. 291; Walwyn v. St. Quintin, 1 B. & P. 654; Rex v. Box, 6 Taunt. 325; Russ. & Ry. C. C. 300, S. C.; and see Pardessus, vol. i. 22, 230, 234, 344; vol. iv. 375; Pailliet, Manuel de Droits Français, title de la Lettre de Change. [3 Kenl's Comm. 2d ed. 745.]

(c) In one case it was stated by Hotham, B. that a bill is nothing more than an authority, Gibson v. Minet, 1 Hen. Bla. 586. But in other cases the judges have defined it to be an assignment to the payee, per Eyre, C. B. id. 602. Therefore it should seem that a drawee may accept or pay a bill after notice of the death of the drawer, post. And in France the

drawing a bill is considered as an assignment or appropriation of the effects in the hands of the drawee, though the will is unaccepted, I Pardess. 343, 429, 442, 448.

(d) Yeomans r. Bradshaw, Carth. 373; 3 Salk. 70, 164; Comb. 392. S. C.; Bac. Abtit. Executors, E. 2; Com. Dig. Administrator,

(e) Miller v. Miller, 3 P. W. 356; Wardr. Turner, 2 Vcs. scn. 442; Tate v. Hilbert, 3 Ves. jun. 111; 4 Bro. P. C. 286, S. C.; Lawson v. Lawson, 1 P. W. 411; 1 Reper on Leg. 2d edit. 3; Toller, Executors, 3d edit. 234, 235, where see the exceptions.

Miller v. Miller, 3 P. W, 356. A person, after having made his will, and about an hour

^{(1) {} A bill of exchange imports a debt due from the drawer to the drawer, which is assigned to the payee; and by acceptance the drawer acknowledges that he has funds of the drawer in his hands, to the amount of the bill. When paid and taken up by the drawer, it ceases to bind any of the parties. Griffith r. Reed, 21 Wend. 502. }

⁽²⁾ In the case of Harrison r. Williamson, 2 Edw. Ch. R. 430, it was decided that a general bill of exchange has not the effect of an assignment of the money for which it is drawn, in the hands of the assignee. And it is well settled that where an order is drawn on a general or particular fund, for a part only, it does not amount to an assignment of that part, unless the drawee consents to the appropriation, by an acceptance of the draft. Poydras r. Delaware, 13 Louis. Rep. 99.

⁽³⁾ In New York, recognizances, bonds, and sealed instruments, have no preference, in the course of administration, over notes, bills, and unliquidated demands and accounts. 2 Rev. Stat. 87, sec. 27, 8. In a few of the States, the English order of preference is preserved; but in most of them, it is entirely disturbed; and in several, simple contracts are placed upon a footing as favorable as that which is given to them in New York. The rules of the different States on this subject are presented somewhat in detail, with proper references, in 2 Kent's Com. 2d ed. 416

^{(4) {} Parish v. Stone, 14 Pick. 198. In the case of Raymond v. Sellick, 10 Conn. 430, it

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a simple contract, is affected by the statute of limitations, and must be sued I. Etymol for within six years after it is payable (f). But though it is a chose in accordance of the payable (f). But though it is a chose in accordance of the payable (f).

before his death, delivered to his wife two bank notes for 300l. each, and another note for 100l. (not being a cash note, nor payable to bearer), adding, that he had not sufficiently provided for ber. On a bill filed in the name of the infant son, being the residuary legatee, against the widow and executors, for an account of the testator's personal estate, it was insisted that the 6001. was in payment of the legacy given her by the testator in a codicil to his will, and that with regard to the other note for 1001. which was not payable to bearer, that was merely a chose in action, and consequently could not pass by a delivery thereof. Per Master of the Rolls, the gift of the 6001. contained in the bank notes was a donatio caus? mortis, which operates as such, though made to a wife, for it is in nature of a legacy, though it need not be proved in the spiritual court as part of the testator's will. But as to the note for 100l. which was merely a chose in action, (and not being payable to bearer) must still be sued in the name of the executors, that cannot take effect as a donatio causi mortis, inasmuch as no property could pass therein by the delivery. See also Ward v. Turner, 2 Ves. sen. 442, and Tate v. Hilbert, 2 Ves. jun. 120; 4 Bro. P. C. 286, S. C.; in which it was held that a check or a promissory note delivered by J. S. on his death-bed, did not take effect as a donatio caus'i mortis. And per Abbott, C. J. in Halliday v. Atkinson, 5 B. & C. 503; S D. & R. 163, S. C.; post, in notes. Simms v. Cox, 3 Law J. 44, K. B., 11th November, 1824. Executors brought an action of trover to recover possession of a promissory note, which it was said had been given by the deceased to a confidential female servant, who claimed it as donatio causa mortis. The jury found a verdict for the plaintiff. The Court would not grant a new trial, observing, that it required a strong case to rebut a suspicion of fraud, when the party had access to keys and drawers. But see Lawson r. Lawson, 1 P. W. 441, and Toller's Law of Executors, 3 ed. 234, 235.

Ranken r. Weguelin, Rolls Court, 14th June, 1832, MS. In this case a husband, in contemplation of death, delivered certain bills of exchange, payable to his order, to his wife for her own use; but did not indorse them. The husband believing that he could not live many days, gave the bills to his wife, saying, "take them for your

own use and benefit." The husband died within a fortnight of the delivery of the bills. The executors took the bills from the wife and received the payment of them when at maturity. question was, whether they were subjects of gift by way of a donatio mortis causa; and it was urged that a chose in action could not be so giv-His Honour said the contrary doctrine had been well established since the time of Lord Hardwicke's opposite decision, and he held that the executors were trustees for the wife, and relied on the case of Duffield v. Hicks, 1 Bligh's Rep. New Series, 497; 1 Dow's New Series, And it appears to have been considered that the delivery of a check by a person on the approach of death, as a gift, is good, if the dones receives the amount from the bankers in the donor's life-time, or before the banker has notice of the donor's death; or if the donee negotiate: the check for a valuable consideration, or in payment of a debt. But that such check will not operate as an appointment of so much, if the donee has it still in his possession after the donor's death; Tate v. Hilbert, 2 Ves. jon. 111. As to what is a good donatio mortis caus?, see Irons v. Smallpiece, 2 B. & Ald. 551; Bunn v. Markham, 7 Taunt. 230; 2 Marsh. 522, S. C.; Binnington v. Wallace, 4 B. & Ald. 650; Gardiner v. Parker, 3 Madd. 184; 2 Swanst. 92; 2 Bla. Com. by Chitty, 514, n. 55; Chit. Eq. Dig. tit. Donatio mortis caus'.

In a very recent case it appeared that the testator some months before his death, but being sick of the disease which afterwards destroyed him, deposited a box with a party, whom he desired to take care of it, as it contained money for herself and her sister, with directions how she was to obtain possession of the key (the box being locked) after his death, but adding that he would want to have the box every three months whilst he lived; and that prior to the testator's decease, the box was twice delivered up to, and as often re-delivered by, the testator; and it was held, on demurrer to a bill praying relief in respect of a check for 5001. contained in the box, that the plaintiff was not entitled to the box or its contents; Riddell v. Dobrec, 3 Jurist, 722, Vice Chancellor's Court, July 22, 1839. As to the delivery of a bill or note by way of gift, see post, Ch. III.

s. i. Consideration.

(f) Renew r. Axton, Carth. 3.

was decided that to constitute a valid donatio mortis causa of a promissory note, it must be made by the donor in the apprehension of approaching death, to take effect only in that event, and must be delivered to the donee. }

A promissory note, payable to a payee or order, is not the subject of a donation mortis causa, by mere parol. Bradley et ux. v. Hunt, 5 Gill & John. 54.

The mere delivery by a husband, in his last sickness, to his wife, of a promissory note, payable to him or order, is not valid, as a donatio mortis caus?. No property in such a note passes by delivery; being a chose in action, it must notwithstanding the delivery be sued in the name of the executor of the husband. Ibid.

Bank notes and promissory notes, payable to bearer, pass by delivery as money, and constitute valid donations when delivered; for in such cases the property in, and legal dominion over the thing intended to be given, pass with the possession. Ibid.

Whether the distinction prevailing in England, between the case of a bond and a promissory note payable to order, as to donations mortis causa, will be adopted here. qu. Ibid.

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I, Etymo- tion in some respects(g), and a mere security for a debt, it is to be considlogy, Defi- ered as "goods and chattels" for some purposes, though it was formerly held otherwise; and therefore the fraudulent delivery of a bill is an act of bankruptcy under the 6 Geo. 4, c. 16, s. 3, which declares that the fraudulent delivery of any "goods and chattels" shall be deemed an act of bankruptcy(h). So if a feme sole, possessed of a bill, marry, her husband may sue, or indorse, or petition for a commission alone, without joining his wife, as he must do in case of other mere choses in action(i). However, a bill or note does not pass by a bequest of all the testator's "property" in a particular house, though bank notes would have passed, the latter being considered quasi cash(k); nor can a bank note or bill of exchange he taken as a distress for rent(l); nor until the late act(m) could they be taken in execution.(1) And the accepting of a bill or note, in satisfaction of a specialty debt or a demand for rent, does not defeat the former, or even suspend the right to distrain (n).

II. GENERAL UTILITY, &c.

mercial transactions within the same kingdom (o). The instance put by

A bill of exchange is a security originally invented amongst merchants in II. General Utility. different countries and kingdoms, for the more easy and safe remittance of money, or rather for the purpose of avoiding the necessity for transmitting money itself, from the one to the other, and has since been extended to com-

> (g) See Richards v. Richards, 2 Bar. & Adol. 447, 452, 453.

> (h) Per Tindal, C J. in Cumming v. Baily, 6 Bing. 871; 4 Moore & P. 36, S. C.; and see Bevan v. Nunn, 2 Moore & S. 132; 9 Bing. 107, S. C., post.

(i) M'Neilage v. Holloway, 1 B. & Ald.

218; 1 G. & J. 1.

(k) Flemming v. Brook, 1 Sch. & Lef. 348; Stewart v. Marquis of Bute, 11 Ves. 762; Popham v. Lady Aylesbury, Ambl. 68. So a bequest of a cabinet, with whatever it contains excepting money, will not pass a promissory note payable to the testatrix, without any words of negotiability, nor indorsed, and which did not appear to have been placed in the cabinet before the will, though of a date anterior to the will, and at her death found in the cabinet; Read v. Stewart, 4 Russ. 69.

(1) Francis v. Nash, Hardw. 58; Knight v.

Criddle, 9 East, 48.
(m) 1 & 2 Vic. c. 110; s. 12; post, Part II.

Ch. III. s. iv. Execution.

(n) Curtis v. Sush, 2 Ves. & B. 416; Drake v. Mitchel, 3 East, 251; Harris v. Shipway. Bul. N. P. 182. It does not even suspend the remedy for rent; Bul. N. P. 182; and see 3 Price, 572; Davis v. Gyde, 2 Ad. & El. 623; 4 Nev. & Man. 462, S. C.; post, Ch. V. s. iv.

Effect of Delivery to Payee. (o) 2 Bla. Com. 466, 467; 1 Pardessus, 21, 22, 327, 328, 362, 363, S. P. This is clearly shown in the latter work. The occasion for the payment of debts or delivery of money in a foreign country, and the desire to avoid the transmittance of money itself, and the coasequent risk of loss in the passage, was the occasion of the invention of these instruments, and of the peculiar privileges attached to them by law; Id. ibid.

Choses in action may be sold under a writ of fieri facias, and for this purpose the seizure of em is not required. Wilson v. Munday, 5 Miller's Louis. Rep. 483. Choses in action are them is not required. Wilson v. Munday, 5 Miller's Louis. Rep. 433. Choses in action are not liable to execution, either at law or in equity. Donovan v. Finn, Hopk. 79; Buford v. Buford, 1 Bibb, 806; M'Farran v. Jones, 2 Little, 222; Goodevon v, Duffield, Wright, 456.

⁽¹⁾ In New York, current coin, and bank notes, are liable to be taken on on execution: the former to be returned as money collected, and the latter sold. 2 Rev. Stat. 366, sec. 18, 19. So in New Hampshire, bank bills may be attached by virtue of a writ and may be seized and sold upon an execution. Spencer v. Blaisdell, 4th ed New Hamp. Rep. 198. And the Court in this case remark, "It has been made a question whether money could be seized upon execution." 9 East, 48, Knight v. Briddle; 4 East, 510, Fieldhouse v. Croft; 1 Pick. 271, Knowlton v. Bartlet. But the better opinion seems to be that money may be seized upon an execution. 1 Cranch, 183; 12 Johns. 220; 5 ditto 167; 12 ditto 395, Holnies v. Nuncoster. And bank bills are treated as money. 12 Johns. 220. Handy v. Dobbin; 12 ditto 395; 1 Burr. 457; 3 D. & E. 554, Wright v. Reed; 7 Johns. 470, Warren v. Mains; 13 East, 20, Pickard v. Banks; 1 Niel Gow. 121, Saunders v. Graham, Ibid.

Sir William Blackstone of the utility of the instrument, is this: "If A. live II. Gene-

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in Jamaica, and owe B., who lives in England, 10001., now if C. be going ral Utility. from *England to Jamaica, he may advance B. this 10001., and take a bill of exchange, drawn by B. in England upon A. in Jamaica, and receive it when he comes thither: thus B. receives his debt at any distance of place by transferring it to C., who carries over his money in paper credit, without the risk of robbery or loss." In the origin of bills of exchange, their principal utility was the safe transfer of property from one place to another; but since the great increase of commerce, they have become the evidence of valuable property, and in a great measure equivalent to specie, enlarging the capital stock of wealth in circulation, and thereby facilitating and increasing the trade and commerce of the country (p). The trader whose capital may not be sufficient to enable him to pay ready money for the commodity which he purchases, on account of his not having the means of immediately obtaining payment of the debts due to him from others, and who might find a difficulty on his own individual security to purchase goods, or obtain money for the purposes of his trade, by drawing a bill on one of his debtors, payable at a future period, may obtain the goods or money on the credit of such

bill; the vendor of the goods, to whom the bill is handed as a security, may also, in his turn, obtain goods or money, in the way of his trade, on the credit of the bill, and the bill may have the same effect in different persons

hands, to whom it may be transferred by indorsement or otherwise. This security is in some respects preferable to many others of a more formal nature, for each of the parties to a bill, by merely writing his name upon it, either as drawer, acceptor, or indorser, thereby impliedly guarantees the due payment of it at maturity, and the consideration in respect of which he became a party to it can be rarely inquired into; whereas, in the case of an ordinary guarantee, the statute against frauds (q) requires the consideration to be expressed, and other matters of form, which frequently render an intended guarantee wholly inoperative (r). So with respect to interest, it is a better security than a bond, (except in so far as it may be affected by the statute of limitations), for when the principal and interest in a bond are equal to the amount of the penalty, the interest must thenceforth cease, for the obligor in a bondin not answerable beyond the amount of the penalty (s) (1).

Hen. Bla. 618.

(q) 29 Car. 2, c. 3, s. 4.

(r) Wain v. Warlters, 5 East, 10. In this case it was held that an engagement in writing to pay the debt of a third person at an hour named, in consideration of the creditor suspending proceedings in an action till that time, but which consideration did not appear on the face of the written engagement, was void on that account; and this case has been fully confirmed by that of Saunders v. Wakefield, 4 B. & Ald. 595, & Jenkins v. Reynolds, 3 Brod.

(p) Per Eyre, C. J., Gibson v. Minet, 1 & B. 14; and other subsequent decisions; Maggs r. Ames, 4 Bing. 470; 1 Moore & P. 294, S. C.; and see cases as to guarantees in lieu of indorsement, post, Ch. VI. s. i. Trans-

(s) Hefford v. Alger, 1 Taunt. 220; Wild v. Clarkson, 6 T. R. 303; Ex parte Mills, 2 Ves. jun. 301; Clarke v. Seton, 6 Ves. 411: but observe, that in an action of debt on a judgment recovered on a bond, interest may be recovered in damages beyond the penalty of the bond, M'Clure v. Dunkin, 1 East, 436.

⁽¹⁾ It is a general rule that the recovery on a bond is limited by its penalty, but this rule is not without exceptions. In Harris v. Clap et al., 1 Mass. Rep. 308, interest beyond the penalty was allowed against a surety, though Sedgwick, J., dissented from the opinion of the court. In Smede's Ex. v. Hooghtaling et al., 3 Caines' Rep. 48, Kent, Ch. J., upon a review of all the desired cisions on the subject, held interest to be recoverable beyond the penalty of a bond, but that the recovery must depend upon principles of law, and not upon the discretion of a jury. If judgment has gone by default, the clerk, in taxing costs, may calculate interest beyond the penalty of the bond. Ib. p. 49, note a. In the same note there is a brief review of cases on this subject. See also State v. Wayman, 2 Gill & Johnson's Rep. 254.

Tidd's Prac. 8th ed. 617, 18, and post. 2 N. Y. Rev. Stat. 856—8. And see Dane's Abr. of Am. Law, vol. 1. p. 542, ch. 28, art. 1, sec. 1, 2, 9, et passim.

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II. Gene- the circumstance also of the exposure of the contract to the public eye, ral Utility: there is a stronger stimulus on every party to a bill to take care that it be duly honoured; whereas punctual payment of a guarantee or bond is not so frequent, and consequently less to be relied on in commerce, where certainty is so essential to the welfare of the merchant. So there are some legal advantages, for after interlocutory judgment in an action on a bill or note, the plaintiff may refer it to the master or prothonotary of the court to assess what is due for principal and interest, &c. without executing a writ of inqui-

*There are, however, some disadvantages accompanying this security, compared with others, and principally that in case of the dishonour of the bill by the person on whom it is drawn, the holder must strictly, and with the utmost punctuality and precision, observe certain formalities peculiarly incident to this security; thus he must immediately give notice of the non-acceptance or non-payment to all the other parties, or he will lose the benefit of his security against them; whereas in the case of a guaranty, such nice and exact conduct on the part of the creditor is not in general requisite (u). Again, in case of death, a bill of exchange being a simple contract is not entitled to the same priority of payment out of the assets of the deceased as a bond (1); nor is there the same expeditions or extensive mode of obtaining payment as in case of a bond, warrant of attorney, statute staple, or statute merchant (x).

The pernicious effects of a fabricated credit, by the undue use of accommodation bills of exchange, drawn out of the ordinary course of trade, have led to the ruin of many; the use of them, where there is no real demand subsisting between the different parties, nor an actual fund to resort to in case of need, is injurious to the public as well as to the parties concerned in But in cases where from some sudden and unexpected the negotiation (y). event a particular branch of commerce may be temporarily affected, and the trader is possessed of, but not able to bring his commodities to a fair market in time to meet the payments for which he has to provide, the temporary assistance of friends, through the medium of bills of exchange, may save his credit, and enable him to hold his goods till some fair opportunity of sale The use of fictitious names to bills has not been unfrequent, but this practice is not only censurable but in most cases punishable criminally (z), and in certain cases under the insolvent act may prevent the parties having the full benefit of the act (a).

III. PECULIAR PROPERTIES & ADVANTAGES OF BILLS ENUMERATED.

III. Peculiar Properties and Advantages of Bills enumerated.

The various advantages which commerce derives from the use of bills of exchange have induced our courts of justice, and also most foreign courts,

Advantages of Bills

enumerate

(t) Tidd's Prac. 9th ed. 570, 571, and post,

part II. Ch. III. s. iii.

(u) Warrington v. Furbor, 8 East, 245; but

(ii) Warrington v. Furbor, 8 Cast, 246; but

(iii) Warrington v. Furbor, 8 Cast, 246; but

(u) Warrington v. Furbor, 8 East, 245; but see Phillips v. Astling, 2 Taunt. 206 See these cases post.

(x) 2 Saund. 70 a, and b, in notes.

(y) Per Lord Eldon, in Ex parte Wilson, 11 Ves. 411.

(2) See post, Part III. Ch. I. Forgery.

(a) See 7 Geo. 4, c. 57, sec. 49, (similar provisions 1 & 2 Vic. c. 110, s. 78). Under the 64th clause the Insolvent Court considered debtors on accommodation bills as not having necessarily incurred the same within the words of the act.

⁽¹⁾ See ante p. 2, note (1).

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to allow them certain peculiar privileges, in order to give full effect to their III. Pecautility. These are,-

First, that although a bill of exchange is a chose in action, yet it may be vantages, assigned so as to vest the legal as well as equitable interest therein in the in- &c. dorsee or assignee, and to entitle him to sue thereon in his own name.

Secondly, that although a bill of exchange, &c. is not a specialty, but merely a simple contract, yet a sufficient consideration is implied from the nature of the instrument, and its existence, in fact, is rarely necessary to be proved, and in the hands of a bona fide holder is indisputable (b).

The first of these privileges is of most essential importance in various points of view, and principally that a release by the drawer to the acceptor, or a set-off or cross demand due from the former to the latter, cannot affect the right of action of the payee or indorsee, because the legal and not the mere equitable interest is vested in *such payee or indorsee, and the action is [*6 sustainable in his own name; whereas suits upon bonds, and most other choses in action, must be in the name of the original obligee; and though it be apparent that he sues merely as a trustee for another to whom he has assigned his interest, yet a release from him, or a set-off due from him to the obligor, may be an effectual bar to the action (c)(1). The second of these privileges is also of great importance. In general an action cannot be supported upon a contract not under seal, without the plaintiff's alleging in pleading, and proving on the trial, in the first instance, that the contract was made for a sufficient consideration; but in the case of bills of exchange, promissory notes, &c. a sufficient consideration is presumed, and the validity of the bill, &c. cannot in general be disputed on account of the want of sufficient consideration, when it is in the hands of a bona fide holder, who has given value for it(d).

As it may tend to elucidate the properties of bills of exchange, and other negotiable instruments of that nature, we will shortly examine the doctrine relating to the assignment of choses in action, and the necessity in general for the proof of a sufficient consideration to give effect to a contract.

The first peculiar privilege of a bill of exchange is its assignable quality, bothe asand which is in direct opposition to a very ancient rule of law, the founders signment of of which refused to sanction or give effect to the transfer of any possibility, Choses in right, or any other chose in action (which is defined to be a right not reduced (e)(2).

(b) Bishop v. Young, 2 Bos. & Pul. 79.

(c) Bauerman v. Radenius, 7 T. R. 663. (d) See cases, post, Ch. III. s. i. Considera-

(e) As to the assignment of choses in action in general, see Master v. Miller, 4 T. 340. In Williamson v. Thompson, 16 Ves. 443, it was held that the indorsement of an India certifi-

cate did not pass the legal interest. In Glynn r. Baker, 13 East, 509, it was held that an India bond was not assignable, but this has been since altered by 51 Geo. 3, c. 64, which makes them assignable, and enables the assignee to sue in his own name. See also Wookey r. Pole, 4 B. & Ald. 1.

(1) The bona fiele indorsee of a promissory note is not responsible for any equity existing between the maker and payee; but where the consideration of the note was a transaction between the maker and the party to whom it was indorsed; and the note was made payable to a third person to obtain his security, the equity may be gone into, in an action between the indorsee and maker. Lauclos v. Robertson, 3 Miller's Louis. Rep. 259.

⁽²⁾ What amounts to an assignment.—Where the payee of a promissory note lodged it, with other demands, in the office of an attorney for collection, and afterwards drew an order on the attorney, directing him to pay to a third person the amount which might be collected on the de-mands left with him; which the attorney accepted to pay such sums as he should receive after obtaining what might be due to himself; this was held to be no assignment of the note in question; and therefore a subsequent payment to the promisee was held good. Thayer v. Havener, 1 Greenl. 212.

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III. Pocu- into possession (f) to a stranger; on the ground that such alienations tended to increase maintenance and litigation, and afforded means to powerful men to purchase rights of action, and thereby enable them to oppress indigent debtors, whose original creditors would not perhaps have sued them (g). Our ancestors were so anxious to prevent alienation of choses or rights in action, that we find it enacted by the 32 Hen. VIII. c. 9, (which, it is said, was in affirmance of the common law (h)), that no person should buy or sell, or by any means obtain any right or title to any manors, lands, tenements, or hereditaments, unless the person contracting to sell, or his ancestor, or they by whom he or they claim the same, had been in possession of the same, or of the reversion or remainder thereof, for the space of one year before

> (f) Termes de la Ley, tit. Chose in Action; 2 Bls. Com. 442. In other words, "the interest in a contract, which, in case of non-performance, can only be reduced into beneficial possession by an action or suit."

(g) Co. Lit. 214, 265 a, n. (1); 232 b, n. (1); 2 Rol. Abr. 45, 46; Godb. 81; Termes de la Ley, tit. Chose in Action; Scholey 1. Daniel, 2 Bos. & Pul. 541.

(h) Partridge v. Strange, Plowd. 88.

A note assigned, and the note retained in the hands of the assignor, until his death, vests at interest in the assignee. Clark v. Boyd, Ohio Rep. Cond. 250.

In an action against the drawer of a note he can demand of the plaintiff, if he is not the payer, to show a transfer of the note to him, but this demand is satisfied by evidence which prima face conveys the right and interest of the payee. Ibid. Wilson r. Munday, 3 Miller's Louis. Rep. 483.

If the assignment of the note be voluntary, the transfer in the payee's hand-writing is suffcient, and if forced, it suffices that there is judgment, execution, and sale, according to law. Ibid.

Effect of Assignment.—The interest of a mortgagee in land, is a mere chattel, and when the mortgage is given to secure a note payable to bearer, the interest of the mortgagee in the had will pass by the mere delivery of the note as an incident to the debt. Southerin r. Mendam, 5 New Hamp. Rep. 420. Paine v. French, Ohio Rep. Cond. 807.

Where obligee passes a note without assignment, and the purchaser passes it in like masser to another, who obtains obligee to make an assignment in the common form, the presumption is there is no liability. Butler v. Sluddeth, 6 Monroe's Rep. 542.

It may be proved by parol notwithstanding the written assignment of a note in the usual form, that the transfer was without recourse. Ib.

Assignee may recover of assignor the costs expended by him in prosecuting obligor to insolvercy, but not the costs recovered of him, the assignee, by his assignee, who had pursued the obliger, and then returned on him and recovered a judgment with costs. Ih.

Each assignee recovers of his assignor according to the consideration he paid. Ib.

Per Martin, J. "It is said in the books, promissory notes payable to order, are transferable by indorsement only: we understand by this that without an indorsement, the assignee is not invested with the right of indorsing over the note, or resisting the drawer's claim for compensation of sums due him by the transferrer, on account of payment made before the transfer, and before the note was due. But he certainly can transfer his interest therein without indorsing the note, as is done in the case of a session of goods or an assignment to trustees." Hughes r. Harrison, 2 Miller's Louis. Rep. 89.

The payee of a negotiable promissory note, having indorsed it in blank and delivered it in pledge to another, as collateral security for his own debt, has still the right to negotiate it to a third person; who may maintain an action upon it in his own name as indorsee, the lien of the pledge being discharged before judgment. Fisher v. Bradford, 7 Greenleaf's Rep. 88.

An assignee of a promissory note cannot sue a remote assignor, where the note assigned is and governed by the law of merchants. McCarty v. Rhea, 1 Black. 55.

Mandeville v. Biddle, 1 Cranch, 290. Drake v. Johnson, Hardin, 218. Jones v. Wood, S.A. K. Marsh, 162. The assignee of a promissory note in Virginia, may recover the amount from a remote assigner, in equity, though not at law. The remote assignor has the same defence in equity against the remote assignee, as against his immediate assignee; and he has a right to insist that the other assignors be made parties. Riddle v. Mandeville, 5 Cranch, 322. Ib.

The law in Kentucky is settled, as it is in Virginia, and in this court, upon original contracts the independent of promissory notes, that every resemble offert must be made to recover of the

by indorsement of promissory notes, that every reasonable effort must be made to recover of the drawer by suit, before the assignee can have recourse against the assignor or indorser. The Bank

of the United States v. Weisiger, 2 Peters' Rep. 247.

An assignment of a note given for the purchase money passes to the assignee the vendor's lien, on the property sold, for the payment of the purchase money. Johnston v. Gwathmey, 4 Litt. 317. So in case of a bond. Kenny v. Collins, Idem, 289. The assignment of a note gives the assignee a lien on the estate conveyed in trust, to secure the payment. M'Clanahan v. Chambaron 44. bers, 1 Monroe, 44. }

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the contract: and this statute was adjudged to extend to the assignment of a III. Pecucopyhold estate(i), and of a chattel interest, as a lease for years of land, liar Properties, Adwhereof the grantor was not in possession(k). At what time this doctrine, vantages, which, it is said, had relation originally only to landed estates (1), was first &c. adjudged to be equally applicable to the assignment of a mere personal chattel not in possession, it is not easy to decide: it seems, however, to have been so settled at a very early period of our history, as the works of our oldest text writers and the reports contain numberless observations and cases on the subject. *Lord Coke says (m), that it is one of the maxims of the common law, that no right of action can be transferred, "because, under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law for-Accordingly we find that judgment was arrested in an action on a bond conditioned for the performance of articles of agreement, which contained a covenant that the defendant should assign certain bonds to the plaintiff for his own use, on the ground that such condition and covenant amounted to maintenance (n). And although it was decided that the king, in respect of his prerogative, might transfer a right of action(o), yet it was afterwards ruled that his assignee had no such power (p).

This doctrine, however strictly adhered to in our courts of law, was not adopted by our courts of equity (q): for though it is said to have been decided in the 11th James I.(r) that the assignee of a covenant could not sue in a court of equity to enforce performance, because it was against law to assign a covenant, yet that seems to be an insulated case; and no other authority is to be found where a court of equity has refused to give effect to the assignment of a chose in action, provided such assignment were made for a sufficient consideration(s). A court of equity having it in its power to decree according to the justice of every case, there could have been no danger of maintenance being increased by its giving effect to such assignments; we therefore find a great number of cases where decrees have been made in favour of such assignees(1).

In courts of law the equitable interest of the assignee of a chose in action seems to have been recognised as far back as the middle of the last century, when we find it said by one of the judges (u), "that if an assignee of a chose in action have an equity, that equity should be no exile to the courts of common law." In another case also, the court speak(x) of an assignment of an apprentice, or an assignment of a bond, as things valid between the parties, and to which they must give their sanction; and an assignment of a chose in action has always been deemed a sufficient consideration for a promise (y),

(i) Kite and Queinton's case, 4 Co. 26 a.

⁽k) Partridge v. Strange, Plowd. 88. As to a possibility in land, See Jones v. Roe, 1 Hen. Bla. 30; 3 T. R. 89, S. C. in error; Cullea, 178.

⁽l) 2 Wood. 388.

⁽m) Co. Lit. 214 a. See also Scholey r. Daniel, 2 Bos. & Pul. 541.

⁽n) Hodson r. Ingram, Aleyn, 60; et vide 2 Rol. Abr. 45, 1. 40.

⁽⁰⁾ Co. Lit. 232 b, n. (1); Breverton's case, 1 Dyer, 30 b, pl. 28; The King r. Wendham, Cro. Jac. 82.

⁽p) The King v. Twine, Cro. Jac. 180; Kingdom v. Jones, Skin. 6, 26.

⁽q) Per Buller, J. in Master v. Miller, 4 T. R. 840.

⁽r) 1 Rol. Abr. 376, 1. b.

⁽s) Vin. Abr. tit. Maintenance, (B.); 2 Rol. Abr. 45, 46; Co. Lit. 232; and see the cases collected in Chitty's Eq. Dig. tit. Chose in Action.

⁽t) Id. ibid; Baldwin r. Rochford, 1 Wils. 229; Wright v. Wright, 1 Ves. 411, 412; Peters v. Soame, 2 Vern. 429; Baldwin v. Billingsley, id. 540; Crouch c. Martin, id. 595; Cole v. Jones, i.l. 692; Carteret (1 ord) v. Paschel, 3 P. W. 199; and it has been decided that an equitable assignment of a debt may be by parol as well as by deed, Heath v. Hall, 4 Taunt. 326.

⁽u) In Kingdom v. Jones, 33 Car. 2; Skin. 6, 7; Sir T. Jones, 150, S. C.

⁽x) The King v. The Parish of Aickless, 12 Mod. 554.

⁽y) 1 Rol. Abr. 29; Loder r. Cheelyn, Sid.

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although the debt assigned was uncertain (z). So judged it was decided, that liar Proper- where the obligee has assigned over a bond, and afterwards become a bankrupt, he might nevertheless bring an action on the bond(a); and that in an action upon a bond given to the plaintiff in trust for another, the defendant may set off a debt due from the person beneficially interested in like manner *8] as if the action had been brought by the cestui que *trust(b). A debt assigned for the benefit of creditors is not liable to be attached for the debt of the assignor(c). But though courts of law have gone the length of taking notice of assignments of choses in action, and of giving effect to them, yet in almost every case they have adhered to the formal objection, that the action should be brought in the name of the assignor, and not in the name of the assignee; the consequence of which rule is, that the defendant may give in evidence a release, declaration, or admission of the plaintiff on the record, to defeat the action, although it be evident such plaintiff is but a mere trustee for a third person (d)(1). It has been observed that the substance of the rule being done away, there can be no use or convenience in preserving the shadow of it: for where a third person is permitted to acquire the interest in a thing, whether he bring the action in his own name or in the name of the assignor, does not seem to affect the question of maintenance(e). However, in a subsequent case (f), Lord Kenyon expressed his determination not to sanction the assignment of a chose in action, so as to allow the assignee to sue in his own name (2). The consequence of this doctrine is, that if an instrument

> 212; Lewis v. Wallis, Sir T. Jones, 222; Meredith r. Short, 1 Salk. 25 ; Banfill v Leigh, 8 T. R. 571; Israel v. Douglass, 1 Hen. Bla.

(z) Mousdale v. Birchall, 2 Bla. Rep. 820. (a) Winch v. Keeley, 1 T. R. 619; Car-

penter v. Marnell, 3 Bos. & Pul. 40.

(b) Bottomley v. Brook, and Rudge v. Birch, cited in Winch v. Keeley, 1 T. R. 621, and in Masters v. Miller, 4 T. R. 341; sed vide Bauerman v. Radenius, 7 T. R. 668. But the court refused to allow a defendant to set off a bond debt of the plaintiff assigned to him by a third person, to whom and for whose use it was originally

given; Wake v. Tinkler, 16 East, 36.

(c) Lewis v. Wallis, Sir T. Jones, 222. (d) Bauerman v. Radenius, 7 T. R. 663; Banfill v. Leigh, 8 T. R. 571; Jones v. Dualop, id. 596; Offly v. Ward, 1 Lev. 285; Johnson v. Collings, 1 East, 104; et vide Medlica's case, Sel. Cas. 161.

(c) Per Buller, J. in Master v. Miller, 4 T. R. 340; et vide Winch v. Keeley, 1 T. R. 621; Israel v. Douglass, 1 Hen, Bla. 239; and Ban-fill v. Leigh, 8 T. R. 571.

(f) Johnson r. Collings, 1 East, 104; Whit-

well r. Bennett, 8 Bos. & Pul. 559.

(1) { The assignee of an unnegotiable instrument, may sue the obligor in the name of the obligee; and equity would prohibit the obligee from releasing the demand, or receiving satisfaction.

M'Gee v. Lynch, 3 Hayw. 105.

There are many other cases in which the rights of the assignee have been recognized and en-

⁽²⁾ Courts of law now take notice of assignments of choses in action, and afford them every protection not inconsistent with the principles and proceedings of tribunals acting according to the course of the common law. They endeavor in these respects to apply, as far as may properly be done, the rules and doctrines recognized in Courts of Equity. They will not therefore give effect to a release procured by the original debtor under a covinous combination with the assignor in fraud of his assignee; nor permit the assignor injuriously to interfere with the conduct of an muit commenced by the assignee to enforce the rights which passed under the assignment. Welch v. Mandeville, 1 Wheaton, 233. See, as to the right of the United States to sue in their own name upon a bill indorsed to their agent, Dugan v. United States, 3 Wheaton, 172. See also Skelding et al. v. Warren, 15 Johns. 270.

Upon these principles a release procured after a notice of the assignment has been held to be a nullity. Andrews r. Beecher, 1 John. Cas. 411. Littlefield r. Storey, 3 John. Rep. 426. Light 1 Res. (7 Pull 447 Payment 1 Res. (7 Pull 447 Payment 2 Res.) v. Legh, 1 Bos. & Pull. 447. Raymond v Squire, 11 John. Rep. 47. So a satisfaction of a judgment entered up by the assignor after the assignment has been vacated. Wardell v. Edes, 2 John. Cas. 121, 258. S. C. I John. Rep. 531, note. So a dismissal of a suit or a retraxit entered up without the consent of the assignee will be no bar to a subsequent snit. Welsh r. Mandeville, ut supra. And if the fact of the assignment be known to the court, it will not suffer the defendant, whose name is used, to discontinue the suit without the agreement of the assignee. M'Cullum v. Coxe, 1 Dall. Rep. 139.

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which is not assignable at law, so as to pass the legal interest, be indorsed III. Pecaby the person to whom it is payable to his agent, to whom he is indebted liar Properties. Adgenerally, without any specific appropriation, the agent, in case of the vantages, death of the principal, will have no legal or equitable interest in the instru- &c. ment towards satisfaction of his debt, but must restore it to the executor(g).

Even at the earliest period of our history, the doctrine relating to the assignment of choses in action was found to be too great a clog on commercial intercourse, an exception was therefore soon allowed in favour of mercantile transactions. It was the observation of the learned and elegant commentator on the English laws, that in the infancy of trade, when the bulk of national wealth consisted of real property, our courts did not often condescend to regulate personalty; but as the advantages arising from commerce were gradually felt, they were anxious to encourage it by removing the restrictions by which the transfer of interests in it was bound. On this ground the custom of merchants, whereby a foreign bill of exchange is assignable by the payer to a third person, so as to vest in him the legal as well as equitable interest therein, was recognised and supported by our courts of justice in the fourteenth century; and the custom of merchants rendering an inland bill transferable, was established in the seventeenth century. In short, our courts, anxiously attending to the interests of the community, have, in favour of commerce, adopted a less technical mode of considering personalty than realty; and in support of commercial transactions have established the law merchant, which is a system peculiarly founded on the rules of equity, and governed in all its parts by plain justice and good faith(h)(3).

Having thus endeavored to point out the peculiar properties of a bill of Distinction exchange, in respect of its being assignable, so as to give *the holder a right Bills and of action in his own name, it will be proper to make a few observations on other Simthe second privilege by which it is distinguished from other simple contracts, ple Contract as to that of its importing a consideration unless the contrary be shown, and fre-Considerquently excluding the inquiry (i).

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(i) See Per Lord Ellenborough, C. J. in Phil-(g) Williamson v. Thompson, 16 Ves. 448. (h) Per Buller, J. in Master v. Miller, 4 T. liskirk v. Pluckwell, 2 Maule & S. 395. R. 342.

forced in suits at law; but it is foreign to the purposes of this note to give them a minute analysis. The reader will receive further information on the subject by consulting the subjoined cases. Perkins v. Parker, 1 Mass. Rep. 117. Wakefield v. Martin, 3 Mass. Rep. 558. Dix v. Cobb, 4 Mass. Rep. 508. Dawes v. Boylston, 9 Mass. Rep. 337. Crocker v. Whitney, 10 Mass. Rep. 816. Wood v. Partridge, 11 Mass. Rep. 488. Alner v. George, 1 Camp. N. P. 392. Tutle v. Beebee, 8 John. Rep. 152. Meghan v. Mills, 9 John. Rep. 64. Brisban v. Caines, 10 John. Rep. 45. Inglis v. Inglis's Executors, 2 Dall. Rep. 45. Roussett v. The Insurance Company of North America, 1 Binn. 429. Woodbridge v. Perkins, 3 Day's Rep. 564. Da Costa v. Shrewsbury, 1 Bay's Rep. 211. Administrators of Compty v. Alken, 2 Bay's Rep. 481. Raymond v. Squire, 11 John. 'tep. 488. Anderson v. Van Allen, 12 John Rep. 843. Mowry v. Todd, 12 Mass. Rep. 281. Jones v. Witter, 13 Mass. Rep. 304. Bowman v. Wood, 15 Mass. Rep. 534. Martin v. Hawkes, 15 Johns. 405. Wheeler v. Wheeler, 9 Cowen, 84.

An assignee of a chose in action will be protected in a court of law against the acts and declarations of the assignor subsequent to the assignment. Kimball v. Huntington, 10 Wend. Rep.

Though a promissory note, not payable to order, is not assignable so as to vest the legal interest in another person, yet the assignment of such note transfers the equitable title, which will be recognized both in a court of equity, and in a court of law, and fully protected. Lyon v. Summers, 7 Conn. Rep. 399. To give effect to this doctrine is the object of the Conn. statute of May 28d 1822, ch. 12, § 1. Ib.

(3) The lex mercatori which governs foreign and inland bills of exchange, is a part of the common law of England; and is embraced by that clause of the Indiana statute which adopts the common law. Pratt v. Ends, 1 Blackf. 81. | But the assignment of promissory notes, in that state, is not governed by the law of merchants. Bullit c. Scribner, Idem, 14. }

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III. Pecuties, Advantages; & c.

When a Considera-

Contracts are of three descriptions. 1st. Matter of Record. 2dly. liar Proper- Specialty. 3dly. Parol or Simple Contracts. The first of these, viz. the judgment of, or a recognizance acknowledged before a court of record, on account of its being either actually or supposed to have been sanctioned by such tribunal, cannot be impeached, or the propriety of it questioned, in any action on the judgment. Nor can there be any allegation in pleading against tion not ea- the validity of a record, though there may be against its operations. Secsential to ondly, Specialties rank next in point of estimation. These on account of of a Bill of the deliberate mode in which they are supposed to be made and executed, Exchange, have always been holden to bind the party making them, although they were executed without adequate consideration (k), and consequently it is not incumbent on the plaintiff in an action upon a deed to state or prove upon what cause or for what consideration it was made(l); and though the defendant may be at liberty to avail himself of the illegality in the consideration, it is incumbent on him to state it in pleading, and to establish it by evidence (m). But the third description, namely, parol or simple contracts, (which in legal definition include as well unsealed written contracts as those which are merely verbal,) are not in general entitled to such respect, because the law presumes that such contracts may have been made inadvertently and without sufficient reflection(n); and therefore, in general, they will not be enforced, unless the plaintiff alleges and proves that they were made for a sufficient consideration (o). And if an instrument, in other respects in the form of a bill of exchange or promissory note, be invalid as such, as for instance because it was payable on a contingency, it will afford no prima facie evidence of having been given for adequate consideration, although it in terms profess to have been given for "value received," nor will it be negotiable or even valid between the original parties, unless it be proved that it was founded on adequate consideration (p). It is otherwise however in the case of a valid bill of exchange or promissory note(q), it being scarcely ever necessary for the plaintiff to prove that he gave a consideration for it: and the defendant is not at liberty to prove that he received no consideration, unless in an action brought against him by the person with whom he was immediately concerned in the negotiation of the instrument (r), or by a person who has given no value for it. In this respect, therefore, a a bill of exchange, although it is not a specialty (s), yet it carries with it

(k) See the argument Sharington v. Strotton, Plowd. 308, where, though quaintly, yet correctly, it is said that deeds are received as a lien final to the party making them, although he in truth received no consideration; in respect of the deliberate mode in which they are supposed to be made and executed, for 1st, the deed is prepared and drawn; then the seal is affixed; and lastly, the contracting party delivers it, which is the consummation of his resolution. Voluntary conveyances, and deeds without any consideration, are void as to creditors, but in the absence of froud are valid and binding at law and in equity against the party and his heir and personal representative. See Gully v. Bishop of Exeter, 10 B. & C. 584, 601, and per Lord Tenterden, id. 609; and under the words in a deed, "other good and valuable causes and considerations," it may be shown as matter of fact, that there were other considerations; per Bailey, J. in Gully v. Bishop of Exeter, 10 B. & C. 609; and Tull v. Partlett, I M. & M. 472.

(1) Fellowes v. Taylor, 7 T. R. 477; Bunn

r. Guy, 4 East, 200.

(m) Petrie v. Hanney, 3 T. R. 424.

(n) Fonbl. 329, 333; Sharington r. Strotton, Plowd. 308.

(o) See the case of Rann v. Hughes, 7 T. R. 350, in which it was adjudged that all contracts are by the law of England distinguished into agreements by specialty and agreements by parol, and that there is not any such third class as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved. See also same case in 7 Bro. Parl. Cas. 550; Parker v. Baylis, 2 Pos. & Pul. 77; Johnson r. Collings, 1 East, 104; Sharington v. Strotton, Plowd. 308; Petrie v. Hanney, 8 T. R. 421.

(p) Magga v. Ames, 4 Bing, 470, 471; 1 M. & P. 294, S. C.; Morgan v. Jones, 1 Tyr. 21; 1 C. & M. 162, S. C.

(q) Simmonds v. Parminter, I Wils. 189. (r) Guichard v. Roberts, 1 Bla. Rep. 445; Lewis v. Cosgrave, 2 Taunt. 2; post, Ch. III. s. i. Consideration.

(s) Yeomans v. Bradshaw, 3 Salk. 70; ante, 2, note(d).

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the same presumption of a consideration as a bond or other specialty, par- III. Pecaticularly when it is, in the hands of a third person (t). It is not however liar Preowing to the form of a bill of exchange, nor to the circumstance of its being Advanin writing, that the law gives it this effect, but in order to strengthen and tages, &c. facilitate that commercial intercourse which is carried on through the medium of this species of security; for notwithstanding a contract be in writing, it is essential to the validity of it that it should in all cases be founded on a sufficient consideration, unless the writing, from its being of the highest solemnity, imports a consideration, or unless it be negociable at law, and the interests of third persons are involved in its efficacy (1)

IV. THE HISTORY OF BILLS.

Having thus endeavoured to state two of the most peculiar properties of a IV. The

(t) Philliskirk v. Pluckwell, 2 Maule & S. 395.

(1) The doctrines contained in this paragraph have been frequently recognized in the United States. In general, a written promise requires a consideration no less than a parol one. Homer v. Hollenbeck, 2 Day's Rep. 22. And a note made without consideration is nude, pact. and void as between the original parties to it. Pearson v. Pearson, 7 John. Rep. 26. Stackpole v. Arnold, 11 Mass. Rep. 27. { Raymond v. Sellick, 10 Conn. 480; Hartwell v. McBeth, 1 Har. Del. Rep. 363; Bickinson v. Hall, 14 Pick. 217; Barnum v. Barnum, 9 Conn. 242. } So if the consideration have totally failed. Dennison v. Bacon, 10 John. Rep. 198. Tappen v. Van Wagenen, 8 John. Rep. 465. Fowler v. Shearer, 7 Mass. Rep. 14. Livingston v. Hastie, 2 Caines' Rep. 247. Barkhamsted v. Case, 5 Conn. Rep. 528. See Hills v. Banister, 8 Cowen, 81. { Rice v. Goddard, 14 Pick. 293; Loffland v. Russell, Wright, 438; Bowles v. Newby, 2 Blackf. 364; The People v. Niagara, Com. Pleas, 12 Wend. 246; Fallis v. Griffith, Wright,

Every note within the statute imports a consideration unless the contrary appear on the face of the note itself. Goshen Turnpike Company, 9 John. Rep. 217. Ten Eyck v. Vanderpool, 8 John Rep. 120. { So of a bill of exchange. Early v. McCart, 2 Dana, 414. } And the words "value received" in a note not within the statute are prima facie evidence of a consideration sufficient to cast on the defendant the burthen of proof of the want of a consideration. { Or of a failure of consideration, or fraud. Towsey v. Hook, 8 Blackf. 267. But a promissory note not expressed to be for value received does not import a consideration. Edgerton v. Edgerton, 8 Conn. 6. Jerome v. Whitney, 7 John. Rep. 321. contra.—Lansing v. M'Killip, 3 Cain. Rep. 286. A promissory note expressed to be for 'value received' may be avoided as between the payee and maker, by showing that there was no consideration for it, originally; and a note given for the renewal of one so voidable is likewise without consideration. Hill v. Buckminster, 5 Pick. 391.

So, as between the original parties, the true consideration of a note may always be inquired into: Thus, where a note was given for the balance due on a settlement of accounts, a mistake as to the amount, may be shown. Hampton v. Blakeley, 3 M'Cord, 469. Slade v. Halsted, 7 Cowen, 322. See Lawrence v. Stonington Bank, 6 Cons. Rep. 521. And in this case, it was held that though a bona fide holder of a bill for valuable consideration, cannot be affected by the want of consideration, as between the original parties; yet, if he received the bill without value, he is in privity with the first holder, and the want of consideration between the original parties, is equally available against him.

Where a promissory is void on account of a total fraud in the consideration, the maker has adequate remedy at law. Barkhamsted v. Case, 5 Conn. Rep. 528. The holder of a bill, check, or note, is prima facie deemed the rightful owner of it, and need not prove a consideration given John Cas. 5. Conroy v. Warren, 3 John. Cas. 259. 3 Wheaton, 182. { Jackson v. Heath, 1 Bai. 355; Dean v. Hewitt, 5 Wend. 257; Cox v. Bethany, 10 Curry's Louis. Rep. 152; Sinse v. Lyles, 1 Hill, 39; Peasely v. Bootwright, 2 Leigh, 185; Dugan v. Campbell, Ohio Rep. Cond. 56. And an indersement of a note is prima facie evidence of being made for full value; and it is in general incumbent on the defendant to show the real consideration if it was an inadequate one. Biddle v. Mandeville, 5 Cranch's Rep. 322. Percival v. Framplin, 3 Dowl. P. C. 748. See also Simpson v. Clarke, 2 Cromp. M. & Rosc. 342. Brook v. Thompson, 1 Bai. 322. The drawer of a bill of exchange may rebut the presumption of his liability, in case of non-payment by the drawee, by proving that between the payee and himself, there was no consideration, Miles v. O'Hara, 1 Serg. & Rawle, 32.

{ See further, as to consideration, Post, Part I. ch. III. sec. I. }

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IV. The History of Bille.

bill of exchange, namely, its assignable quality, and its validity in the bands of a bonû fide holder, though made without consideration, it may be proper to inquire concisely, but more particularly, into the history, general nature, and use of these instruments.

Foreign or Inland.

Bills of exchange are Foreign or Inland. Foreign, when drawn by a person abroad upon another in England, or vice versa; or in one foreign country upon another: and inland, when both the drawer and the drawee reside in England, or in that part of the kingdom where the bill is drawn and payable; or when both drawn and payable in England though accepted abroad. A bill drawn in Ireland upon England is to be considered as a foreign bill and not an inland bill; and therefore where a person in Ireland drew a bill on another in England, who wrote a letter promising to accept, it was decided that such promise amounted to a legal and binding acceptance, although such letter was written after the passing of the act requiring that all inland bills shall be accepted by writing on the same (u). But a bill drawn in Lowdon, payable to the order of the drawer in London, upon a merchant residing at Brussels, and accepted by him payable in London, is an inland bill, and must be stamped as such (x). It seems extremely doubtful at what period or by whom foreign bills of

Foreign Bills.

exchange were first invented. The elementary writers differ on the subject. It is said by Pothier (y), that there is no vestage among the Romans of bills of exchange, or of any contract of exchange; for though it appears that Cicero directed one of his friends at Rome, who had money to receive at Athens, to cause it to be paid to his son at that place, and that friend accordingly wrote to one of his debtors at Athens, and ordered him to pay a sum of money to Cicero's son, yet it is observed, that this mode amounted [*11] to nothing more than a mere order or *mandate, and was not that species of pecuniary negociation which is carried on through the medium of a bill of exchange; nor does it appear that the commerce of the Romans was carried on by means of this instrument; for we find by one of their laws (z), that a person lending money to a merchant who navigated the seas, was under the necessity of sending one of his slaves to receive of his debtor the sum lent, when the debtor arrived at his destined port, which would certainly have been unnecessary if commerce, through the medium of bills of exchange, had Most of our modern writers have asserted (probabeen in use with them. bly on the authority of Montesquieu (a)), that these instruments were invented and brought into general use by the Jews and Lombards when banished for their usury, in order, with the secrecy necessary to prevent confiscation, to draw their effects out of France and England to those countries in which they had chosen or had been compelled to reside; but Mr. Justice Blackstone says(b) this opinion is erroneous, because the Jews were banished out of Guienne in the year 1287, and out of England in the year 1290(c), and in the year 1236 the use of paper credit was introduced into the Mogul empire in China(d). Other authors have attributed the invention to the Florentines, when, being driven out of their country by the faction of the Gebelings, they established themselves at Lyons and other towns(e).

(z) De nautico fænere.

(e) Poth. pl. 7.

⁽u) 1 & 2 Geo. 4, c. 78, and 9 Geo. 4, c. 24; Mahoney v. Ashlin, 2 Bar. & Adol. 478; and see Chaters v. Bell, 4 Esp. Rep. 48; see

also Salomons v. Staveley, 3 Doug. 298.

(x) Amner v. Clark, 2 C., M. & R. 468.

(y) Traités de Droit Civil, tit. Traité du Contrat de Change, pl. 6.

⁽a) Esp. L. 21, c. 16, n. I.

⁽b) 2 Bla. Com. 467. (c) 2 Carte. Hist. Eng. 208, 206.

⁽d) However, the only authority in support of that assertion is the 4 Mod. Univ. Hist. 499; a work not of paramount authority.

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On the whole, however, there is no certainty on the subject, though it seems IV. The clear foreign bills were in use in the fourteenth century, as appears from a History of Venetian law of that period; and an inference drawn from the statute 5 Bills, &c. Rich. II. st. 1, c. 2(f), warrants the conclusion that foreign bills were introduced into this country previously to the year 1381.

The mode of avoiding the necessity for transmitting money itself from one country to another by means of these instruments having been once discovered, the advantages derived from it soon induced merchants universally to adopt it, and from thence it very early grew into a custom, which seems to have been judicially sanctioned in this country at a very early period of our history, though no earlier decision relative to the custom can be found than in Jac. 1(g), where it was adjudged that acceptance raised an assumpsit in law, for the breach of which an action on the case would lie. ever, as our courts did not at first conceive it necessary to the encouragement of commerce, that this exception to the rule relative to choses in action should be carried any further than to foreign bills drawn merely for the purposes of trade, we find that formerly they would only give effect to bills made between merchant strangers and English merchants(h); however, it was soon extended to all traders, and finally in this country to all persons, whether traders or not(i). But in foreign countries this is not now universally so; thus in France, though it is not essential that the parties to a bill should be commercantes, or regular traders; there are some exceptions, and no female, whether single or widow, unless a regular merchant, can effectually be a party to a bill(k). Hence the necessity for every person having any transactions relating to foreign bills, *being completely informed of the [*12] law of every country through which they have passed.

Inland Bills of Exchange, (which are so called because they are drawn as Inland well as payable in England,) according to Lord C. J. Holt's opinion, did Bille. not originate at a much earlier period than the reign of Charles the Second.(m) They were at first, like foreign bills, more restricted in their operation than they are at present, for it was deemed essential to their validity, that a special custom for the drawing and accepting them should exist between the towns in which the drawer and acceptor lived; or if they lived in the same town, that such a custom should exist therein (n)(1). At first also effect was only given to the custom when the parties were merchants, though afterwards extended, as in the case of foreign bills, to all persons whether traders or not(o). And even after the general custom had been established, and it had been adjudged that all persons having capacity to contract might

⁽f) Claxton r. Swift, 2 Show. 441, 494. (g) Martin v. Boure, Cro. Jac. 6; Oaste v.

Taylor, Cro. Jac. 306; 1 Rol. Abr. 6; Hussey v. Jacob, Ld. Raym. 88.

⁽h) Oaste v. Taylor, Cro. Jac. 306, 307.
(i) Per Treby, C. J., in Bromwich v. Lloyd, 2 Lutw. 1585; Sarsfield v. Witherly, 2 Vent. 295; Comb. 45, 152, S. C.; Crawlington v. Evans, 2 Vent. 310.

⁽k) 1 Pardess. 329, 329.

⁽¹⁾ See Mahoney v. Ashlin, 2 Bar. & Adol. 878, and Amner v. Clark, 2 C., M. & R. 468;

ante, 10, notes (u), (x).
(m) Buller v. Crips, 6 Mod. 29; Anon.
Hardr. 485; Claxton v. Swift, 3 Mod. 86; Marius, 2; and see the argument in Mahoney r. Ashlin, 2 Bar. & Adol. 478.

⁽n) Buller v. Crips, 6 Mod. 29; Pinckney v. Hall, I.d. Raym. 175; Erskine v. Murray, id. 1542, Mannin v. Carey, Lutw. 279; Pearson r. Garrett, 4 Mod. 242.

⁽o) Bromwich v. Loyd, 2 Lutw. 1585; Sarsfield v. Witherly, Carth. 82.

^{(1) {} A bill drawn by a person residing in one of the United States upon a person residing in another is a foreign bill. Phoenix Bank v. Hussey, 12 Pick. 483; Bank of Cape Fear v. Stivewetz, 1 Hill (So. Car.) Rep. 44; Halliday v. McDougall, 20 Wend. 81; Brown v. Ferguson, 4 Leigh, 87; Dickens v. Beal, 10 Peters, 572; Bank of the United States v. Daniel, 12 id. 32; Townsley v. Sumrall, 2 id. 170; Bucker v. Finley, id. 586; Per Nelson, J. Wells v. Whitebeard, 5 Wend. 530; Green v. Leskon, 15 Maine Per, 126; Pice a Hearn, 2 Period 124. 5 Wend. 530; Green v. Jackson, 15 Maine Rep. 136; Rice v. Hogan, 8 Dana, 184. }

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IV. The History of Bills, &c.

make them, a distinction was taken with respect to form between bills made payable to order, and bills made payable to bearer; for it was once thought that no action could be maintained on a bill payable to the order of a certain person by that person himself, on the ground that he had only an authority to indorse; and those payable to bearer were at first thought not to These distinctions, however, have long been be negotiable in any case. held to be without foundation; and on the whole, as observed by Mr. Justice Blackstone(p), although formerly foreign bills of exchange were more favourably regarded in the eye of the law than inland, as being thought of more public concern in the advancement of trade and commerce, yet now, by various judicial decisions, and by two statutes, the 9th and 10th Will. 3, c. 17, and the 3rd and 4th Anne, c. 9, inland bills stand nearly on the same footing as foreign; and what was the law and custom of merchants with regard to one, and taken notice of as such, is now by these statutes enacted with regard to the other. The principal difference between foreign and inland bills is, that the former must be protested, the latter need not(q) (1). In Scotland both must be equally protested (r).

Checks, &c. Besides inland and foreign bills of exchange there are some other descriptions of negotiable instruments for the payment of money, viz. checks on bankers, promissory notes, bank notes, and bankers' notes, and which are transferable so as to vest the legal right to receive the money in the holder. Most of the rules applicable to bills of exchange equally affect these instruments. Their peculiar qualities and requisites, and the law affecting them in particular will be separately considered(s)(2).

(p) 2 Bla. Com. 467. (q) Buller v. Crips, 6 Mod. 29; Windle v. No. 18; Glen. 189, 2d edit. Abdrews, 2 B. & A. 696. (r) Ferguson v. Belch, Morr. App. to Bills, 189, 2d edit. (s) See post, Ch. XI. and XII.

(2) Bank checks are considered as inland bills of exchange, and may be declared on as such Cruger v. Armstrong, 3 Johns. Cas. 5. The rules, therefore, that are applicable to the one, are generally applicable to the other. See Murray v. Judah, 6 Cowen, 484. Mauran v. Lamb, 7 Cowen, 174.

A check payable to bearer passes by delivery, and the bearer can sue on it as on an inland bill of exchange. Woods v. Schroeder, 4 Har. & John. 276.

One possessed of a check, or order, for the payment of money to bearer, addressed to no perticular person as drawee, can maintain no action against the person subscribing it, without showing that he came fairly by it, for a valuable consideration. Ball v. Allen, 15 Mass. Rep. 433.

^{(1) &}quot;The English law requiring protest, and notice of non-acceptance of foreign bills has been adopted and followed as the true rule of mercantile law in the States of Massachusetts, Connecticut, New-York, Maryland, and South Carolina. Watson v. Loring, 3 Mass. Rep. 557. Stery v. Robinson, 1 Day's Rep. 11. Mason v. Franklin, 3 Johns. Rep. 202. Weldon v. Buck, 4 b. 144. Winthrop v. Pepoon, 1 Bay's Rep. 468. Philips v. M'Curdy, 1 Harr. & Johns. 187. But the Supreme Court of the United States. in Brown v. Barry, 3 Dall. Rep. 365, and in Clarke v. Russell, cited in 6 Serg. & Rawle, 358, held, that, in an action on a protest for non-payment on a foreign bill, protest for non-acceptance, or a notice of the non-acceptance, need not be shown inasmuch as they were not required by the custom of merchants in this country, and those decisions have been followed in Pennsylvania. Read v. Adams, 6 Serg. & Rawle, 356. It becomes, therefore, a little difficult to know what is the true rule of the law merchant in the United States, on this point, after such contradictory decisions." 3 Kent's Com. 2d ed. 95. \[\] In Alabama, inland bills of exchange are regulated and governed by the same laws, usages, and customs which regulate and govern foreign bills; except in the amount of damages. Hanrick r. The Farmers Bank, 8 Porter, 539. \[\]

*CHAPTER II.

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OF THE PARTIES TO A BILL OF EXCHANGE, PROMIS-SORY NOTE, &c.

I. WHO MAY BE A PARTY, AND V	VH0	II. NUMBER OF PARTIES	2
NOT OF SUFFICIENT CAPACIT	ry 13	Drawer or Maker	2
Aliens	13	Acceptor	2
Clergy	14	Payee	2
Trader or nol	14	Bearer	20
Corporations and Partnerships	ex-	Indorser	26
ceeding Six Persons	15	Indorsee	26
Incapacily in General	18	Acceptor supra protest	27
Imbecility of Mind	18		27
Infant	18	Payer supra protest, &c. &c. III. Modes of becoming a Party	27
Married Women	20	In Person	27
Consequences as to other Parties	24	By Agent	27
•	- 1	By Partner	86

It is essential to the validity of every contract that there be proper parties to it, and that those parties have capacity to contract. The parties to a contract are generally only two, namely, the person binding himself to perform some act, and the person in whose favour that act is to be performed; but in the case of bills of exchange and promissory notes, on account of the assignable quality of each, there may be and usually are more than two par-The capacity of the contracting parties, or in other words, who may be concerned in the transaction, will be considered in the first part of this chapter; the number of the parties in the second; and in the third the modes by which they may become such.

1. Who may be a Party, and who not of sufficient Capacity.

All persons, if they have capacity to contract, and are not under any legal I. Who disability, may be parties to a bill of exchange. In France, minors and may be women, whether spinsters, widows, or married women (unless regular com- &c. mercantes or traders) are incompetent to be parties to a bill(a).

In general, contracts in favour of alien enemies are void, both at law and Aliens. in equity (b), unless he comes into the country sub salvo conductu or live here by the King's licence(c); therefore a bill drawn in war by an alien enemy abroad, on a British subject here, and indorsed during war to a Britishborn subject voluntarily resident in the hostile country, cannot be enforced by the latter after peace restored(d). But where two British subjects were detained prisoners in France, and one of them drew a bill in favour of the other on a third British subject, resident in England, and such payee indorsed the same in France, to an alien enemy, it was held that the alien's right

(c) Brandon v. Nesbitt, 6 T. R. 23; 2 Ves.

(b) Williamson v. Patterson, 7 Taunt. 439; 1 J. B. Moore, 333, S. C.; Brandon v. Nesbitt, 6 T. R. 23; 2 Ves. & B. 332.

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⁽a) 1 Pardess. 228, 440; Pailliet, Manuel de Droit Français, 842.

[&]amp; B. 332; Mostyn r. Fabrigas, Cowp. 163.
(d) Willison v. Patteson, 7 Taunt. 439; 1
J. B. Moore, 133, S. C.

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I. Who may be parties, &c.

of action was not only suspended during the war, and that on the return of peace he might recover the amount from the acceptor (e), for otherwise such persons would sustain *greater privations during their detention; and for the same reason it is no objection to an action on such bill that it is brought as to part in trust for an alien enemy (f). And after the expiration of a temporary act, which prohibited the paying such bills during the subsisting war, under a penalty, a promise to pay such bill will be valid (g). And an action may be sustained here by a neutral on a promissory note given to him by a British subject in an enemy's country for goods sold there (h).

Clergy.

It appears (i) that in France ecclesiastics were prohibited from being parties to a bill of exchange, or from carrying on commerce in any way, on the principle that such transactions were repugnant to the sanctity of their profession; but in this country, until recently, although clergymen were prohibited by statute(k), under penalties, from trading or farming; yet the act of being a party to a bill would not constitute a trading within the statute(1), and if it did, as the act was merely prohibitory, the bill itself would not be void(m). It has, however, been lately determined, that the 57 Geo. 3, c. 99, (repealing the former enactment), which prohibits spiritual persons from being engaged in any trade or dealing for gain or profit, includes banking companies; and therefore that it is a good plea to an action by the indorsees against the indorser of a bill of exchange, that the bill was made and indorsed after the passing of the statute 57 Geo. 3. c. 99, that the plaintiffs were a banking company, of which certain spiritual persons holding benefices were partners and members, and that the trade or business of a banker was carried on by the said co-partnership for gains and profits, as well of those spiritual persons as others, contrary to the form of the statute, whereby the indorsement and the promise in the declaration mentioned were void in law(n).

Merchant or Trader, or not. It was once thought that as the only reason why bills of exchange were suffered to be assigned by one person to another, was because they were the the means of increasing commerce, and facilitating the ends of it, no person who was not a merchant, or engaged in some trade, could be a party to a

(e) Antoine v. Morshead, 6 Taunt. 237, 447; 1 Marsh. 558, S. C.; and Danbuz v. Morshead, 6 Taunt. 332.

Where an Englishman permanently resides and carries on trade, and is proved to be roluntarily domiciled in a foreign land, the government of which is at war with this country, he so far loses the right of an Englishman that he cannot sue in our courts; M'Connell r. Hector, 3 Bos. & P. 113; 5 Rob. Adm. R. 90; 3 Id. 22; O'Mealey r. Wilson, 1 Campb. 482; Roberts r. Hardy, 3 Maule & S. 533, 536.

But an Englishman domiciled in a foreign state in amity with this country may lawfully exercise the privileges of a subject of the place where he is resident, to trade with a nation in hostility with this; Bell r. Reid, I Maule & Sel. 726.

So a native of a foreign state in amity with this country, taken in an act of hostility on board an enemy's fleet and brought to England as a prisoner at war, is not disabled from suing, even during his confinement, on a contract entered into by him as such prisoner; Sparenburgh v. Bannatyne, 1 Bos. & P. 163; Rex v. Despardo, 1 Taunt. 28.

(f) Danbuz r. Morshead, 6 Taunt. 332.

(g) Duhammel r. Pickering, 2 Stark, 90.
 (h) Houriet r. Morris, 3 Campb. 803; Mostyn r. Fabrigis, Cowp. 163.

(i) Poth. Traite de Change, pl. 27.

(k) 21 Hen. 8, c. 13; 43 Geo. 3, c. 84, s. 5.
(l) Hankey v. Jones, Cowp 745, Lord Mansfield said, "This case is merely a drawing by a person for the purpose of improving his own estate, and he pays discount on what be draws, and therefore there is no colour for saying he is within the description of the bankrupl laws."

(m) Id ibid.; Ex parte Meymot, 1 Ak. 196; per Lord Chancellor, "The Statue of 21 II. S, is rather in the nature of a prohibition, and a prohibition will not exempt him from being a bankrupt; for if a man, with his eyes open, will break the law, that does not make void the contract."

(n) Hall v. Franklin, 3 Mec. & Wels. 259; 1 Horn & H. 8, S. C. The inconvenience resulting from this decision to associations and copartnerships already formed, is remedied by 1

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bill(o). It has however been long settled, that all persons having capacity I. Who and understanding to contract in general, may be parties to these instrumay be parties, ments(p); and as a person does not make himself a merchant by drawing &c. or accepting a bill of exchange, an attorney does not (independently of 1 & [*15] 2 Vict. c. 110,) by accepting a bill lose his privilege from arrest and to be sued by bill(q).

In general a corporation can only contract by deed under its corporate Corporaseal(r); and it has been doubted, whether a corporation established without Co-partany power expressly given to it to be a party to bills or promissory notes, nerships has power to bind itself by such instruments, at least it is doubtful whether having a corporation can so bind itself for purposes foreign to those for which it more than Six Cowas originally established(s)(1). But upon the question whether a corpo-partners.

(o) Fairley v. Roch, Lutw. 891; Bromwich v. Lloyd, Lutw. 1585.

(p) Sarsfield v. Witherly, 2 Vent. 295; Comb. 152; Carth. 82; 1 Show. 125, S. C.; Hodges v. Steward, 12 Mod. 36; 1 Salk. 125, S. C. The law in France is the same, 1 Pardes, 328, 329.

(q) Comerford v. Price, 1 Dougl. 312. Same point ruled by Dampier, J., 6th May, Easter Term, 1815, MS.

(r) Slark r. Highgate Archway Company, 5 Taunt. 794; Broughton v. The Manchester Waterworks Company, 3 B. & Ald 8; The King v. The Inhabitants of Chipping Norton, 5 East, 239; Bac. Ab. Corporations, E. 3; The King v. Bigg, 3 P. W. 482, 434; Yarborough v. Bank of England, 16 East, 11; 3 & 4 Anne, c. 9 s. 3; 1 Chitty on Pleading, 6th edit. 106,

(s) Per Bayley, J. in Broughton v. Manchester Waterworks Company, 3 B. & Ald. 8; and see Slark v. Highgate Archway Company, 5 Taunt. 792.

(1) An insurance company may make a valid promissory note, which will be held good until the contrary be shown. Barker v. Mochanic's Fire Ins. Co., 3 Wend. Rep. 94.

A note by which J. F. as president of an insurance company, promises to pay a sum cortain,

is not the note of the company, but of the maker aloue. Ib.

The Utica Ins. Co. have a right to invest their surplus funds in loans; but having called in a part of their capital for the express purpose of making loans in a particular way, viz. by the issuing of checks in the shape of bank notes, it was hcld, that loans thus made are in violation of the restraining act, and that a note taken upon such loan is void. Utica Ins. Co. v. Cadwell, 3 Wend. Rep. 296.

Per Savage, Ch. J. By the restraining act, no person unauthorized shall become a proprietor of a fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may or do transact by virtue of the acts of incor-

The money lent may, however, be recovered under the common count, and checks drawn, received as money, and duly paid, will be considered as money. The recovery, however, in such case, being on the contract as distinguished from the security, an action cannot be sustained against the borrower and his sureties, the sureties not being parties to the contract. Id.

A note given to an incorporated company for stock is valid in the hands of an indorsce without notice, notwithstanding the statutory provision forbidding directors of such companies to receive a note or other evidence of debt in payment of any instalment actually called in and requirel to be paid, where it is not affirmatively shown that the note was given for stock called in

and required to be paid. Wilmarth v. Crawford, 10 Wend. Rep. 241.

The plaintiffs loaned to J. I. 500 dollars, upon his check for the same sum, collaterally secured by the deposit of a promissory note, indorsed by the defendant. The sum advanced to L. consisted of small checks, drawn by the plaintiffs on the Tradesmen's Bank, having the general appearance of bank notes, and being intended to circulate as such. They were not redeemed at the bank on which they were drawn, but by the plaintiffs themselves at their own office. L. having failed to repay the loan, the plaintiffs brought an action on the note, to which the indorsers set up the illegality of the transaction, under the restraining act, as a defence. Held, that the giving of the checks under the circumstances of the case, was not a banking transaction, nor against the restraining act, and that the plaintiffs were entitled to recover. Utica Ins. Co. v. Pardow, 2 Hall's Rep. 515

Banks and other commercial corporations may bind themselves by the acts of their authorized officers and agents without the corporate seal. Hubner v. Bank U.S., 5 Wheat 338.

A corporation may be bound by a note given by an authorized agent on account of a demand against the corporation, though no special clause in the act of incorporation authorizes it to issue notes. Mott v. Ilicks, 1 Cowen, 513. So an incorporated Commission Company may accept a bill of exchange on an agreement of the drawer to deposit Goods. Munn v. Commission Co., 15 Johns. Rep. 44.

The trustees of an academy incorporated to promote morality, piety and religion, and for the

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I. Who may be Parlies, &c.

ration can, without express enactment, make a bill or note, it has been observed, that as corporations are mentioned in the statute of Anne (6 Ann. c. 22,) as persons who may make or indorse notes, and to whom notes may be payable; and as it gives the like remedy to and for corporations and others as upon inland bills of exchange, it implies that by the custom of merchants they might in some cases at least draw, indorse, accept, or sue upon bills of exchange; but that if the being parties to bills or notes were inconsistent with the purposes for which they were incorporated, that inconsistency might be a bar to any remedy by or through or against them on a bill or And where a corporation is empowered by statute to raise money by notes for a special purpose, if it issue notes without stating therein that they were given for that purpose, the corporation may resist payment on the ground that they were given for another purpose(u).

The bank of England have express power to issue their notes(x). So the Royal Bank of Scotland(y), and the British Linen Company in Scotland(z), have at least implied power to issue their notes and bills; and notes have been issued by other companies, signed by their agent, without objec-

tion(a).

The acts relating to these public bodies in general contain particular powers relating to the mode of making their notes, and to the mode by which they are to sue or be sued, or petition in bankruptcy; thus, as to the Bank of England, a clerk verbally authorised by the company may sign notes for [*16] them (\bar{b}) , and his signature may now be impressed by *machinery(c); and the 7 Geo. 4, c. 46, s. 9, provides how the Bank are to sue and be sued, and petition, &c. (d).

Bank Restriction Acts, and decisions thereon (e).

A restraint was imposed by several acts (6 Anne, c. 22, s. 9; 15 Geo. 2, c. 13. s. 5; 21 Geo. 3, c. 60, s. 12; 39 & 40 Geo. 3, c. 28, s. 15; 7 Geo. 4, c. 46; 3 & 4 Will. 4, c. 98,) in favour of the Bank of England, with respect to the description of bills and notes which corporations (except

(t) Bayley on bills, 5th edit. 67, 68, and see cases.

(u) Slark v. Highgate Archway Company, 5 Taunt. 792. The company were incorporated by 52 Geo. 3, c. 146, and authorised to borrow money to complete their works. They gave a note under their common seal for 1000l. at two months date, payable to Nash or order. It did not import to be for money borrowed to complete their works. Gibbs, C. J. thought this no defence against an innocent indorsee who had paid the value, and the plaintiff had a verdict. But the Court of Common Pleas granted a new trial.

(x) 5 W. & M. c. 22; 15 Geo. 2, c. 13, s. 5; The King v. Big, 3 P. W. 432; Bac. Ab. Corporations; and see 11 Geo. 4 and 1 Will. 4, c. 66, post, Part III. Ch. I. relating to the for-

gery of bank notes, &c

(y) Rex v. M'Kay, Easter, 1826. The prisoner was indicted for disposing of a forged 11. note of the Royal Bank of Scotland. A charter was proved, enabling the bank to increase its capital, and a clerk proved that the bank

was in the constant habit of issuing such notes, but no charter was proved giving them such power: on referring to 48 Geo. 3, c. 149, s. 14, and 55 Geo. 3, c. 184, s. 28 Hullock, B. who tried the prisoner, thought such power was sufficiently recognised by those statutes, and the other judges agreed with him; Russ & Ry. C. C. 71; Bayl. 68.

(z) Doubted in Rex v, M'Kny, Russ & Ry. C. C. 71; see 55 Geo. 3, c. 184. s. 23,

which implies the power.

(a) Edie v. East India Company, 2 Bur. 1216; Ryall v. Rolle, 1 Atk. 181; Watsno on Partnership. 1st edit. 53; Kyd on Bills, 32. (b) 8 & 9 Will. 3, c. 20, s. 36; Rex r. Bigg,

3 P. Wms. 419.

(c) 1 Geo. 4, c. 92, s. 3. (d) See cases Chitty's Equity Dig. tit. Bank of Eugland, 89; and tit. "Practice," Injunetion, 1056; and Hammond v. Maundrell, 6 Ves. 772, note.

(e) See post, Regulations as to Banking Companies.

instruction of youth in the learned languages, &c were held capable of procuring subscriptions and taking promissory notes to constitute a fund for the purpose of founding an institution for the education of indigent young men, with the sole view to the christian ministry, to be incorporated with the academy: and an assignment of such notes to a college incorporated distinct from the academy, but by its charter authorised to receive, and required to appropriate the fund in question academy to the will of the donors, was held to be said a properly to the will of the donors. according to the will of the donors, was held to be valid. Amberst Academy v. Cowls, 6 Pick 427.

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the Bank and East India Company (f), and companies in the nature of I- Who banks, may make, accept, indorse, or negotiate; such as those payable on may be demand, which are circulated as cash. Thus it was enacted(g), "that &c. during the continuance of the Governor and Company of the Bank of England, it shall not be lawful for any body politic or corporate whatsoever, or for any other persons whatsoever, united or to be united in covenants or partnership exceeding the number of six persons, in England, to borrow, owe, or take up, any sum or sums of money, on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof." But this and the subsequent enactments are limited in operation by the late important acts of 7 Geo. 4, c. 46, and 3 & 4 Will. 4, c. 98, which confine the above prohibition to corporations and co-partnerships in London, or within sixtyfive miles thereof, and allow banking establishments, though exceeding six in number, to make and issue their bills or notes at any place in England exceeding sixty-five miles from London, payable on demand(h), or otherwise, at a place specified in such bills or notes exceeding sixty-five miles from London, and not elsewhere; provided such bankers have no bankinghouse in or not exceeding sixty-five miles from London, and provided that

As the first of these prohibitory acts in favour of the Bank of England confines its prohibition to corporations and companies in the nature of a bank, and the subsequent acts are in pari materiâ, it is manifest, and it has been decided, that the protection meant to be given was against corporations and companies of bankers, and that it was not the intention of the legislature to prevent co-partners, who were not bankers, nor intended to act as such, from bonâ fide drawing, indorsing, or accepting bills or notes for the purposes of their trade or commerce, and not as a mere colour for raising money by the issue of their notes (j). *So in another case, all the judges were of opinion [*17] that those acts did not prevent a partnership or association of more than six persons from bona fide paying their debts by their acceptance, but merely prevented more than six persons from carrying on a banking concern (k). And in another case it was considered, that taking all the Bank Acts togeth-

every member of the establishment shall be liable (i).

(f) 33 Geo. 3, c. 52, s. 108, 109, 110.

(g) 6 Anne, c. 22, s. 9; and see 15 Geo. 2, c. 13, s. 5, and other subsequent acts referred to in context.

(h) As to how far notes under 5l. can now be made payable on demand, and upon what terms the business of banking may be carried on in London, and within sixty-five miles thereof, see nost.

(i) See sect. 1, 7 Geo. 4, c. 46; 3 & 4 Will. 4, c, 98, s. 2, and see futher provisions, post.

(i) Wigan r. Fowler, 1 Stark. Rep. 459, in which the court afterwards refused a new trial; see observation in Harvey r. Kay, 9 B & C.

Wigan v. Fowler and others, 1 Stark. Rep. 459; 2 Chit. R. 128, S. C. An action against seven co-partners, not bankers, on their promissory note for 1000l. payable three months after date. Defence, note illegal, as contrary to said statute. Verelict for plaintiff; and upon motion to set it aside, Lord Ellenborough said "This objection, if it were available, would affect the holder's right of action in every case where it might be contended that the number of the firm, by which the bill was drawn, exceeded six. Such a decision would virtually incapacitate any number of

persons exceeding six from entering into a commercial parnership to draw bills of exchange; and great inconvenience would result, since it would be incumbent on every person before he took a bill to inquire whether the firm by which it was drawn consisted of more than six members. The statute must be construed secundum subjectam materiam, and it was the manifest object of the legislature in framing this act to protect the Bank of England against rival banks. If a commercial partnership be made amere colour for raising money by the issue of notes, I agree that the case would fall within the prohibition of the statute." Bayley, J. " Admitting the case to be within the statute, the note would not be void, and the illegality would affect those only who knew the defect. The intention of the legislature was to protect the Bank of England against other banking companies, and the construction contended for might defeat their remedy in almost every m-stance in which they discounted bills." Mr. Justice Holroyd expressed the same opinion.

(k) Magor v. Hammond. This was a special verdict in C. P. argued before the twelve judges. It is not reported, but it was referred to by Bayley, J. in Harvey v. Kay, 9 B. &

C. 363, 864.

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I. Who may be Parties, &c.

er, the object of the legislature was to give protection against rival banks only(1). But where the corporation of the company and proprietors of the Manchester and Salford Waterworks accepted a bill payable at three mosts from the date, the case was held to be within the prohibition of the above statutes, and it was distinguished from the case of Wigan r. Fowler, because in the latter case it did not appear on the face of the instrument that the security was made by more than six persons, whereas in the principal case the bill was accepted by a corporation(m).

It is also to be observed, that the acts alluded to, though prohibitory and imposing penalties, do not declare that the bill or note issued in contravention shall be *void*, and therefore, as observed by Mr. Justice Holroyd, a bill or note upon which the objection does not appear on the face of it, may be

valid in the hands of a bona fide holder (n).

In those cases where the particular act has given a corporation power to make bills and notes, it must necessarily be taken to have given the holder the like remedy against the body corporate as the law gives against any ordinary party (o)(1). Sometimes moreover the act contains a particular pro-

(1) Perring v. Dunston, Ryan & M. 426. In an action upon a note for 1000l. payable at a shorter time than six months, it appeared to have been made by more than six persons, and it was insisted that it was therefore void as an infringement of the privilege granted to the Bank by 21 Geo. 3, c. 60, s. 12; but Best, C. J. agreed with the opinion given by Lord Ellenborough in Wigan v. Fowler, and thought that taking all the Bank Acts together, the object of the legislature was to give protection against rival banks only; and that it did not appear that this note had any relation to persons in partnership for the purpose of banking, and that the case of Broughton v. The Manchester Waterworks went on the act of the defendants being a corporation.

(m) Broughton v. The Manchester Waterworks Company, 3 B. & Al. 1; and see observations of Beet, C. J. in Perring v. Dunston, Ry. & M. 426, supra, as to the distinction between a corporation and an ordinary copartneship. Sed quære, the acts make no distinction between corporations and co-partnerships; and the real question should seem to be, whether either the one or the other be established for banking purposes. See cases under the late Bank Act, 3 & 4 Will. 4, c. 98, post.

(n) Per Holroyd, J. in Boughton v. The Manchester Waterworks, 3 B. & Al. 1; see also the observation of Bayley, J. in Wigan v.

Fowler, 1 Stark. 459, supra.

(o) Murray v. East India Company, 5 B. & Al. 204.

(1) The indersement and delivery of a promissory note to a bank on its request, is a sufficient consideration for an undertaking on the part of the bank to charge the inderser by notice: and if they neglect to do this, the holder may maintain an action against them and recover damages for the neglect. Bank of Utica v. Smedes, 3 Cowen, 663, in error. And a count for such neglect would be good as a count for misfeasance. Ibid \ M'Kinster v. Bank of Utica, 9 Wend. 46. And see 11 Wend. 473, S. C. affirmed by the Court of Errors.

So a bank receiving for collection a bill of exchange drawn npon a person residing is another state, is liable for any neglect of duty accruing in its collection, whether arising from the default of its officers at home, its correspondents abroad, or of agents employed by such correspondents. Allen v. Merchants Bank of New York, 22 Wend. 215. And for any neglect of the necessary means to secure the liability of the parties to the bill or note, the bank is liable. Armington v. Gas Light & Banking Co. 15 Louis. Rep. 414. Thompson v Bank of S. Carolina, Riley's Law Cases, S1; S. C. 3 Hill's Rep. 77. 'The general custom of banks to use moneys so collected is a sufficient consideration for this undertaking. 3 Hill's Rep. ubi sup. But see contra. The East Haddam Bank v. Scovil, 12 Conn. Rep. 303.

This liability may be varied, however, either by express contract or by implication arising from general usuge in respect to such paper; it is competent, therefore, for the bank to show as express contract, varying the terms of its liability, or in the absence of judicial determination on this point, to show that by the usage and custom of the place, the liability of the bank is diminished.—This inquiry is, however, not as to the opinion of merchants as to the law of the case, but as to the usage and practice in respect to such transactions, or the general understanding of merchants, as to the nature of the contract evidenced by their nets, so as to enable the court to give the contract a correct interpretation. Allen r. Merchants Bank of New York, ubi sup-

Where a debt was lost by omission of the notary to give notice of non-acceptance of a bill presented before maturity, it was held, not to excuse a bank which had received the same for collection, that by the law merchant of the place where the bill was presented, notice of non-acceptance was deemed unnecessary; but, as the lex loci contractus governed in the case, it was the daty of the bank to have given the necessary instructions to its correspondents. Ibid.

the duty of the bank to have given the necessary instructions to its correspondents. Ibid.

The omission to give requisite notice, happening through the default of a commissioned public officer, a notary, does not vary the rights of the parties; pro hac vice, he acted merely as the

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vision authorising actions and proceedings by and against the public officer of I. Who the banking company nominated as the act directs, and proceedings in bank- may be ruptcy may be instituted by, and the property in personalty may in criminal &c. cases be laid in him(p). The recent act of 1 & 2 Vict. c. 96, also enables the members of a banking co-partnership, not being a corporation, to sue and be sued by the co-partnership in the name of their public officer (q). In Scotland, by the statutes 6 Geo. 4, c. 131, and 7 Geo. 4, c. 67(r), joint stock societies *or partnerships may sue and be sued in the name of the firms [*18] severally used by such societies or partnerships, or in the name of the manager, cashier, or principal officer of such society or partnership. And in Ireland also, societies or partnerships formed under the authority of the statutes 5 Geo. 4, c. 73, and 6 Geo. 4, c. 42, s. 16, and the Saint Patrick's Assurance Company of Ireland(s), may sue and be sued in the name of any one of their public officers.

With respect to the capacity of the contracting parties in general, the law Incapacity has wisely taken care of the interests of those who either have not judgment in general. to contract, as in the case of infants; or who, having judgment to contract, camot in law have a fund or property to enable them to perform the contract, as in the case of a feme covert; and therefore it has in general rendered the contracts of infants voidable, and those of married women absolutely void.

If a person imbecile in mind be imposed upon and induced to sign a prom- Imbecility, issory, not drawn in the usual form, and when he was not conscious of what Drunkenhe was doing, such note is bad even in the hands of an indorsee for value(t). So if a note be signed by a person in a complete state of intoxication it will be void in the hands of the party obtaining it(u); but not, it should seem, in the hands of an innocent indorsee for value (w). Mere weakness of intellect, however, where there has been no fraud in the transaction, will not

(p) 7 Geo. 4, c. 46, s 9, see the enactments in the concluding part of this chapter. Without an express power such officer could not petition for a commission, Guthrie v. Fisk, 5 D. & R. 24; 3 Stark. 153, S. C.

(q) This act, which was only to be in force until the end of the session of 1839, is continued by 2 & 3 Vict. c. 68; and see the Trading Companies Act, 7 Will. 4 & 1 Vict. c. 73, post.

(r) The 7 Geo. 4, c. 67, enables joint stock banking companies in Scotland to sue and be sued and to prove by their cashiers. Of course in making proof the provisions of the act must be complied with, and the party attempting to prove as cashier must swear that the company has complied with the regulations of the act; and if he has previously obtained an attachment according to the law of Scotland, he must abandon it, or undertake to abandon it, before

he can be allowed to prove. Per Commissioner Fonblanque, in the bankruptcy of Maberley, February, 1832.

(s) 5 Geo. 4, c. cix. and see course of proceedings, Bartlett v. Pentland, 1 B. & Adol.

(t) Sentance v. Poole, 3 Carr. & P. 1. On a plea " that the defendant did not make the promissory note mentioned in the declaration,' he cannot give in evidence that he was of im-becile mind at the time when he made it; Harrison r. Richardson, 1 Mood. & Rob. 504.

(u) Pitt v. Smith, 3 Campb. 33; Fenton v. Holloway, 1 Stark. 126; Gregory r. Frazer, 3 Campb. 454; Yates v. Boen, 2 Stra. 1104, n. 1; Bul. N. P. 172.

(w) See per Tindal, C. J., in Northam r. Latouche, 4 C. & P. 145, and see Johnson r. Medlicott, 3 P. Wms. 130.

agent of his employers, and not in his official capacity. Id. Thompson v. Bank of So. Car. 3 Hill's Rep. 77.

It seems that in such case an action lies at the suit of any person beneficially interested in having the duty performed, which the law under such circumstances casts upon the bank. Bank of Utica v. M'Kinster, 11 Wend. Rep. 473.

An agreement by the president and cashier of the bank of the U.S. that the indorser of a

promissory note shall not be liable on his indorsement, does not bind the bank. It is not the duty of the cashier and president to make such contracts; nor have they power to bind the bank, except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper in loaning money. Bank of the United States v. Dunn, 6 Peters' Rep. 51.

The officers of the bank have no authority, as agents of the bank, to bind it by assurances which would release the parties to a note from their obligations. Ib. Bank of the Metropolis v.

Jones, 8 Peters' 12.

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I. Who may be Parties, &c. afford any defence (x); and no person can, in defending an action, be allowed to stultify himself, unless it be also shown that he was defrauded or imposed upon, and a defendant cannot in an action set up his own insanity as a defence, unless he has been imposed upon by the plaintiff in consequence of his mental imbecility (y).

In general, all contracts made by infants, otherwise than for necessaries (which is a relative term depending on their station in life), are voidable by them(a); and a bond in a penalty, or for the payment of interest(b), and bills of exchange, in the course of trade, and not merely for necessaries, are Infants(z). clearly not binding upon them(c)(1); and though it *has been considered, [*19] that a single bill or bond for the exact sum due, and not in a penalty, given for necessaries, is obligatory upon an infant(d), yet an indorsee of a bill or note cannot sue an infant upon either of those instruments, though given for such consideration; and as an infant cannot state an account(e), it seems to be the better opinion that these instruments are not in any case available against infants, even between the original parties(f). However, it is clear

(x) Baxter v. Earl Portsmouth, 8 D. & R. 614; S. C. 5 B. & C. 170; 2 Carr. & P. 178; Yates v. Boen, 2 Stra. 1104; Faulder v. Silk, 3 Campb. 126; 2 Bla. Com. 292.

(y) Brown v. Jodrell, 3 Carr. & P. 30;
Baxter v. Portsmouth, 8 D. & R. 614; 5 B.
& C. 170, S. C.; and see Dane v. Kirkwall, 8

C. & P. 679.

- (z) In France, infants cannot be parties to bills, 1 Pardess. 328, 329. Pailliet, Manuel de Droit Français, 842, n. 2. In America he cannot be sued on a bill for necessaries, Swasey v. Vanderheydon, 10 John's R. 33. In this country, an infant is capable by law of entering into a contract not merely for necessaries for ready money, but into any reasonable contract for necessaries upon credit, although he may be allowed an income sufficient to supply him with necessaries for ready money; Burghart v. Hall, 4 M. & W. 727.
 - (a) Hands v. Slaney, 8 T. R. 578.
 (b) Fisher v. Mowbray, 8 East, 330.
- (c) Williams v. Harrison, Carth. 160; 3 Salk. 197; Sel. Cas. 17, S. C.; Williamson v. Watts, 1 Campb. 552; Com. Dig. Enfant, C. 2. Williams v. Harrison and others, Carth. 160;

3 Salk. 197, S. C. Action against the defend-

of merchants, upon a bill drawn by the defendants, and protested. R. Harrison, one of the defendants, pleaded infancy, and upon demune therto, the Court held that infancy was a good bar, notwithstanding the custom of merchants; for here the infant is a trader, and the bill of exchange was drawn in course of trade, and so for any necessaries.

(d) Co Lie 172 a. n. 2: 1 Rol. Abr. 728.1.

ants, being merchants, according to the custom

(d) Co. Lit. 172 a, n 2; 1 Rol. Abr. 729.1. 20; 1 Lev. 86; 8 East, 330; Trueman r. Hunt,

1 T. R. 41.

(e) Trueman v. Hurst, 1 T. R. 40; Ingledew v. Douglas, 2 Stark. 36. An infant cannot be liable on an account stated, and the reason given is, that he cannot calculate, and is fore incapable of stating an account. See per Abinger, C. B., in Burghart v. Hall, 4 M. & W. 727, 731, 732.

(f) Williamson v. Watts, 1 Campb, 552.

(f) Williamson v. Watts, 1 Campb, 552.

Sir J. Mansfield appears to have considered that an infant could not be liable as acceptor of a bill, although drawn on account of necessaries; the case was this: "Assumpsit on a bill, plea, infancy. Replication, bill accepted for necessaries, and issue thereupon." Sir J. Mansfield, C. J. said "this action certainly cannot be

(1) The same doctrine is asserted in respect to infants in the United States. They are not liable upon notes given by them, although carrying on trade as adults. Van Winkle v. Ketcham, 3 Caines' Rep. 323. A negotiable note given by an infant even for necessaries is void. Swansey v. Adm. of Vanderhayden, 10 Johns. Rep. 33. Fenton v. White, 1 Southard's Rep. 100. M'Crillis v. Howe, 3 New Hamp. 348. \{ In the cases of Haines' adm. v. Tenant, 2 Hill, 400, and Dubose v. Wheddon, 4 M'Cord, 221, the contrary is decided. \}

And the same evidence has been required of the confirmation of a voidable contract of a in-

And the same evidence has been required of the confirmation of a voidable contract of an infant after full age, as of the execution of a new one. Rogers r. Hurd, 4 Day's Rep. 57. But if infancy be set up against a note executed in a foreign country, the party is bound to show that by the law of such country, such plea is a good defence. Thompson r. Ketcham, 8 John. Rep. 139. A note made by an infant for a valuable consideration, but not for necessaries, is not confirmed by a clause in his will made after coming of age, directing all his just debts to be paid. Smith r. Mayo, 9 Mass. Rep. 62.

Where a promissory note was given by an infant, and after he became of full age, he submitted to arbitrament the question whether he was liable on the note; it was held, that this fact did not prove, nor tend to prove, a rutification of the original contract. Benham r. Bishop, 9 Conn.

Rep. 330.

The bare retention of the consideration for which the note of infant was given, after his coming of full age, is not a ratification; nor is a mere acknowledgment that he made the note, or that it is due, sufficient for this purpose; but there must be a promise to pay. Ib.

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that a person is liable as acceptor of a bill drawn upon him whilst he was an I. Who

infant, but accepted after he came of age(g).

It is an unsettled point, whether an infant first indorsee can by such in- &c. dorsement give currency to a bill of exchange, so as to entitle the holder to sue on it; though indeed in a case where the acceptor knew the payee and indorser was an infant, the Court held him liable (h), and *so in a case where [*20] the infant ratified his indorsement after coming of age(i). And it should seem, that without either of those particular circumstances the indorsee might recover, because the acceptance admits the competence of the drawer (k). So it has been held, that the drawer of a bill cannot set up the infancy of the payee and indorser, as a defence to the action against such drawer(l).

maintained. The defendant is allowed to be an infant; and did any one ever hear of an infant being liable as acceptor of a bill of exchange? The replication is nonsense, and ought to have been demurred to. As the point of law is so clear, I am strongly inclined to nonsuit the plaintiff; however, if I am required to hear the evidence, I will do so, and the defendant will find redress in the court above, should the verdict be against her." It appeared that the defendant was a woman of the town, and that the consideration for the acceptance was the sale of silk stockings, and other expensive articles of dress; whereupon Sir J. Mansfield directed a nonsuit. See also Selwyn's Ni. Pri. 9th ed. 302. And in equity, a note obtained from an infant just after his coming of age, for extravagant supplies previously made, has been set aside; Brook v. Galby, 2 Atk. 34; Parnard. 1, 8. C

But in the case of Trueman v. Hurst, 1 T. R. 40, and MS. the court seemed to have been of opinion, that a note given by an infant for necessaries is valid. From a manuscript note of that case it appears that the declaration was on a note, whereby the defendant acknowledged himself to be justly indebted to the plaintiff in the sum of 101., for board and lodging, and for teaching and instructing the defendant in the business of hair-dressing, and did therefore promise to pay the same to the plaintiff on demand; and after the common counts there was an account stated. The defendant pleaded infancy to the whole declaration; and the plaintiff replied, that the note was given for necessaries, and that the sum mentioned in the other counts were due for necessaries; to which replication the defendant demurred; and it was argued for the defendant, that an infant cannot bind himself by a promissory note, even for necessaries; that there is a great difference between a single bill and a promissory note, because an action on the first must be brought in the name of the person to whom it was given, in which case the consideration may be gone into, whereas a promissory note is negotiable. The court desired the counsel for the plaintiff to confine him-self to the objection to the account stated, from which it might perhaps be inferred, that they considered that the action on the note was sustainable

In Kyd on Bills, 29, it is urged, that if a single bill for necessaries be valid, there seems no reason why a bill or note for the same consideration should not be binding; and it has been observed, that this circumstance of a single bill for

necessaries being valid seems to afford an argument from analogy to show that a promissory note given by an infant for necessaries would be binding, if payable only to the person who supplied them, though he cannot be bound by his signature to a negotiable bill or note, as that not only prima facie admits the debt and operates as an account stated but, if valid, would render him liable to an action at the suit of an indorsee, in which the amount of the original debt could not be d'sputed; 1 Campb. 553, notes. . And it has been observed in Holt's Ni. Pri. Cas. 78, 79, that as a promissory note, by the statute of Anne, a ny be indorsed over, it should seem that an infant would not be bound by such security, at least not whilst it is in the hands of an indorsee; and in the hands of the person to whom it was originally made payable, it would probably be deemed to have no other qualities than a promissory note before the statute of Anne, that of being merely evidence of a

(g) Stevens v. Jackson, 4 Campb. 164; 2 Rose, 284.

(h) Jones v. Darch and others, 4 Price, 300. The defendants knew, at the time they received the bill, that the payee was an infant, and that he had indursed it before they accepted it, and the defendants had been in the practice of raising money on similar bills. And see Jenne v. Ward, 2 Stark. 330. In America, in the case of Nightingale v. Withington, 15 Mass. R. 272, it was held, that if an infant indorse a note, an action may be maintained upon it by the indorsee against any of the prior parties. And per Parker, C. J., "That an infant may indorse a negotiable promissory note or bill of exchange, payable to him, seems to be well settled in the Law-Merchant, and is no ways repugnant to the common law. Whether an infant may avoid an indorsement so made, and oblige the promiser to pay him, is a question not arising in this case; for there has been no countermand or revocation of the order to pay, which is implied in his indorsement. If an action should be brought against the infant as indorser, without doubt he may avoid such action on a plea of infancy." As to the French law, see 2 Pardess. De Lettres de Change, 459, post.

(i) Taylor v. Croker, 4 Esp. 187, post, 24. (k) Id. ibid and see principle in Drayton r.

Dale, 2 B. & C. 299.

(1) Grey v. Cowper, E. 22 G. 8. 1 Selw. N. P. 302, 9th ed.; and the law in America is the same, Nightingale v. Withington, 15 Mass. R. 272.

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I. Who may be Parties, &c.

If one of two partners acceptors is an infant, and has set up his infancy as a defence, the holder may declare on it against the adult as accepted by him only, and if he plead in abatement the non-joinder of his partner, the plaintiff may reply his infancy, and it will be no departure (m).

Ratificatract.

As the contract of an infant is only voidable, and not absolutely void, he tion of con- may by a promise to pay the bill, made after he attains twenty-one, and before action(n), render it as operative against him as if he had been of age at the time it was made(o). Such promise, however, must be express; and a bare acknowledgment of the debt is not a sufficient confirmation, nor will a promise to pay a part, or an actual payment of a part, create any further liability (p); and such ratification must now be in writing and signed (q). In the case of a continuing contract, voidable only by an infant on his coming of age, he is presumed to ratify and confirm the contract, if he do not within a reasonable time, after he has attained his full age, give notice of the disaffirmance of, or otherwise reject such contract, unless the other party dispense with such disaffirmance (r).

An infant may certainly sue on a bill in his favour(s). Though where one of several persons, who is an infant, has been suffered to appear as a partner with others, they are not obliged to join him in an action at their suit(!).

Married women (u). [*21

A married woman cannot be a party to a bill of exchange, promissory note, or other contract, so as to subject herself to liability in a *court of law, although she be living apart from her husband, and have a separate maintenance secured to her by deed(x); and though she live apart from her husband, in a state of adultery, and there exist a valid divorce à mensa et the ro(y); and a feme covert sole trader in London is not liable to be sued as such in the courts at Westminster(z).

But sometimes a feme covert is chargeable in equity where a feme covert is treated as a feme sole in respect of her separate property (a); and where a

(m) Burgess v. Merrill, 4 Taunt. 468; see Glossop v. Coleman, 1 Stark. Rep. 25, but see Gibbs v. Merrill, 3 Taunt. 307.

Though an infant is not liable as a partner, ret he will be so if he do not, on attaining his full age, notify to persons, trusting the firm after that time, his disaffirmance of the partnership; Goode v. Harrison, 5 B. & Al. 147, and see Holmes v. Blogg, 8 Taunt. 85.

(n) Thornton v. Illingworth, 2 B. & C. 324; 4 D. & R. 545, S. C.
(ρ) Taylor v. Croker, 4 Esp. Rep. 187. In

an action by drawer against acceptor of a bill of exchange for 1011., defendant proved that he was under age when he accepted the bill. Plaintiff then produced in evidence a letter in defendant's handwriting, purporting by its date to have been written after he came of age, addressed to a third person, in these words:--" I request you to pay H. (the plaintiff) 101l. at your earliest convenience after the date of this letter, from the money left me by my late grandfather, for which I have given my bill." This letter was proved to have been delivered to plaintiff's clerk, but it did not appear when; it was held, that the letter must primi facie be taken to have been written and issued at the time when it bore date; and that having been written after defendant came of age, and be-fore the bill became due, it would support a count on a promise to pay according to the te-nor and effect of the bill; Hunt v. Massey, 5 Bar. & Adol. 902; 3 Nev. & M. 109, S. C.

(p) Dilk v. Keighley, 2 Esp. Rep. 481; Thupp v. Fielder, Ib, 628. See Hunt v. Massey, 5 Bar. & Adol. 902, last note.

(q) 9 Geo. 4, c. 14, s. L. (r) Holmes v. Blogg, 8 Taunt. 85; Goode

v. Harrison, 5 B. & Al. 147; supra, n. (m). (s) Warwick v. Bruce, 2 Maule & S. 205; Teed r. Elworth, 14 East, 210; 6 Taunt. 118, S. C. in error; Holliday v. Atkinson, 5 B. & C. 501; Kyd, 80; Bac. Abr. Infants, I. 6. (t) Glossop v. Coleman and others, 1 Stark.

(u) In France a bill made by a woman though unmarried, unless regularly concerned in trade, has no other effect than a simple promise, and is not negotiable; 1 Pardess. 328. 55. Puilldiet, Manuel pe Droit Français, til-

Lettres de Change, 842.

(x) Marshull v. Rutton, S T. R. 545. (y) Lewis v. Lee, 3 B. & C. 291; 5 Dow. & Ry. 98, S. C.; Faithorne v. Blaquire, 6 Maule & S. 73, sed vide Cox v. Kitchen, 1 B. & P. 338. After a divorce à vinculo matrimonii the wife may contract as a feme sole, Com. Dig. Bar. & Feme, C. 1 C. 7; Moore Rep. 666; Deerly v. Mazarine, 1 Salk. 116; Cro. Eliz. 908; Chamberlaine v. Hewson, 5 Mod. 71; Gow, C. N. P. 10.

(z) Beard v. Webb, 2 B. & P. 98. The husband must be joined for conformity. See in France, 1 Pardess. 45, 56, 59, 328.

(a) Vin. Ab. Bar. & Feme, N. 8. pl. 4; Peacock v. Monk, 2 Ves. sen. 190; Norton v. Turvill, 2 P. Wms. 144; Nurse v. Craig, 2 New Rep. 163; Bac. Ab. Bar. & Feme, K.; Dal-

biac v. Dalbiac, 16 Ves. 116; Headen v. Ros-

was a bill filed against Clarke and his wife,

and the trustees under the marriage settlement,

dated the 2d and 3d May, 1806, previous to

the marriage, and vesting several real estates

and personal property in the trustees, for the sole and separate use of the wife; and the bill

stated, that on the 4th October, 1806, the wife

requested the plaintiff to lend her 2501., which

she promised should be repaid to him, with in-

terest, out of her separate property; and the plaintiff knowing that she had such a separate

for her separate use; and she gave him her promissory note for the sum of 250l. with law-

ful interests, upon demand, dated the 4th of

October, 1806. By a letter from the wife to

the plaintiff, in answer to an application for re-

payment, she acknowledged the debt, and promised to pay it out of her separate estate. The

note and the letter were admitted by the an-

swer. Sir Samuel Romilly, for the defendants,

contended that the promissory note was not the

execution of a power, nor an appointment of

any part of this settled property, and had no

reference to it; constituting merely a debt for

a simple contract, and that there was no au-

thority establishing the right of a court of equi-

ty to apply the rents and profits of the separate

estate of a married woman to the payment of a

debt. But the decree directed the trustees to

receive the rents and profits of the several es-

tates in the marriage settlement mentioned;

that an account should be taken of what was

due to the plaintiff for principal, interest, and costs, upon the note of the wife; and that the

trustees should pay to him what should be

found due in respect of such principal, interest and costs, out of such rents and profits; that they should account annually for the rents and

profits, and pay to the plaintiff the balance

which should from time to time be reported

due, until the principal, interest and costs, shall

roperty, accordingly advanced her that sum

(b) Bullpin v. Clarke. 17 Ves. 866. This

her, 1 Mac. & Y. 90.

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be fully paid. And see Bingham v. Jones, in-(c) Hulme v. Tenant, 1 Bro. C. C. 16; 9

married woman borrowed money, and gave her promissory note payable on I, Who demand, with interest, on a bill filed against the husband and wife, and trus- may be tees acting under a marriage settlement, it was decreed that the debt should be paid out of the rents and profits of the estates settled to her separate use(b); and so where she gave a note jointly with her husband, as a security for his debt(c); and the same point was determined where a fome covert lived separate from her husband, and had a separate maintenance, and accepted a bill of exchange(d). So a feme covert having a separate estate settled upon her is liable in equity upon a hill accepted by her, though for the benefit of another person(e).

*When her husband is in legal consideration dead, as where he is trans- [*22] ported, banished, &c., a married woman may contract so as to be liable at Where a husband has been abroad and not heard of for seven years, it will be presumed he is dead, and the wife is liable(g). If an alien husband never has been in this country, and his wife reside here and con-

Ves. 189, 486; 11 Ves. 209; 1 Ves. & B.

(d) Stewart v. Lord Kirkwall and others, 3 Madd. 397.

(e) Bingham v. Jones, Chancery, 1882, MS. This was an appeal from the judgment of the Master of the Rolls. The question was as to the effect of an acceptance of a bill of exchange by a feme covert, who had an estate settled upon her for her sole and separate use. The bill was drawn and indorsed by her daughter. When the case was argued, his lordship felt no doubt upon the point; but in consequence of the pressing manner in which some authorities had been argued, he was induced to defer his judgment. He had entertained no doubt upon the subject for years past, and a solemn-decision at law had established the liability of the acceptor. The foundation of the argument against her liability was, that this was an accommodation bill, and therefore it was said she must be regarded as a surety; but the contrary had been decided by three eminent judges in the Court of Common Pleas. It had been also said that there was a difference where the feme corert accepted a bill for her own use, and where it was accepted, as in this case, for the benefit of another. There did not appear to be any decision precisely on that point in this court, though there was a case in 15 Vesey, which came near it, but the acceptance made a good debt at law, on which the acceptor might be sued, and by which he became primarily liable whether the bill was for accommodation or not. This was the view which had been taken of the case in the court below, and therefore the judgment was affirmed with. costs, and see Bowyer v. Peake, Freem. C. R.

(f) Derry v. Duchess Mazzarine, Lord Raym. 147; De Gaillon v. L'Aigle, 1 Bos. & Pul. 858, 859; Carrol v. Blencow, 4 Esp. 27; Belknap's case, Year Book, 2 Hen. 4, 7 a; Bac. Ab. Bar. & Feme, M.; Lean v. Schutz, 2 Bla. Rep. 1197; Corbett v. Poelnitz, 1 T.

(g) Hopewell v. De Pinna, 2 Campb. 118; Lambert v. Atkins, 2 Camp. 273; 1 Jac. 1, c. 11, s. 2; Rowe v. Hasland, 1 Bla. Rep. 404; Doe v. Jesson, 6 East, 80.

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I. Who may be Parties, &c.

tract debts, she is responsible(h). But in the case of an alien, who has once resided in this country, the animus revertendi is, it seems, to be presumed, unless the contrary appear; and therefore it has been held at Nini Prim that a woman, by birth an alien and the wife of an alien, cannot be sued as a feme sole if her husband has lived in this country, although he has left her here and entered into the service of a foreign state(i).

Though it has been decided, that if a married woman give a promissory note, and after the death of her husband promise to pay it in consideration of forbearance, such promise is void; yet if the wife had separate estate secured to her at the time she gave the note, the promise may be enforced

at law(k).

If it be proved that a wife has antecedently usually drawn, accepted, or indorsed bills or notes for her husband with his authority, the proof of her hand-writing to a bill or note has generally been held to bind him. But in a late case it seems to have been considered, that though it be proved that a tradesman cannot write, and that his wife usually had written for him whatever was requisite in his trade, yet he will not be liable upon a bill or note signed by her, unless there be also some evidence that it was signed by her in respect of his trade, and this although she signed in his name, and though he afterwards recognised it (l). If a husband indorse a promissory note made by his wife and payable to him, the indorsee may sue him as such indorser(m).

If a bill or promissory note be made to a feme sole, and she afterwards marry, being possessed of the note, the property vests in the husband, and he alone can indorse the same (n); and if such instrument be made payable to a feme covert, the legal interest vests in the husband, and he alone can in gen-[*23] eral indorse the same (o); and though the *wife might join with him in an action, yet it is not necessary that she should do so, because by the act of marriage itself the husband is virtually an indorsee(p); and in such case when the husband sues alone on a promissory note given to his wife, a debt due to the maker from the feme dum sola cannot be set of f(q). But where a married woman, being executrix, received a sum of money in that character, and

(h) Kay v. De Pienne, 3 Camp. 124.

(i) Kny r. De Pienne, 3 Camp. 123, 125; sed wide 2 Esp. 554, 587; 2 N. R. 380, S. C. (k) Lloyd v. Lee, 1 Stra. 94; Lee v. Mug-

geridge, 5 Taunt. 36.

(1) Smith r. Pedley, MS. 1824, Bayl. 5th ed. In an action by the indorsee of note against maker, it appeared that defendant could not write, and that his wife wrote for him whatever was requisite, and that this note was signed by the wife in his name; but there was no evidence that the note was given on account of any concerns of the husband: it was however left to the jury to presume it was given for the husband's concerns, and the jury found for the plaintiff. But on a rule nisi for a new trial, the court thought there was nothing to warrant such presumption by the jury, and a new trial was granted. See post, 819, (2).

(m) Haly v. Lane, 2 Atk. 182.

(n) Conner v. Martin, 1 Str. 516, cited in 3 Wils. Rep. 5. In an action against husband and wife on a note made by the wife dum sola, a statement by a witness that he knew A. B. (the wife) formerly, and had heard that she afterwards married E. F. (the husband), was held sufficient prim's facie evidence of marriage

in the absence of any cross-examination of the witness on the part of the plaintiff; Evans r. Morgan, 2 Crom. & J. 458.

(o) Philliskirk et Ux. v. Pluckwell, 2 Maule & S. 393; Mason 4. Morgan, 2 Ad. & El. 30; 4 N. & M. 46, S. C.; but see Cotes v. Davis, 1 Camp. 485; and Prestwich v. Marshall, 4 Car. & P. 594; 4 M. & P. 513, S. C. infra. To a plea of coverture in the plaintiff, she cannot reply that at the time of the promise declared on, her husband had been absent seven years, and that during that period he was not known nor is he now known by the plaintiff to be alive, but should reply that her husband is dead; Lake v. Ruffle, 6 Nev. & Man. 684.

(p) M'Neilage v. Hollaway, 1 B. & Ald. 218; Arnold r. Revoult, 1 Brod. & Bing. 445; 4 J. B. Moore, 70, S. C. The husband may declare alone on a note made to his wife during coverture, alleging it was payable to him; Arnold r. Revolt, 4 J. B. Moore, 70, 71; 1 Brod. & B. 445, S. C.; Ankerstein r. Clarke, 4 T. R. 616; or she may join in the action, 2 Maule & S. 393.

(q) Burrough v. Moss, 10 B. & C. 558; 8 Law J. 237, S. C.

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lent the same to her husband, and took in return for it the joint and several I. Who promissory note of her husband and two other persons, payable to her with may be interest; it was held, that although she could not have maintained any action &c. upon the note during the lifetime of her husband, yet that he having died, and it having been given for a good consideration, it was a chose in action surviving to the wife, and that she might maintain an action upon it against either of the other makers at any time within six years after the death of her husband, and recover interest from the date of the note(r).

Where a note was given by the defendant to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she owed him, in the course of carrying on a trade in her own name, by the consent of her husband; yet it was held that the property in the note vested in the husband, and that no interest passed by an indorsement in her name to the plaintiff(s). But in another case, where on the note being presented for payment the defendant promised to pay the indorsee of the wife who passed and indorsed by a name different from her husband and with his knowledge, the jury were directed to infer an authority to make such indorsement (t). And in a recent case it was held that the indorsement by a married woman in her own name, with her husband's assent, of a bill drawn by her, is binding upon him, and will pass the interest in the bill to the indorsee, so as to enable him to sue the acceptor who *had previously paid similar bills so indorsed(u)(1). The power and ca-[*24] pacity of a bankrupt to become a party to a bill will be hereafter noticed (x).

(r) Richards v. Richards, 2 Bar. & Adol. 447. Post, 819, (3).

(s) Barlow v. Bishop, 1 East, 432; 3 Esp. Rep. 266, S. C. Ann Parry was a married woman, carrying on trade in her own name with the consent of her husband. She became in the course of such trade indebted to the plaintiff, and to enable her to pay him, defendant, who knew that she was married, gave her a note payable to her or order for the amount of the debt; she indorsed it in her own name to plaintiff, and he brought this action. Lord Kenyon at the trial thought it not maintainable, and saved the point, and after a rule for a nonsuit and cause shown, said it was clear that the delivery of the note to the wife vested the property in the husband; that as he permitted her to trade on her own account, and this was a transaction in the course of that trade, he was not prepared to say that if she had indorsed the note in his name, that that would not have availed, and the jury might have presum-ed an authority from her husband for that purpose. But the indorsements being in her own name, it was quite impossible that it could pass away the interest of her husband by it. Rule absolute. But see Prestwich v. Marshall, 4 Car. & P. 594; 4 Moore & P. 513, S. C.; post, 24, n. (u).

(t) Cotes v. Davis, 1 Camp. 485. Action

by indorsee against maker of promissory note, payable to Mrs. Carter or order, and indorsed by her in her own name. The note when due, with the indorsement thereon, was presented by a notary to defendant, who said it should be paid in a few days; defendant now offered to prove that Mrs. Carter was the wife of one Cole, who was still living. Lord Ellenborough said, the jury might presume that her husband authorised her to indorse notes by the name in which she herself passed in the world, and that the defendant was estopped from contesting her authority for this indorsement. Verdict for plaintiff. See also Doe ex dem. Leicester and another v. Biggs, 1 Taunt. 367; Prince Brunatte, 1 Bing. N. C. 435, post, 24, n.(a).

(u) Prestwich v. Marshall, 4 Car. & P. 594; 4 M. & P. 513, S. C.; ante, 23, n.(s). To a dealerst in agging the acceptance of the left.

declaration against the acceptor of a bill of exchange alleged to have been drawn and indorsed by Sarah Ellwood, defendant pleaded that she was the wife of Thomas Ellwood, who was still alive; replication, that she drew and indorsed the bill by the authority of her husband, held no departure; Prince r. Brunatte, 1 Bing. N. C. 435; 1 Scott, 342, S. C.; 3

Dowl. 382, S. C. (x) Post, Ch. VI. s. i. Transfer; Drayton v. Dale, 2 B. & C. 299.

(1) A feme covert may make a valid indorsement of a note given to her before marriage, by a name different from that of her husband, if the circumstances of the case be such as to warrant the presumption that the indorsement was made with the assent of the husband. Miller v. Delamater, 12 Wend. 433.

Such indorsement will be valid, notwithstanding that by an ante-nuptial contract she had assigned the note to a trustee for her benefit: if the indorsement be made with the knowledge and assent of the trustee. Ibid.

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I. Who may be Parties. &c.

Effect of Incapacity as to other Parties.

Except in the instance of an indorsement by a feme covert, it seems that although a bill, &c. be drawn, indorsed, or accepted by a person incapable of binding himself, it will nevertheless be valid against all other competent Therefore, if a husband indorse a note by which his wife promised to pay him a sum of money, as between him and the indorsee, it is certainly good(z); and as infancy is a personal privilege, of which the infant alone can avail himself, the drawer or acceptor of a bill cannot set up the infancy of the indorser as a defence to the action(a); and it is reported to have been decided, that where a bill drawn and indorsed by an infant to a third person, who indorsed the same to the plaintiff, had been misappropriated by the first indorsee, in fraud of such drawer, and he had therefore demanded the bill from the plaintiff, that circumstance afforded no defence in an action against the acceptor, because it would materially injure the circulation of bills, if such facts were to be inquired into (b)(2); and this decision seems sustainable on the ground that the drawee, by accepting such negotiable bill, admits the ability of the party to draw it, or at least is estopped from disputing such ability in an action by a bona fide holder, though perhaps he may be liable to pay the amount over again to the infant or the husband of a feme covert indorser(c). And where the acceptor knew the payee and first indorser was an infant at the time he accepted the bill, he was held liable(d); but the point whether an infant, first indorser, can by such indorsement give currency to a bill, so as to entitle the holder to sue on it, still remains unsettled(e).

It should seem, however, that the holder may at all events, sue a subse-

quent indorser(f).

II. OF THE NUMBER OF PARTIES.

II. We have observed that bills of exchange differ from most other con-II. Of the Number of tracts in the circumstance of there being frequently more than two parties to them(g): a bill has indeed, previously to its being transferred, generally Parties. three parties, namely, the person making it, who is called the drawer, the person to whom it is directed, who before acceptance is called the drawe, and afterwards the acceptor, and the person in whose favour it is made, who, when named in the body of the bill or note, is called the payee. It is not however necessary that there should be three parties to a bill; there are sometimes only two; as where a person draws a bill on another payable to his own order; and indeed a bill will be valid where there is only one party to it, for a man may draw on himself payable to his own order(h)(3). In [*25] such case, however, *the instrument may be treated as in legal operation

> (y) Poth. pl. 29; Haly v. Lane, 2 Atk. 182; ante, 22, n.(m).

(z) Huly v. Lane, 2 Atk. 181. (a) Haly v. Lane, 2 Atk. 182; and see the general principle, Holt v. Clarencieux, 2 Stra. 987; Warwick v. Bruce, 2 Maule & S. 205; 6 Taunt. 118. But in Jeune v. Ward, 2 Stark. 380, such a defence was permitted, and see Jones v. Darch, 4 Price, 800; ante, 19, n. (h). (b) Taylor v. Croker, 4 Esp. Rep. 187, post.

(c) Ante, 20, 23; and see Drayton r. Dale, 2 B. & C. 299, which proceeded on the same principle.

(d) Jones v. Darch, 4 Price, 300; ante, 19, n.(h).

(e) See id.; 2 Stark. 330.

(f) Supra, note(d), and ante, 19, note(h).

(g) Ante, p. 1. (h) 1 Pardessus, Cours de Droit Commercial, 351.

[¿] Knox v. Reeside, 1 Miles, 294. ⟩ (2) Though a note given by an infant be void as against him, yet the indorser is liable. Ensign v. Woodhouse, Ms. cited in 4 Esp. Rep. 188. note(1). See Hull v. Connolly, 3 M'Cord, 6.

(3) { Randolph v. Parish, 9 Porter, 76. And such a paper, when negotiated, will be a bill. in the hands of an indorsee. Ibid. >

Per Bayley, J. in Harvey v. Kay, 9 B. & C.

364. "In Magor v. Hammond, which was a

special verdict in C. P. argued before the twelve

judges, all the judges were of opinion that an

instrument might be a bill of exchange, though

the drawer and drawee were the same per-

But such an instrument may be treated as a

promissory note, and so declared upon, and then the defendant is not entitled to notice of dis-

honour; Roach v. Ostler, 1 Man. & Ry. 120;

Ex parte Parr, 18 Ves. 69. Per Lord Eldon, "It is said by the counsel that the house at Liverpool was partner with the other house at

Demerara; but it has been established above

thirty years that the same person may be both

drawers and acceptors, as constituting different

Starke v. Cheesman, Trin. 11 Will. 3;

Carth. 509. Christopher Cheesman, being in Virginia, drew a bill on Christopher Cheesman

as in Ratcliffe, London, which in truth was up-

on himself, and the plaintiff declared that de-

fendant drew a bill payable after sight, and directed the same to Christopher Cheesman in

Ratcliffe, and then averred that the drawee was not found; and thereupon the bill was protested, and the defendant, as drawer, became chargeable. The defendant suffered judgment

by default, and moved in arrest of judgment;

but made no objection, on the ground that the

bill was drawn by the drawer upon himself, though other objections were taken, and the plaintiff had judgment.

Dehers v. Harriott, Trin. 2 JW. & M., 1

Show. 168. A drew a bill payable by himself

in Dublin; an action was afterwards brought thereon, and no objection being taken on this

Robinson v. Bland, Burr, 1077. The defendant being at Paris, drew a bill on himself

in London; the consideration was partly for money lost at play in Paris, and partly money

lent at the time and place of pluy, and upon

that ground a case was reserved for the opinion of the court; but no objection was made that

the defendant drew the bill upon himself.

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See these cases observed upon in Harvey v. Kay, 9 B. & C. 363, 364.

But an authority to an agent to draw bills on the principal will not make the principal a

account, plaintiff recovered.

a promissory note, and declared on accordingly (i)(1). But in practice it is II. Of the usual to declare upon the instrument as if it were a bill, not admitting the Number of identity of the drawer and drawer (k). And an instrument in the common Parties. identity of the drawer and drawee(k). And an instrument in the common form of a bill of exchange, except that the word at is substituted for to, before the name of the drawees, should be declared on as a bill of exchange, and if refused acceptance, the drawer may immediately be sued(l), or if such word "at" is written so small, or in a manner so indistinct, as to be capable of deceiving, it might be declared on either as a bill or as a promissory note after it is due(m). So though husband and wife are in legal

> drawer; Ex parte Bolton, 3 Mont. & Ayr. 367; 2 Dea. 537; Ducarry v. Gill, 4 C. & P. 121; post, 29, n. (r).

> (i) Roach v. Ostler, 1 Man. & Ry. 120; su-pra, n. (h); and see Dickinson v. Valpy, 10 B. & C. 128; 5 M. & R. 126, S. C.

(k) See cases in note (h), supra.

(1) Shuttleworth v. Stevens, 1 Camp. 407. Declaration in common form, as upon a bill of exchange drawn by defendant on Messrs. John Morson and Co., payable to John Jenkins, and indorsed to him by the plaintiff. In support of the artion, a paper writing, of which the fol-lowing is a copy, was given in evidence:— 21st October, 1804.

Two months after date, pay to the Order of John Jenkins 781. 11s. value received.

Tho. Stevens. At Messrs. John Morson

and Co.

Lord Ellenborough held that this was properly declared on as a bill of exchange, and that Mesers. Morson & Co. might be considered as the drawees, although perhaps it might have been treated as a promissory note, at the option of the holder. In a late case, in an indictment for forgery, describing the instrument as a promissory note, and the instrument being in the following form:--

Newport, Nov. 20, 1821.

£28 15 0,

Two months after date, pay Mr. B. Hobda or order, the sum of 281. 15s. Value received.

John Jones.

At Messrs. Spooner & Co.

Bankers, London.

It was held a variance, as the instrument was in law a bill of exchange; Rex v. Hunter, Russ. & Ry. C. C. 511; but see cases, post, as to form of bill.

(m) Allen v. Mawson, 4 Campb. 115. The plaintiff declared, as indorsee, against the defendant, as drawer of a bill of exchange, alleged to have been dishonoured for non-accept-The instrument given in evidence was in the following form:

Bradford, August 2nd, 1814. Two months after date, pay to Mr. Lewis Alexander or Order, Forty Pounds, value received.

George Mawson.

^{(1) {} Randolph v. Parish, 9 Porter 76. In the case of Cunningham v. Wardwell, 3 Fairf. 466, it was decided that a bill of exchange drawn by one upon himself was to be regarded as an accepted bill. }

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Parties.

II. Of the consideration *one person, and though a note given by a married woman Number of to her husband is void, yet if he indorse it over to a third person, as between the husband and the indorsee, the note is certainly good(n). conveniences however may arise from the same person becoming a party to a bill or note in different capacities, viz. as drawer, and also as second indorser(o); and if the drawer of a bill indorse it, and afterwards it be indorsed back to him, he cannot sue such indorser in any case on the bill, or even in a special action of assumpsit, without averring and proving an adequate consideration and legal promise corresponding with the averments(p); and a person cannot effectually become even a surety by writing his name as a second drawer or second acceptor of a bill addressed only to one person(q).

> at Sir John Perring, Shaw, Barber, and Co. Bankers, London.

The word at was in very small letters, inclosed in the hook of the following S. This instrument was drawn in Yorkshire, and being remitted to the plaintiff, who was an attorney in London, he presented it for acceptance to Perring & Co., and as they refused to accept it, he immediately gave notice of its dishonor to the defendant, and commenced an action against him. The question was whether the plaintiff had a right to treat this instrument as a bill of exchange. Gibbs, C. J., "Upon the authority of the above case I should not have hesitated to decide that in point of law this instrument is a bill of exchange, had the word 'at' been distinctly written before the names of the drawees; but I shall leave it to the jury whether the word 'at,' from the manner in which it was written, was not inserted for the purpose of deception, and then the instrument is a bill of exchange in point of fact. The 'at' being struck out, it is in the common form in which bills of exchange are drawn. The defendant says, 'Two months after date pay to;' this is not a promise to pay, but a request to third persons to pay. I cannot receive evidence of the manner in which such instruments are considered in Yorkshire. The defendant, in contemplation of law, issued it in London, where the plaintiff received it; he took it to be a bill of exchange, as almost any other person in London would have done. I can see no motive for drawing an instrument in this form, except to deceive the public. If such instruments have been common in the country they ought not to be continued or endured. plaintiff did well in immediately commencing the action when Perring and Co. refused to accept the bill." The jury found the insertion of the "at" to be fraudulent, and the plaintiff recovered. Edis v. Bury, 6 B. & C. 433; post, Ch. **V. s.** i.

(n) Per Lord Hardwicke, in Haly v. Lane,

2 Atk. 181. (o) Mainwaring v. Newman, 2 Bos. & Pul. 120; Bishop v. Hayward, 4 T. R. 470; Porthouse v. Parker and others, 1 Campb. 82; Ex parte Parr, 18 Ves. 65; Davison v. Robertson, 3 Dow, 229, 230.

As to fictitious bills see post, Ch. V. s. ii. Effect of giving time to a party who is both the first and last indorser of a bill, Hall v. Cole, 4 Ad. & El. 577; post, Ch. IX. s. ii. Bishop v. Hayward, 4 T. R. 470, declaration

on a promissory note, stated to have been made by Collins, payable to plaintiff, or order, and afterwards indorsed by him to defendant, who reindorsed it to plaintiff. The court, upon motion, arrested the judgment; and per Buller, J.," the consequence of supporting this judgment would be, that the plaintiff, without having any real demand on defendant, might recover against him by the judgment of the court, without allowing the defendant a possibility of defending bimself.'

Britten v. Webb, 2 Bar. & Cres. 483; 8 Dow. & Ry. 650, S. C. Plaintiffs stated that they drew their bill upon Webb, payable to their own order, that Webb accepted, that plaintiffs, by their certain indorsement, appointed the contents to be paid to defendant, and that defendant afterwards, by his indorsement, appointed the contents to be paid to plaintiffs, and plaintiffs averred that at the time of the drawing of the bill and of defendant's indoorsement, it was agreed between plaintiffs and defendant, that defendant's name should be upon the bill, as a security to plaintiffs for the due payment to plaintiffs of the sum in the bill by Webb, being a debt due from Webb to plaintiffs; that the bill was indorsed by defendant under that agreement, and for that purpose only; that plaintiffs took it in satisfaction of the debt from Webb, upon the faith that defendant would so indorse it; and that the indorsement by plaintiffs to defendant was without consideration from defendant to plaintiffs, and for the purpose only of procuring defendant's indorse-ment, and making the bill negotiable. On demurrer, the court held these averments did not entitle plaintiff to sue; they were at variance with the allegation that plaintiffs appointed the sum of money mentioned in the bill to be paid to defendant, and gave plaintiffs no right to sue upon the usage and custom of merchants; and to give plaintiffs a right to sue exclusively of such usage, they were bound to state a consideration for defendant's promise, which they had not done. But see Penny F. Innes, 1 C., M. & R., 439; post, Ch. VI. s. i. Transfer—Right of Indorsee.

(p) Id. ibid. (q) Jackson v. Hudson, 2 Campb. 447. But in America it has been decided that if a person, not the payee, indorse his name upon it at the time it is made, intending to make himself responsible to the payee, he is liable as an original promiser; Mores v. Bird, 11 Mas. R. 436; Bayl. 88, American edit.

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It is by transfer of a bill of exchange from one person to another, when it II. Of the is negotiable, that the parties may become still more numerous; in which Number of case, if the transfer be by indorsement, the person making it is called the indorser; the person in whose favour the transer is made, the indorsee; and in all cases the person in possession of the bill is called the holder, or where transferable by delivery to the *bearer, the bearer, and the number of in- [*27] dorsers is unlimited; and if there be not room on the bill others may be added on an annexed paper called un allonge.

The acceptor of a bill and the maker of a note are respectively considered as the original and principal debtors, and primarily liable, and the drawer and indorsers are considered as sureties, liable as sureties or parties guaranteeing the performance of the principal's contract. It will be found exceedingly important, in various respects, to keep in view this distinction between their respective situations and liabilities (r).

The drawer, acceptor, indorser, and holder, are the principal and immediate parties to the instrument; but besides them a person may become a party to it in a collateral way (s); as where the drawee refuses to accept, any third party, after protest for non-acceptance, may accept for the honour of the bill generally, or of the drawer, or of any particular indorser, in which case the acceptance is called an acceptance supra protest, and the person making it is styled the acceptor for the honour of the person on whose account he comes forward; and he acquires certain rights, and subjects himself to nearly the same obligations as if the bill had been directed to him(t). person may also become party to the instrument by paying it supra protest, either for the honour of the drawer or indorsers (u); or by a bill being addressed "au besoin chez Messers."—or, "in case of need, to G. H."—or, "per aval." The rights and obligations attached to these collateral modes of becoming party to a bill will be spoken of hereafter (x).

III. Modes of Becoming a party.

With respect to the mode of becoming party to any one of these instru-III. Modes ments, it is a general rule that no person can be considered as a party to a of becombill unless his name, or the name of the firm of which he is a partner, appear ing a on some part of it(y); however, a person may become drawer, indorser, or Party. acceptor, not only by his own immediate act, but also by that of his agent or partner. Where a party insists that his name has been forged, he may resist the payment at law, or file a bill in equity. If he intend to resist the payment, he should, immediately he hears that his hand-writing has been imitated, Party himgive public notice, cautioning persons from taking bills or notes with his name solf. thereon, without first applying to him. A court of equity has jurisdiction to declare an instrument forged, and to order it to be delivered up, without sending the fact of forgery to be tried by a jury, but not if a doubt be raised, by even one witness swearing to the authenticity of the instrument, in which case an issue must be directed (z).

(r) See post, as to the liability of an accept-

or, and the cases there collected.
(s) Poth. pl. 25, 26. See Britten v. Webb, 2 Bar. & Cres. 483, ante, 26. n.(o), where it was held the indorser could not become collaterally liable on the bill to the drawer.

(t) See post, Ch. VIII. s. iii.

(u) See post, Ch. X. s. ii.

(x) See post, Ch. V. s. ii.

(y) Per Buller, J., in Fenn v. Harrison, 3 T. R. 760; Siffkin v. Walker and another, 2 Campb. 308; Emly v. Lye and another, 15 East, 7; and see Ducarry v. Gill, 4 Car. & P. 121; post, 29, note(r); Wilson v. Barthrop, 2 M. & W. 863, post.

(z) Peake v Highfield, 1 Russ. R. 559.

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III. Modes ing a Party.

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By Act of Agent. *28

Mode of appointment.

It is general rule of law, that when a person has power, as owner, to perof becom- form an act, he may, as incident to his right, perform it by attorney or agent Hence it is clear that a person may draw, accept, or indorse a bill by his agent as well as by himself(b). In these cases *he is said to draw, accept, and indorse by procuration(c). As this agency is a mere ministerial office, infants, feme coverts, persons attainted, outlawed, excommunicated, aliens, and others, though incapable of contracting on their own account, so as to bind themselves, may be agents for these purposes (d). And a partner may act for the whole firm by procuration, and indorse a bill for it in this manner(e); but by so doing such partner cannot ever be sued by the firm, or one or more members of it, on the bill(f).

With respect to the manner of their appointment, it is said(g), that there ought to be a formal power of attorney, but this is by no means necessary, unless when the agent is to execute a deed for his principal; for the authority which an agent has to draw, indorse, and accept bills (being simple contracts) for his principal, may be, and indeed most usually is by parol(h). And though in general an agent to a corporation must be appointed by deed, yet it has been held that the Bank of England or any similar corporation may, without deed, empower its servants to make bills of exchange or promissory notes in its name, as is the usual practice, for this is not matter in itself connected with its title or interest, but merely the ordinary course of its business(i); and now in the case of the Bank of England, by 1 Geo. 4, c. 92, s. 3, the name of the bank clerk may be impressed by machinery. The secretary of a company has not in general any authority as such to accept or negotiate bills for the same (k); and if by the resolution of a mining company, four directors are essential for the doing an act to bind the company, and three only execute a power of attorney, authorising an agent to draw bills, a member of the company will not be bound by bills drawn by such agent(l).

Extent of Authority.

If a bill or note appear to be drawn, accepted, or indorsed in the name of another, or by procuration for him, it will not hind the principal, unless the act were within the scope of the agent's authority; and consequently whenever an instrument of this nature is not signed by the party himself, the party taking it must first satisfy himself that the agent had power so to act for the supposed principal(m); for otherwise he and any subsequent indorsee

(a) Combe's case, 9 Co. 75 b.; Kyd, 32. (b) Molloy, b. 2, c. 10, s. 27; Com. Dig. Attorney, C.; Ward v. Evans, Ld. Raym. 930; 6 Mod. 36, S. C.; -- v. Harrison, 12 Mod. 346; Anonymous, id. 564; Usher v. Dauncey and another, 4 Campb. 97, et vide 3 & 4 Anne, c. 9, s. 1.

(c) Beawes. pl. 83; Kyd, 33; see post.

(d) Co. Lit. 52 a. (e) Williamson v. Johnson, 1 Bur. & Cres. 146; 2 Dow. & Ry. 282, S. C.

(f) Teague v. Hubbard, 8 flar. & C. 345;

post.

(g) 1 Beawes, pl. 86; Marius, 2nd ed. 104.
(h) Per Lord Eldon, in Davison v. Robertson, 3 Dow, Rep. 229; Porthouse v. Parker, 1 Campb. 82, and per Holt, C. J., in Anonymous, 12 Mod. 564; Harrison v. Jackson, 7 T. R. 209; The King v. Bigg, 3 P. Wms. 432; Bac. Abr. Corporations, E. 3; Payley, Prin. & Agent, 117; and see 3 & 4 Anne, c. 9.

(i) Co. Lit. 94 b; 1 Salk. 191, pl. 3; Rex.

r. Biggs, 3 P. Wms. 423.

(k) Neale v. Turton, 4 Bing. 149; post,

Partnership.

(1) Ducarry v. Gill, 4 Car. & P. 121; Mood. & M. 450, S. C.; rost, 29, n. (r).

(m) Atwood c. Munnings, 7 B. & C. 278; post, 30, n.(b). East India Company v. Traton, 3 Bar. & Cres. 280. Three bills apon the East India Company were payable to Hope or order, they got into possession of Card, who indused them, "by procuration for Hope." Card had a power of attorney from Hope, bat it was not sufficient to warrant these indorsements. From Card the bills passed to Davis and Card, and they indorsed them to defendants, their bankers; the con-pany required to see Hope's power to Card, and it was shown them, and they registered it in their books. The bills were afterwards presented for payment by defendants, the company paid them, and Davis and Card drew the money from defendants. Hope's representatives afterwards enforced payment over again from the company, on the ground that Card's indorsement was un-authorised; and the company then sued defendants, on the ground that they were to be taken

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may be unable to recover on the bill, *and he may be obliged to refund in III. Modes case payment should be obtained; though a defect in the authority of the of becomageut would not, it seems, subject an innocent indorsee to refund, especially By Agent. if the person paying inspected the power before he paid, and the holder did not(n).

As to the extent of the agent's authority, if a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by all his acts; but an agent constituted so for a particular purpose, and under a limited and circumscribed power, cannot bind the principal by any act exceeding his authority (o). Therefore, where A. desired B. to get a bill discounted for him, but declared that he would not indorse, it was decided(p) that no representation of B. could bind A. as an indorser, though it was insisted that what B. had done was within the scope of his employment, which was to raise money on the bill, and that a subsequent promise to pay was inoperative. It appearing, however, on a second trial, that A. did not declare that he would not indorse it, it was adjudged, that as he had authorised B. to get the bill discounted, without restraining his authority as to the mode of doing it, he was bound by his acts(q)(1).

to have vouched for the validity of Card's indersement. But on special verdict, the court held that defendants could not be taken to have given any such voucher, that they were at least equally innocent with plaintiffs, and then, it not being against conscience in them to retain the money, they were not liable to refund it, and in truth blame was rather imputable to plaintiffs, for plaintiffs saw the power, and had the opportunity of judging what it authorised, and defendants did not appear ever to have seen it. Judgment for defendants. As to liability of agent acting without authority, see post.

(n) See preceding note.

(o) Per Buller, J., in Fenn v. Harrison, 3 T. R. 757; East India Company v. Hensley, 1 Esp. Rep. 111, 819,(4).

(p) Dissentiente. Kenyon, C. J.

(q) Fenn v. Harrison, 3 T. R. 757; 4 T. R. 177, S. C.; defendants employed F. H. to get a bill discounted, but said they would not indorse it; F. H employed his brother, J. H. and said he would indemnify him if he would indorse k. J. H. indorsed it, and the plaintills discounted it. The bill being dishonoured, plaintiffs applied to defendants, who promised to take it up, but did not, and this action for money had

and received, and money paid, was brought agninst them. Lord Kenyon told the jury, that if they thought J. H. had made himself answerable as the agent of the defendants, that was sufficient consideration for their promise. A verdict was found for the plaintiffs, and on a rule nisi for a new trial, and cause shown, Lord Kenyon inclined to think the verdict right, because, though the agent had exceeded his authority, he thought the principal bound by what he did, but the other judges differed, because F. H. was a particular agent only and the rule was made absolute. On the next trial, it did not appear that the defendants had told F. II. that they would not indorse the bill, and a verdict was found for plaintiffs; and on a rule ·nisi for a new trial, and cause shown, the whole court thought the verdict right; because as F. H. was not restrained as to the mode of getting the bill discounted, the defendants were bound by his acts; but Butler and Grose, Justices, said, that if the facts had been the same, they should have continued of their former opinion. Rule discharged. See observations on this case, in Payley, Prin & Agent, 124, 125, 138, 146. See also Helvear r. Hawke, 5 Esp. 75; Alexander v. Gibson, 2 Campb. 555.

(1) A person's acting as clerk to a merchant does not authorize him to sign notes in the name of his master. Terry v. Fargo, 18 John Rep. 114. But the clerk of a firm may sign notes, aceept bills, &c., in consequence of an authority given by one partner, for each has full power to this effect. Tillier v. Whitehead, 1 Dall. Rep. 269.

An authority to sign a note may be by parol, or by letter, or by verbal directions, or may be

implied from certain relations proved to exist between the actual maker of the note, and him for whom he undertakes to act Long r. Colburn, 11 Mass. Rep. 97. See Odiorne r. Maxey, 15 Mass. Rep. 39. Haven r. Hobbs, 1 Vermont R. 238.

If an agent act beyond his authority, he will be responsible personally to third persons. Dusenberry v. Ellis, 3 John. Cas. 70. Therefore if he sign a note for his principal without authority, he will be personally bound, and the name of his principal will be rejected as surplusage, lbid. Or a special action on the case would at all events lie against him. Long r. Colburn.— But a mere stranger cannot disaffirm the contract of an agent upon the ground that he has exceeded his authority. Jackson v. Van Dalfsen, 5 John. Rep. 43. If an agent compromise a demand of his principal, and take therefor a negotiable note indorsed specially to himself, the note becomes the property of the agent, and not of the principal; and the agent is responsible to the principal for the amount, whether secured by him or not. Floyd v. Day, 3 Mass. Rep. 403.

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Party.

III. Modes If A. authorise B. to draw bills on him, and B. do, this will not constitute of become A. the drawer, nor subject him to liability to be such as such (r).

Upon the question what is a general authority, it has been decided, that a person signing his name on a blank stamped piece of paper, and delivering it to I. S. authorises I. S. to insert any sum which the amount of the stamp will warrant(s)(1).

Express powers of attorney containing general words of authority, are,

Formal [] Powers of Attorney to be construed and limited to their expressed particular Objects.

(r) Ducarry v. Gill, 4 C. & P. 121; Mood. & M. 450, S. C.; Ex parte Bolton, 3 Mont. & Ayr. 367, ante, 25, n.(h).

(a) Collis v. Emmett, 1 Hen. Bla. 313; Russell v. Langstaffe, Dougl. 496, 514; see Snaith v. Mingay, 1 Maule & S. 87; Crutchley v. Mann, 5 Taunt. 529; 1 Marsh. 29, S. C.;

Crutchley v. Clarence, 2 Maule & S. 90; Pasmore v. North, 15 East, 517. And it is no objection to the validity of a bill that the acceptance or indorsement is written before the bill is drawn; Schultz r. Astley, 2 Bing. N. C. 541, post, Ch. VI. s. i. Time of Transfer.

A bill drawn by a general agent is binding upon the principal, although the former misapply the money. Hoe v. Oxley, 1 Wash. Rep. 23.

A special authority must be strictly pursued. Therefore if an agent be authorized to sign a note payable at six months, and he sign a note payable at a shorter time, the principal is not bound Batty v. Carswell, 2 John. Rep. 48. See also Munn v. The Commission Company, 15 John.

Rep. 44.

Where the drawer of a note affixes his signature as the agent of another, if in an action against him rersonally, he claims to have had authority to sign as he did, he is bound to show such anthority existing at the time of the making of the note, and is not permitted to show a subsequent ratification of his principal. Rossiter r. Rossiter, 8 Wend. Rep. 494.

Pynchon empowered Rossiter " to accomplish at his discretion, a complete adjustment of all the concerns of Pynchon in the state of New York, and to do any and every act in his name which he could do in person." Held, that Rossiter was not authorized by this power to give a note as the agent of Pynchon. Ib.

Where several gave a joint power of attorney to their agent to renew a note they had in bank, as indorsers, the renewed note must be made in conformity with the original note, as to the order of indorsements, or the agent will be considered as having exceeded his power. Bank r. M'Willie, 4 McCord's Rep. 438.

O. and T. as drawers, and defendant as indorser, gave G. a power of attorney to make the renewals of a note they had discounted at bank. On a suit by the bank against the defendant, as the indorser on a renewal made by G., the bank must show that the note sued on is the renewal of some original note drawn by these parties. Bank v. Herbert, 4 McCord's Rep. 89.

A power to renew a note at 60 or 90 days, will authorize the renewal of the note at 88 days,

that being no violation of the object and intention of the parties. Ib.

If he who puts the note into the hands of an agent for collection, is but an agent himself; he who collects the money cannot retain it at all if he is aware of the circumstances. He who is ultimately entitled to the money, may revoke the power of him who was appointed to receive the money at any time, although the evidence of the debt to be collected, was a note to his agent. Grant v. Seitsinger, 2 Penn. Rep. 525.

(1) A blank indorsement on a blank piece of paper, with intent to give a person a credit, is in effect, a letter of credit; and if a promissory note be afterwards written on the paper, it binds Mechanics' & Farmers' Bank r. Scuyler, Id. 337, in note. Where the defendants left their names indorsed in blank on papers, with their clerk, for the purpose of having notes of a certain description written thereon, and third person obtained those papers by fulse pretences, and wrote notes thereon, signed by himself as promissor to the indorser, and passed them to a third person, who had no notice of the facts, the defendants were held as indorsers. Putnam v. Sullivan, 4 Mass. Rep. 45.

So where a person entrusts another with his blank signature, to be filled up for a particular sum, and to be used in a particular manner, though the confidence is abused and the paper is filed up for a larger amount, and used in a different manner, he will be responsible to a bona fide holder, for the amount for which it is filled up. In such a case an implied authority is given to the holder, to fill up the paper for any sum which he may have advanced upon it in good faith, and in ignorance of any fact which should have put him on inquiry. Herbert v. Huie, I Als. Rep. (New Series) 18. The authority which a blank endorsement confers is irrerocable, and may be exercised after the death of the indorser, as well as before. Cope v. Daniel, 9 Dana, 415.

A letter of credit written by the defendant to the plaintiff, introducing a person as concerned with him in the planting business, and going to the city where the latter resides, to make purchases for the plantation, with directions to draw on him, and requesting him (plaintiff) to pay his drafts, establishes an authority in such person, to draw for an amount unlimited. Segond v. Thomas, 10 Curry's Louis. Rep. 295. }

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nevertheless, to be construed with reference to their expressed particular III. Modes Therefore, though in one case it was holden(u), that a letter of of becomattorney, given by an executor to A. B. authorising him to transact the af- ing a Party. fairs of the testator in the name of the executor, as executor, and to pay, discharge, and satisfy all debts due from the testator, conveys to A. B. a sufficient authority to accept a bill of exchange in the name of the executor, drawn by a creditor for the *amount of a debt due from the testator, and thereby to make the executor personally liable, on the ground that an authority of this nature necessarily includes all intermediate powers, that is to say, all the means necessary to be used in order to effect the accomplishment of the object of the principal, namely, the paying, satisfying, and discharging the testator's debts; yet, in a subsequent case (x), which was upon the same letter of attorney, the court, after consulting with the Judges of C. P., determined that the executor was not personally liable, and that a power of attorney, given by an executrix to act for her as an executrix, does not authorise the attorney to accept bills to charge her in her own right, though for debts due from her testator. So in another case it was decided, that where one gives a power of attorney to another, to demand and receive all monies due to him on any account whatsoever, and to use all means for the recovery thereof, and to appoint attorneys for the purpose of bringing actions, and to revoke the same, "and to do all other business;" the latter words must be understood with reference to the former, as meaning all business appertaining thereto; and that although the attorney might receive monies due to the principal in auter droit, yet he could not under this power indorse a bill for him which came to his hands(y). It has also been held that a power of attorney to receive all salaries and money, with all the principal's authority to recover, compound, and discharge, and to give releases and appoint substitutes, does not authorise the attorney to negotiate bills received in payment, nor indorse them in his own name; nor can evidence of an usage at the navy office to pay bills indorsed by the attorney in his own name and negotiated by him under such a power, be received to enlarge the operation of the power(z). And in a later case, it was held that a power of attorney, authorising an agent to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all monies, debts, and dues whatsoever, and to give sufficient discharges, does not authorise him to indorse bills for his principal(a). So in a still later case(b); the facts were these: A. B. who carried on business on his own account, and also in partnership, went abroad, and gave to certain persons in this country two powers of attorney, by the first of which, authority was given for him, and in his name, and to his use, to do certain specific acts, (and, amongst others, to indorse bills, &c.) and generally to act for him, as he might do if he were present; and by the second, authority was given "for him, and on his behalf, to accept bills drawn on him by his agent or correspondents." C. D. one of A. B.'s partners, (and who acted as his agent) in order to raise money for payment of the creditors of the joint concern, drew a bill, which the attorney accepted, in A. B.'s name, by procuration. In an action against A. B. by the indorsee of the bill, it was held, first, that the right of the indorsee depended upon the authority given to the attorney; secondly, that the powers

⁽t) See Attwood v. Munnings, 7 B. & C. 278; ante, 28, note(m).

⁽u) Howard v. Baillie, 2 Hen. Bla. 618. (z) Gardner v. Baillie, 6 T. R. 591; and

see Kilgour v. Finlyson, 1 Hen. Bla. 155.

⁽y) Hay v. Goldsmidt, 2 Smith's Rep. 79, 80; 1 Taunt 347.

⁽z) Hogg v. Snaith and others, 1 Taunt. 347; see 1 Man. & R. 77.

⁽a) Murray v. East India Company, 5 B. & Al. 204.

⁽b) Attwood v. Munnings, 7 B. & C. 278; 1 Man. & R. 66, S. C.

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III. Modes applied only to A. B's individual and not to his partnership affairs; thirdly, of become that the special power to accept extended only to bills drawn by an agent in ing a Parthat capacity, and that C. D. did not draw the bill in question as agent, but as partner; and lastly, that the general words in the powers of attorney were

not to be construed at large, but as giving general powers for the carrying [*31] into effect the special purposes for which they were given. *Therefore a power of attorney giving the agent full powers as to the management of certain specified real property, with general words extending those powers to all the property of the principal and of every description, and, in conclusion, authorising the agent to do all lawful acts concerning all the principal's business and affairs of what nature or kind soever, does not authorise the agent to indorse bills of exchange in the name of his principal(c).

The power of an agent to indorse a bill will be more fully considered

hereafter (d).

Implied authority.

An authority may also be implied and inferred from prior conduct of the principal, for a special authority is not necessary to constitute a power to draw, indorse, or accept by procuration, but the law may infer an authority from the general nature of certain acts permitted to be done, and usual employ is evidence of a general authority (e); and therefore, if a person has, upon a former occasion, in the principal's absence, usually accepted bills for him, and the latter on his return approved thereof, he would be bound in a similar situation on a second absence from home (f); and if a drawee of a bill has previously paid several bills accepted in his name by a third person, with whom he had connections in trade, he would be liable to an indorsee, though such bill has been accepted without his authority (g); and it has been held, that if a person usually subscribes an instrument with the name of another, proof of his having done so in many instances is sufficient to charge him whose name is subscribed, without producing any power of attorney(h). And although an authority to draw does not impart in itself an authority to indorse bills(i), yet where a confidential clerk of the defendants was accustomed to draw bills and checks on their account, and it was proved that of one occasion he had indersed a bill specially in the name of the firm to one of the defendants, which was by him subsequently indorsed over, and that on two other occasions he had also indorsed bills, which had been discounted by the defendant's bill-broker, and the proceeds received by them, such evidence was held sufficient to warrant the jury (a special jury of merchants), in finding a general authority in the clerk to indorse(k). But it

(d) Post, Ch. VI. s. i. Transfer.

(f) Beawes, pl. 86; Mar. 2d cdit. 125;

Comb. 450.

thereby made himself liable to pay the biff-Verdict for plaintiff. See Reg. v. Parish, 8 C. & P. 94; Reg. v. Beard. id. 143; post, Part III. Ch. I. Forgery.

What not sufficient recognition of authority of chairman of joint stock company to bind directors; Bramah r. Roberts, 8 Bing, N. C. 963;

post, Partnership.

(i) See Robinson v. Yarrow, 7 Taunt. 455; 1 Moore, 150, S. C.; post, Part II. Ch. V. s.

(k) Prescott v. Flynn, 2 Moore & S. 18; 9 Bing. 19, S. C. In such case letters forged by

⁽c) Esdaile v. La Nauze 1 Younge & Col. 394.

⁽g) Barber r. Gingell, 3 Esp. N. P. C. 60; Action against the defendant as acceptor, he proved that the acceptance was forged by Taylor, the drawer; in answer to which it was proved that the defendant had been connected in business with Taylor and that he had paid several bills, drawn as the present, by Taylor, and to which Taylor (as it was supposed) had written the acceptances in the defendant's name. And Lord Kenyon held, that this was an answer to the case of forgery set up by the defendant, for though he might not have accepted the bill, he had adopted the acceptance, and

⁽h) Neal v. Erving, 1 Esp. Rep. 61; Haughton v. Ewbank, 4 Campb. 188; so where the defendant's son had, in three or four instances, signed bills of exchange, by the direction of his father, it was held sufficient evidence for presuming an authority from the father to the son to sign a guarantee; Watkins v. Vince, 2 Stark. R. 368.

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must appear that the bill or note is taken upon the faith of prior similar III. Modes transactions; and, therefore, the holder of a bill purporting to be, but not of becomin fact accepted by the person to whom it is addressed, cannot recover ty. against the apparent acceptor by proving a fact subsequently discovered, that on a former occasion the *defendant had given a general authority to the person who accepted in his name to accept bills for him: to make such authority available, the holder must show either that the authority remained unrevoked at the time of the acceptance, or that he took the bill on the faith of such authority (l). We have seen that where a married woman is permitted by her husband to carry on trade on her own account, and in her own name indorses a bill or note, received in the course of such trade, an authority may be presumed from the husband (m).

It has also been decided that a subsequent assent or expression of approba- Subsetion will make the act of an agent binding on the principal (n)(1); and though quent Asa promise alone to pay a bill indorsed by an agent would not support an action if the indorsement were contrary to authority, yet if the authority is doubtful, such a promise is decisive(o).

A general authority to an agent is supposed to continue until its determi- Notice of nation is generally known, and therefore, after the discharge of a clerk or agent of Agent usually employed to draw, accept, or indorse bills or notes, the employer having will be bound by his signature, made after the determination of his authority, ceased to until the discharge be generally known(p). And if A. permit B. to draw be given. bills in his name, he will be liable as drawer to ignorant indorsees, although he had no interest, nor knew of the particular bills drawn in fraud of him by B., though he will not be liable to a payee, who had knowledge of the impropriety of the transaction (q). When, therefore, the authority of such an agent has been determined, or he has been discharged from his employ, and there is reason to apprehend that he will attempt to circulate bills in the

name of his employer, it is advisable for the latter to give notice of the deter-

the clerk, purporting to contain an authority to indorse upon another occasion, are not admissible in evidence to show he had no authority to make the indorsement on which the plaintiff sued, id. ib.

(1) Cash v. Taylor, 8 Law J. 262, K. B. E. T. 1830.

(m) Ante, 23 n. (t), Cotes v. Davis, 1 Campb. 485; but see Barlow r. Bishop, 1 East, 434. And see Anderson v. Sanderson, 2 Stark. 204; Holt, C. N. P. 591, S. C.; Clifford v. Burton, I Bingh. 199, as to when admissions of wife bind the husband.

(n) Ward v. Evans, Ld. Raym. 930; 2 Salk. 442, S. C.; Boulton v. Hillerden, Comb. 450; Anonymous, 12 Mod. 564; Paley, 124, 126, 127, 211, accord; Fenn r. Harrison, 3 T. R, 757; Howard v. Enillie, 2 Hen. Bla. 618, semb. contra; and see post.

(o) Fenn v. Harrison, 4 T. R. 177, ante, 29, note (q).

(p) Beawes, pl. 231; Molloy, b. 2, c. 10, s. 27, page 107; Paley, 123, 124, 136; Anonymous v. Harrison, 12 Mod. 346. A servant had power to draw bills of exchange in his master's name, and afterwards was turned out of his sereice. Holt, C. J. "If he draw a bill in so little time after, that the would cannot take notice of his being out of service, or if he were a long time out of his service, but that kept so secret that the world cannot take notice of it, the bill in these cases, shall bind the master."

Monk r. Clayton, Molloy, 282, cited in Nickson v. Breham, 15 Mod. 110. A servant of Sir Robert Clayton, who had been used to receive and pay money, took up two hundred guineas after he had quitted the service, and the lender recovered against Sir R. Clayton, by the direction of Keeling, C. J. which was approved by the whole court on a motion for a new trial

(q) Smith v. Stanger, Peake, Add. 116.

⁽¹⁾ If an agent act without proper authority, or exceed his authority, and the principal ratify his acts, or acquiesce in them, or adopt them, he is bound in the same way as if the agent had an original authority. Towle v. Stevenson, I John. Cas. 110. Cushman v. Loker, 2 Mass. Rep. 106. Armstrong v. Gilchrist, 2 John. Cas. 424. Codwise v. Hacker, 1 Caines' Rep. 526. Banorgee v. Hovey, 5 Mass. Rep. 11. Van Reimsdyk v. Kane, 1 Gas. Rep. 630.—Affirmed in Supreme Court of the United States, and reported in 9 Cranch, 155. Long v. Colburn. Cons et al. v. Pean. et al., 1 Peters' Rep. 496. See Schimmelpennich v. Bayard, 1 Peters, 264, 290.

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III. Modes mination of the authority in the Gazette, and also to all his correspondents of become individually, notice in the Gazette not being in general sufficient to affect a former customer, unless he has had express notice thereof(r).

Sub-Agents.

Mode in which an Agent should draw, accept or indorse. [*33]

As the authority of an agent is not coupled with an interest, he cannot dekgate it so as to enable another person to act for his principal(s)(2); if, however, an express authority be given for that purpose, he may exercise it(t).

When a person has authority, as agent, to draw, accept, or indorse a bill for his principal, he should either write the name of his principal, or state in writing, that he draws, indorses, or accepts as agent, or per procuration, as, "by procuration of A. B. (the principal) E. F. (the *agent)(1); for oth-

(r) See post, Cases of Notice of Dissolu-(t) Pulliser r. Ord, Bunb. 166; Coles v. Trecothick, 9 Ves. 234; but see Ex parts Saltion of Partnerships. (s) Combe's case, 9 Co. 75; 1 Rol. Abr. ton, 2 Cox's Cases, 84, contra. 880.

Emerson v. Providence Hat Manufacturing Co., 12 Mass. Rep. 237.

(2) Where a person intends to make a contract as agent, it should appear on the face of the contract that he acts as agent, and he should sign in the name of his principal. Stackpole v Arnold, 11 Mass. Rep. 27. Arpidson v. Ladd, 12 Mass. Rep. 173. For where an agent drew a bill of exchange in his own name on a commercial house, in which his principal was a partner, and in a bill ordered the contents, when paid, to be charged to his principal, and the bill was protested for non-acceptance, he was held personally liable to the payees, as drawer, notwithstanding they were privy to his instructions, and knew that he acted solely as an agent. Mayhew, &c. v. Prince, 11 Mass. Rep. 54. See Meyer v. Barker, 6 Binn. 228.

And it is not sufficient to protect a party, to describe himself as agent, in the contract, if the language of the contract import a personal responsibility. Therefore if a person sign a note "as guardiau" he will be held personally liable to payment. Thatcher v. Dismore, 5 Mass. Rep. 299. Forster v. Fuller, 6 Mass. Rep. 58. And although it may be said that as an administrator cannot by his promise bind the estate of the intestate, so neither can the guardian bind the person or estate of his ward, and therefore, unless the guardian were personally liable, the payee would be without remedy; yet the principle of these cases is, that the description of the trust was not meant to exclude that personal liability, which the language otherwise imported. And a similar construction has been adopted where the party has been described as attorney or agent in the instrament

A note subscribed "Pro. A. B .- C. D." is the note of A. B. and not of C. D. if the latter had authority to make it. Long v. Colburn, 11 Mass. Rep. 97. A note promising to pay A. B. "agent of the P. H. manufacturing company," for value received of the company, is a good note to A. personally. Buffum v. Chadwick, 8 Mass. Rep. 103.

An agent and partner in a joint concern was authorized to take up money on the credit of the whole concern, and draw bills on a house in Amsterdam for payment, and he took up money and drew a bill directing the amount to be charged to the account of all the parties, but signed the bill in his own name only; it was held that at least, in equity, the payee was entitled to recover on non-payment from all the partners. Van Reimsdyk v. Kane, I Gall. Rep. 630. S. C. 9 Cranch, 155.

A person may draw, accept, or indorse a bill by his agent, and it will be as obligatory upon him as though it was done by his own hand; but the agent in such case must either sign the name of the principal to the bill, or it must appear on the face of the bill itself, in some way or another, that it was in fact done for him, or the principal will not be bound; the particular form of the execution is not material, if it be substantially done in the name of the principal. Pents r. Stanton, 10 Wend. Rep. 271.

Where the agent of a manufacturing establishment bought a quantity of dye-stuffs for the use of the factory, without disclosing the name of his principal, and the bill of goods brought, was made out, "Mr. A. B., Agent, bought of," &c., and he drew a bill of exchange on a third person, signing it A. B., Agent, and the bill was subsequently protested, and an action to recover the price of the goods was brought against the principal; it was held that the principal could not be charged as drawer of the bill by his agent, the name of the principal not appearing on it, but that the plaintiff was entitled to recover under a count for goods sold, the jury being warranted under the facts of the case in saying that the goods were not sold on the exclusive credit of the agent. Ib.

Whether, in such case the goods are sold on the credit of the agent or on the responsibility of the principal, whoever he may be, is a question for the jury; but where that question was not submitted in a suit against the principal, and a vedict was found for the plaintiff, and the court were satisfied of the ultimate liability of the principal to the agent, they refused to set aside the

verdict. Ib. Brockway v. Allen, 17 Wend. 40. S. P. Selectmen of a town have power to bind their town by a note given for the support of a pauper. But a note signed by one only of the select-

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erwise the act will not in general be binding on the principal, so as to sub- III. Modes ject him to be sued on the bill or note(u); though in some cases an informal of becom-The drawing, accept- me mode of executing an authority will not vitiate (x). ing, or indorsing as agent for another person may be effected by merely writing the name of the principal, as if he himself were actually the party signing; but the most explicit and regular course is to sign the name of the principal, and then immediately under it to add, "per procuration, A. B." the agent writing his own name (y). If an agent sign only his own name, whether as drawer, indorser, or acceptor, he will (unless in the case of a government agent contracting on its behalf (z)(1), be considered as the principal, and be personally liable as such, unless he add some restrictive or qualifying words, as "sans recours," or "without recourse to me," or "drawn and indorsed to transfer the interest only, and not to incur any personal liability;" " for it is an universal rule, that a man who puts his name to a bill of exchange, thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion: unless he says plainly, 'I am the mere scribe,' he becomes liable (a) (2). *On this ground, it has been decided, that if a bro- [*34]

(u) See Thomas v. Bishop, 2 Stra. 955, infra; Sowerby v. Butcher, 2 C. & M. 368; 4 Tyr. 320, S. C.

In Leadbitter v. Farrow, Mich. Term, A. D. 1816, B. R., plaintiff wanted a bill upon London for 501., and sent to defendant, whom he knew to be agent to the Durham Bank at Hexham; defendant drew a bill accordingly: " Pay to the order of Mr. Leadbitter 501., value received, which place to the account of the Durham Bank as advised. C. Farrow. To Messrs. A and B. London." In an action thereon the defendant urged that he was not personally liable, or at least that the plaintiff, who knew him to be only agent, could not sue him; but on a case reserved the court held his signature pledged his own credit, and that only, and that he was therefore liable. See also 5 Maule & S. 349, S. C.; so in Ducarry v. Gill, Mood. & M. 450; 4 C. & P. 121, S. C., it was held, that an agent for an association, even if authorised by them to draw bills, does not bind them by drawing bills in his own name, and not as agent.

But if the produce of the bill come to the principal's hands, he may be sued for the amount in certain cases. See observation of Lord Tenterden, C. J. in Ducarry v. Gil, Mood. & M. 450.

See further Com. Dig. Attorney, (C. 14); Beawes, pl. 83, n.; Wilks v. Back, 2 East, 142; Barlow v. Bishop, 1 East, 434; 3 Esp. Rep. 266, S, C.; White v. Cayler, 6 T. R. 176; Combe's case, 9 Co. 75; Frontin r. Small, 2 Stra. 705. As to the mode in which an attorney should execute a deed, &c. for his principal, as thus, "for I. B. (the principal) M. W. (the attorney) (L. S.)" Wilks v. Back, 2 East, 142.

(x) Cotes v. Davis, 1 Campb. 485; Mason r. Rumsey, id. 384.

(y) And see Wilks r. Back, 2 East, 142.
(z) Macbeath r. Haldimand, 1 T. R. 172; Unwin v. Wolseley, id. 674; Myrtle v. Beaver, 1 East, 135; Rice v. Chute, id. 579; Prosser r. Allen, Gow, 117; Allen r. Waldegrave, 2 Moore, 627; Gidley r Palmerstone, 7 id. 91; 3 Brod. & B. 275, S. C.

(a) Per Ld. Ellenborough, in Leadbitter v. Farrow, 5 Maule & S. 349, supra, note (u); and see Thomas v. Bishop, 2 Stra. 955; Rep. T. Hardw. 3, S. C.; Le Fevre v. Lloyd, 5 Taunt. 749; 1 Marsh 318, S. C.; Goupy v. Harden, 7 Taunt. 159; 2 Marsh, 454, and Holt, C. N. P. 342, S. C.; Appleton v. Binks, 5 East, 148;

men, with his own name, " for the selectmen" is not the promissory note of the town. Andover v. Grafton, 7 N. Hamp. 298.

(1) A like exception in favor of public agents has been repeatedly recognized in the United States. Hodgson v Dexter, 1 Cranch, 363. Jones v. Le Tombe, 3 Dal. 384. Brown v. Austin, 1 Mass. Rep. 208. Sheffield v. Watson, 3 Caines' Rep. 69. Freeman v. Otis, 9 Mass. Rep. 272.

An agent who makes a contract on behalf of his principal, whose name he discloses at the time to the person with whom he contracts, is not personally liable, and there is no difference in this respect between an agent for government and an individual. Rathbon v. Budlong, 15 Johns. Rep. 1. See as to agent indorsing a note for the benefit of his principal, Chalmers, Jones & Co. v. M'Murdo, 5 Munf. Rep. 252.

Where a bill of Exchange properly drawn by an authorized agent on the head of a department is permitted by him to be protested for non-acceptance and non-payment, under a mistake of fact concerning it, the agent is entitled to a credit for the damages paid by him in consequence of the protest. Armstrong v. United States, Gilpin, 399. }

(2) { Where individuals subscribe their proper names to a promissory note prima facie they are personally liable, although they they add a description of the character in which the note is giv-

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III. Modes ker sell goods and draw on the buyer in favour of his principal, he will be liaof becom- ble as drawer upon the bill if it be dishonoured, unless he use special words ing a Party. to prevent it, and may be sued even by his employer, although he received no guarantee, commission, or other remuneration for incurring such personal responsibility (b). Again, if the known agent of A. at the request of the plaintiff, draw a bill upon B. payable to the plaintiff although he direct B. to place the amount to the credit of A., such agent will be personally liable to the plaintiff (c). So if a person employed by the plaintiff to purchase bills for him, obtains them payable to himself, and indorses them generally, he will be liable upon that indorsement, even to his own employer, although be had no guarantee commission, and the court observed that the defendant might have specially indorsed the bill sans recours, and not having thought fit to do so, he was personally liable (d). If a factor under a commission del credere sells goods and takes accepted bills from the purchasers, which bills he indorses to a banker at the place of sale, and receives the banker's bill, (payable to the factor's order) on a house in London, the factor indorses and transmits the latter bill to his principal, who gets the same accepted, and the acceptors and the drawer fail, the factor is answerable to the amount of the bill, being personally liable under his commission del credere to satisfy his principal the price of the goods sold(e).

It has also been decided that commissioners under an inclosure act, drawing drafts upon their bankers, requiring them to pay the sums therein men-

De Gaillon v. L'Aigle, 1 Bos. & Pul. 369; Macbeath v. Haldimand, 1 T. R. 181; Poth. pl. 119; Burrell v. Jones, 3 B. & Al. 47.

Thomas v. Bishop, 2 Stra. 955; Ca. temp. Hardw. 1, S. C. The plaintiff was indorsee of a bill of exchange, drawn from Scotland upon the defendant, in these words: " At thirty days sight pay to J. S. or order, 2001., value received him, and place the same to account of the York Buildings Company, as per advice from Charles Mildmay; to Mr. Humphrey Bishop, Cashier of the York Buildings Company, at their house in Winchester Street, London. Accepted per H. Bishop." The bill not having been paid, an action was brought against defendant upon his acceptance; at the trial he proved that the letter of advice was addressed to the Company; and that the bill having been brought to their house, defendant was ordered to accept it, which he did in the same manner as he had accepted other bills. Page, J. directed the jury to find for the plaintiff, which they did accordingly. On motion for a new trial, the court held the direction right; " for the bill on the face of it imported to be drawn on the defendant, and it was accepted by him generally. and not as servant to the Company, to whose account he had no right to charge it until ac-

tual payment by himself. And this being an action by the indorsee, it would be of dangerous consequence to trade to admit evidence arising from extrinsic circumstances, as the letter of advice. And this differed widely from the case of a bill addressed to the master, and underwritten by the servant; where, undoubtedly, the servant would not be liable, but his acceptance would be considered as the act of the master. A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing. In this case there was nothing in writing to bind the Company, nor could any action be maintained against them upon the bill; for the addition of cashier to defendant's name was only to denote the person with certainty; the direction to whose account to place it was for the use of the drawee only. Judgment for the plaintiff.

(b) Lefevre v. Lloyd, 5 Taunt. 749; 1 Marsh. 818, S. C.; see last note; Sowerby v. Butcher, 2 C. & M. 368; 4 Tyr. 320, S. C.

(c) Leadbitter r. Farrow, ante, 33, note (u) (d) Goupy v. Harden, 2 Marsh. 454; 7 Taunt. 159; Holt, C. N. P. 342, S. C.; as to qualified indorsement, see post, Ch. VI. s. Transfer.

(e) Mackenzie v. Scott, 6 Bro. P. C. 280.

en; but such presumption of liability may be rebutted by proof that the note was in fact given by the makers as the agents of a corporation for a debt due from it to the payee, and that they were authorized to make such note as the agents of the corporation. Brockway v. Allen, 17 Wend. 40.

Where the drawer of a bill directed it to be charged to the account of the steamer U. S.: Held. that the agency of the drawer is apparent on the face of the bill, which negatives the idea that he was to be personally bound. Maher v. Overton, 9 Louis. 115. Master of a ship not liable on a bill drawn by him in favor of the agents and consignees for supplies and disbursements they have made, with their knowledge that he drew as master. Lincoln v. Smith, 11 Curry's Louis

A person may draw as agent, upon his principal, for a debt not personal to himself, but due by the principal to the payees, without expressing the agency on the face of the bill. Wolfe r.

Jewett, 10 Id. 888. }

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tioned on account of the public drainage, and to place the same to their III. Modes account as commissioners, are personally liable to the bankers, though it of becommight be otherwise, if they were directed to place the same to the account ing a Party. of the inclosure (f). So if A. and B. sign a formal promissory note by which they promise, "as churchwardens and overseers," to pay to C. or order, a sum of money with interest, which sum is in fact the amount of a loan made by C. for the use of the parish, A. and B. are personally liable upon such note(g).

These decisions, subjecting an agent to personal liability, as regards third When an persons, ignorant of the circumstances under which the agent became a parential entitled to ty, are consistent with the other principles of law applicable to these instru- Relief. But it seems questionable whether even at law it is correct to allow an employer to recover from his agent under such circumstances, because in general, between original parties, it may be shown as a good defence at law, that the bill was drawn, accepted, or indorsed for the plaintiff's accommodation, or for a purpose or consideration which has failed or been satisfied(h); and to allow such a principal to recover at law against his agent, is only to compel the *latter to resort to a court of equity for relief, which [*35] might just as well be afforded at law, and a court of equity will certainly afford relief; for where an agent, in the course of his employment as such, procured a banker's bill, which was accidentally drawn in his favour, and indorsed by him to his employer, who deposited it with a banker, who gave credit for the amount, but was cognizant of the manner in which the bill had been indorsed, the Court of Exchequer restrained an action brought by the banker on the bill against the agent as indorser (i). And where a person employed to get a bill discounted, being unable to effect it without indorsing it, therefore indorsed in his own name, it was held that he was entitled to be indemnified by his employer, although the name of the latter was not on the bill, and a claim and proof under a commission of bankruptcy were allowed accordingly (k).

If a person sign a bill or note as agent, when in fact he had no authority, Conseand his act did not bind his pretended principal, it is clear that he will be li- quences of ble to a special action on the case for pretending to have authority when he without had not. And, therefore, where a bill was presented for acceptance at the Authority. office of the drawee when he was absent, and A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter; and the bill was dishonoured when due, and the indorsee brought an action against the drawee, and on proof of the above facts was nonsuited; and the indorsee then sued A. for falsely, fraudulently, and deceitfully representing that he was authorised to accept by procuration, and on the trial the jury negatived all fraud in fact; it was held, notwithstanding, that A. was liable, because the making of a representation which a party knows to be untrue, and which is intended, or is calculated, from the mode in which it is made, to induce another to act on the faith of it, so that he may incur damage, is a fraud in law, and A. must be considered

(f) Eaton v. Bell and others, 5 B. & Al. Herron, Ry. & Mo. C. N. P. 229. 87; 1 Bro. C. C. 101; Amb. 787; Burrell v. (g) Crew v. Petit, 3 Nev. & M Jones, 8 B. & Al. 47; Spittle v. Lavender, 5
Moore, 270; 2 B. & B. 452, S. C.; Iveson v.
Conington, 2 Dow. & Ry. 307; 1 B. & C. 160,
S. C.; Prosser v. Allen, Gow, 117; Norton v.

(g) Crew v. Petit, 3 Nev. & M. 456; 1 Ad. & Ellis, 196, S. C.

(h) Post, next chapter.
(i) Kidson v. Dilworth, 5 Price, 564.

(k) Ex parte Robinson, 1 Buck. 118.

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III. Modes as having intended to make such representation to all who received the bill in of become the course of its circulation(1). In America it has even been held that he ing a Party. may be sued on the bill or note as a principal (m)(1); and Bayley, B. is said to have laid it down as a general rule, that where an agent makes a contract in the name of his principal, and it turns out that the principal is not liable for the want of authority in the agent to make such contract, the agent is personally liable on the contract(n). It seems, however, doubtful, whether in this country an agent, whose name does not appear on the bill, but who merely draws the bill in name of his principal, without authority, can be made liable an to action upon the bill; at all events, in order to make him so liable, it is incumbent on the plaintiff to prove the want of authority, and that the defendent did not act bon'i fide(o).

*36] of Agents as to bills, &c.

*With respect to the duty of agents in relation to bills and notes, it has The Duties been well observed that an agent employed in negotiating bills of exchange is bound, first, to endeavour to procure acceptance(2); secondly, on refusal, to protest for non-acceptance; thirdly, to advise the remitter of the receipt, *36] acceptance, or protesting; and fourthly, to advise any third person that is concerned; and all this without any delay (q). Losses occasioned by fraud

> (1) Polhill v. Walter, 3 Bar. & Adol. 114; 10 Law J. 92. K. B. S. C. It was also held that A. could not be charged as acceptor of the bill, because no one can be liable as acceptor but the person to whom the bill is ad-dressed, unless he be an acceptor for honour. Quære, if A. would have been liable had he appended a memorandum to the bill, to the effect that he accepted by procuration without authority, trusting that his act would be recognised by the drawee.

> (m) Long v. Colborn, 11 Mass. R. 97; Bayl, 51, Amer. edit.; Durenbury v. Ellis, 3 John's Ca. 70; Bayl. 52, Amer. Edit.; and see the Judgment in Polhill v. Walter, 3 B. & Ad. 122.

(n) See note to Thomas v Hewes, 2 C. &

M. 530.

(o) Wilson v. Barthrop, 2 M. & W. 863. There three persons carried on business as partners, under the firm of J. B. & Son. Two of the partners died, and the surviving partner employed the defendant, who had previously acted as a clerk to the firm, to wind up the affairs. In this character the defendant attended the warehouse, and transacted business with different parties on account of the firm. Under

these circumstances the defendant, using and signing the name of the firm, drew upon J. H., a debtor to the firm, a bill of exchange, which J. M. accepted: Held, that the defendant was not liable, as the drawer, in an action upon the bill, his name not being affixed to it, without some proof that he had no authority to to draw bills in the name of the firm, or that he had not acted bona fide; and the court doubted whether if it had been proved that he had no such authority, he would have been liable in an action upon the bill.

But, semble, if it had been shown that the defendant had applied the money to his own use, and had no authority to draw bills, an action for money had and received might have been maintained. See per Abinger, C. B. ib. 865. And inasmuch as no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honour, it follows that a party who, without authority, accepts a bill as by the procuration of the person to whom the bill is addressed, cannot be sued in that character; Polhill r. Walter, 3 B. & Ad. 114, ante, 35, note(1).

(q) Beawes, 431; Pal. P. & A. 6.

the signers and did not bind the corporation. \
(2) \{ An agent receiving for collection, before maturity, a bill payable on a particular day after date, is held to attrict vigilance in making presentment for acceptance; and if guilty of negative to the payment of all demonstration in the state of the payment of all demonstrations. ligence, is subject to the payment of all damages sustained by the owner. Allen v. Suydam, 20 Wend. 321. Where the debt is lost through the negligence of the agent, the measure of dama-

⁽¹⁾ Where A. put the name of B. to a promissory note without any authority from B., and the note was delivered to the payee for a valuable consideration, it was held that under these circumstances the law would presume that A. intended to bind himself, that he might so bind himself, and that he was liable in an action against him in his true name on the note, upon a count alleging that he made the note by the name of B. Bank v. Finnders, 4 New-Hampshire Rep. 239.

Bradlee v. Boston Glass Manufactory, 16 Pick. 347. The B. G. M. gave the plaintiffs a note for borrowed money, signed by K. as !treasurer of the corporation and indorsed by H. and G. as sureties. This note was subsequently taken up and the following note was substituted: "We the subscribers promise to pay the plaintiffs or order, for the B. G. M. \$3500 on demand. &c." This note was signed by II. G. & K. without annexing to their names any words designating a connexion with the cerporation; but was entered in the note-book of the corporation as a note due from it, and the interest was annually paid by them. Held, that it was the note of

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or failure of third persons, to whom an agent has given credit, pursuant to the III. Modes regular and accustomed practice of trade, are not chargeable upon him(r)(1). of becom-And therefore where the receiver of Lord Plymouth's estate took bills in the country of persons who at the time were reputed to be of credit and substance, in order to return the rents in London, and the bills were dishonoured, and the money lost, yet the steward was held to be excused(s); and if a trustee appoint rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable; and it has been observed, that none of these cases are on account of necessity, but because the person acted in the usual method of business (t). So in an action for money had and received, the facts were that the plaintiff had engaged the defendant, as his agent, to receive money due to him from his customers, directing him to remit by the post a bill for these and other sums due to him; a bill was accordingly remitted to him by the post, but the letter was suppressed, and the money upon the bill received at the banker's by some unknown person, and was not recovered. Lord Kenyon said, "had no direction been given about the mode of remittance, still this being done in the usual way of transacting business of this nature, I should have held the defendant clearly discharged from the money received as agent. It was so determined in Chancery forty years ago(u)."

However, if an agent place his principal's money to his own account with his general banker, without any mark by which it may be specified as belonging to the trust, and the banker fail, the agent will not be excused, because he cannot so deal with his principal's money, as that if the banker's solvency continue, he may be in a condition to treat it as his own, and if insolvency happen he may escape by considering it as belonging to his principal(x); the agent should therefore keep the money he received as such in a separate account at his banker's. And a loss occasioned by an unauthorised disposal or adventure of the principal's money, and not prescribed by the usage of business, though *intended for his benefit, is chargeable to the agent(y); [*37]and therefore where A. in London, consigned goods to the firm of B. and C. at Hamburgh, for sale upon a del credere commission, and B. in London made advances to A. to be repaid out of the proceeds, and B. and C. with

(r) Russell v. Hankey, 6 T. R. 12; Payley, 37, 38.

(s) Knight v. Lord Plymouth, 2 Atk. 480. (t) Ex parte Parsons, Amb. 219; and see 1 Bro. Ch. R. 452; 3 Ves. 566; 6 Ves. 226, 266; 5 Ves. 331, 839; and see Warwick v. Noakes, Peake Rep. 68, next note.

(u) Warwick v. Noakes, Peake Ni. Pri.

(x) Wren v. Kirton, 11 Ves. 382; Robinson v. Ward, Ry. & Mo. C., N. P. 274; 2 Carr. & Pa. C. N. P. 59, S. C.; and see Rocke v. Hart, 11 Ves. 60; Massey v. Banner, 4 Madd. 413; affirmed on appeal, I Jac. & Walk. 241.

(y) Paley, P. & A. 89; 3 Chit. Com. Law.

ges, prima facie is the amount of the bill. The defendant is at liberty, however, to show circamstances, if any exist, tending to mitigate damages or reduce the recovery to a nominal amount. Ibid. }

An agent does not bear the same relation to his principal that the holder of a bill does to the drawer or endorser. The same negligence or omission which will deprive the holder of all recourse against the drawer or endorser will not subject the agent to his principal, to the extent of the bill placed in his bands for collection. Ibid.

The factor to whom commercial paper is sent for collection, but who does not make himself a party by putting his name upon the paper, is an ordinary agent, and is not subject to the law merchant. Ibid. }

⁽¹⁾ Where bills are remitted by a merchant to his factor, to be converted into available funds, and the factor mingles the property with that of others, by selling the bills on a credit and taking a joint note, covering other sums, this is in accordance with the general usage, and if the parties to the note become insolvent before it is due, the factor will not be held responsible, in consequence of the mere act of taking such joint note, for the loss sustained. Hamilton v. Cunningham, 2 Brock. 350.

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III. Mode the proceeds purchased bills for A. which they transmitted to B. in London, of becom- specially indorsed to him, and these bills whilst they were in B.'s hands were dishonoured; it was held that B. and C. must bear the loss(z). On the other hand, in general whatever profit an agent may derive from dealing with bills the property of his principal belong to his principal, and therefore where the master of a ship in a foreign port, from the state of the exchange, received a premium for a bill drawn upon England on account of the ship, it was held that this belonged to his owner, although there might have been an usage for masters of ships to appropriate such premiums to their own use (a).

Bill of In-

Where a person holds bills as agent for another, and a third person sues terpleader him for the same, he may, by resorting to a court of equity, compel the two claimants to litigate the claim, without involving him in the expense of resisting two suits; and a bill of interpleader has been sustained upon bills of exchange received by the plaintiff as agent, to procure payment for his principal in Scotland, to whom they had been remitted, against an order for goods pursued in an action of trover by such principal, and also by attachment in Scotland by a creditor of the principal (b). Or the like relief may now be obtained on motion to the common law courts, under 1 & 2 Will. 4, c. 58, s. 1(c).

By Act of Partner.

With respect to a person's becoming a party to a bill or note, or liable to pay the same by the act of a partner, it is expedient to consider this important subject under the following divisions:-

I. PRIVATE PARTNERSHSIP 1. What constitues a Partnership, and who a Partner Being in fact a Partner ih. Of mere prospective Partnerships By representing himself as such 39 2. Liability of a Partner in general, in case of Bills, &c. In case of an open General Partnership Where Name not disclosed, and Secret Partner, optional to sue secret Partner In case of Particular Partnership 44 But not a mere Joint Ownership or a Single Transaction Must be a Partnership at Date of ib. Transactions Must be a Partnership in a Trade or Transaction requiring Use of Bills 46 Of Admissions of Liability ib. Not liable in case of Fraud on part of Holder as well as Co-partner Notice not to use Name 48 Injunction against Partner 49 Dissolution of Partnership ib. First, By Effluxion of Time

Secondly, By Act of Parties, &c. Dissolution must be according to Terms of Partnership ib. 50 Notice thereof ib. When necessary Necessary in case of an oslenih. sible Partnership Not necessary in case of cret Partnership 52 What Notice required Consequences of retiring Pariner still appearing as a Partner 53 Acts of Partner after Dissolution, how far binding All Partners continue liable for prior Debts 55 Thirdly, By Bankruptcy 56 Fourthly, By Death ib. 4. How Partners should sign How Persons not Partners to sign 59 5. When one Partner cannot sue Copartner 6. When Partners affected by the Promise of a Partner II. Public Regulations Affecting CORPORATIONS AND CO-PARTNER-SHIPS

(z) Lucas and others v. Groning and others, 1 Stark. Rep. 891.

(a) Diplock v. Blackburn, 3 Campb. 43; Thompson v. Havelock, 1 Campb. 327; Payley on Prin. & Agent, 41; 1 Ves. 88; Chitty's Law of Apprentices, 67, 68, 69; 8 Chit. Com. Law,

(b) Stevenson v. Anderson, 2 Ves. & Bes. 407.

(c) See this act with notes, Chit. & Hulme's Stat. 564, title Interpleader, and post, Part II. Ch. III.

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*1. Who a Partner or not.—To subject a person to liability as a partner III. Modes in general, he must have been either actually a partner at the time of mak- of becoming the supposed contract, or have represented or held himself out to the By Partworld or to some party to the bill to be such, though in truth he was not so. ners. If he actually was a partner at that time, though induced to become so by 1. Private Partnerthe fraud of others, all the consequences as to bona fide holders will follow, shipe. although he has never signed the formal agreement or deed of co-partnership executed by others(c); and if an agreement of partnership be general on the face of it, parol evidence to shew that the partnership was really not to commence till a subsequent time will not be admissible (d). So where the defendants became directors, bought shares, and attended meetings of a projected Water Company, for which an act was to be obtained, it was held that though no act had been obtained, and the project had failed, yet they were responsible for works, although such works were ordered at subsequent meetings of the projectors, which the defendants did not attend; the defendants not having previously declared off, or done any act to divest themselves of their interest in the concern, or apprised the plaintiff or others of their having ceased to be partners(e). And it is immaterial whether the party were a partner for his own benefit or as an executor or trustee for the benefit of others; and therefore an executor who, after the death of one of several partners, continues to receive a share for the benefit of infants, is liable on a bill issued by one of the firm, although his name does not appear in the firm(f). And if a person during his infancy carry on trade as partner with another, he must, on coming of age, notify that he disaffirms the partnership, or he will be liable as partner on all subsequent transactions (g), though as to prior bargains he will be free from responsibility, unless he ratify them by writing signed by him(h).

But a mere offer or proposal to become a partner in a projected concern, A mere which proves abortive, or an application by a party to have shares, and his Proposal paying a first deposit in anticipation of the formation of a projected compa-does not Constitute ny, but which was never completed, will not constitute him a partner in a Partnerfact(i); nor will the insertion of his name by the secretary of such projected ship. company in a book containing a list of subscribers, be considered as a permission by him to hold him out as a partner (k). Where, however, a person's name was entered in a book with those of several other subscribers to a projected joint-stock company, and he received certain script receipts, but sold them before the deed for the formation of the company was executed, and he never was a party to that deed; it was nevertheless holden that he was a partner in the concern, and continued such, especially as the deed contained a stipulation that notice should be given to the directors of the persons to whom it was proposed by any of the members to make a transfer, and no such notice had been given (l).

(h) 9 Geo. 4, c. 14, s. 5.

⁽c) Ellis v. Schmæck, 5 Bing. 521; 8 M. &

⁽d) Williams v. Jones, 5 B. & C. 108. (e) Doubleday v. Muskett, 7 Bing. 110; 4 M. & P. 750, S. C.; and see Perring v. Hone, 4 Bing. 28; 12 Moore, 135, S. C.; infra, note

⁽f) Wightman v. Townroe and another, 1 Maule & S. 412.

⁽g) Goode v. Harrison, 5 B. & Ald. 147.

⁽i) Fox v. Clifton and others, 6 Bing. 776; 4 M. & P. 676, S. C. In this case the jury, on a new trial granted having again found for the plaintiffs, the court directed a third trial, 9 Bing. 115; 2 Moore & S. 146, S. C.

⁽¹⁾ Perring v. Hone, 4 Bing, 28; 12 Moore, 135, S. C.; and see Doubleday v. Muskett, 7 Bing. 110; 4 M. & P. 750, S. C.; supra, note

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III. Modes ing a Party. By Part-

*So in general a mere prospective partnership or company will not subject of become a party who merely proposes to become a partner, to any liability (m)(1).

pective Partnership.

But if a Party repis liable.

If a person represent himself to be a partner, though in fact he was not so, Nor a Pros- and thereby induce a person to give credit to a concern, he will be liable as a partner(n); but the representation must be by himself or by some third person by his authority(o); and it must be general and public, or to the particular creditor, for a representation only to one or more persons which the creditor never heard of, could not mislead him, and he has no right to avail resent him- himself of it in order to fix a party who in fact was not a partner (p); and self to be a therefore where a person, not in fact a partner in working a mine, nor hav-Partner, be ing represented herself as such to the plaintiff, although she had erroneously acknowledged herself to others to be a shareholder, but had not had any shares of any interest in the mine assigned to her, was holden not to be liable to an action for goods supplied for the use of the mine(q).

2. Liability in case of a genership.

- 2. General Liability of Partner.—In general one joint-tenant, tenant in common, or person jointly interested with another in real or personal proal Partner- perty, is not capable by himself of doing any act to bind or prejudice his co-But by the custom of merchants, long established as law, if one partner in trade draw, accept, or indorse a bill, check, or note, in the name, and seemingly on the behalf of the firm, such act will render all the partners liable to a BONA FIDE HOLDER, although the instrument had no relation to the joint trade, and the other partners were wholly ignorant of the transaction, and were even intentionally defrauded by their partner (s)(2). The
 - (m) Bourne v. Freeth, 9 B. & C. 632. It being in contemplation to form a company for distilling whiskey, the following prospectus was issued in May, 1825: "The conditions upon which this establishment is formed are, the concern will be divided into twenty shares of 100l. each, five of which to belong to A. B. the founder of the works, the other fifteen subscribers to pay in their subscriptions to M. & Co. bankers, Liverpool, in such proportions as may be called for. The concern to be under the management of a committee of three of the subscribers, to be chosen annually on the 10th of October, ten per cent to be paid into the bank on or before the 1st of June next." Held, that this prospectus imported only that a company was to be formed, not that it was actually formed; and that a person who subscribed his name to this prospectus, and who was present at a meeting of subscribers, when it was proposed to take certain premises for the purpose of carrying on the distillery, which were after-wards taken, and solicited others to become shareholders, but never paid his subscription, was not chargeable as a partner for goods supplied to the company.

As to prospective partnerships incomplete see Fox v. Clifton, 6 Bing. 786; 4 Moo. & P. 676; Thames Tunnel Company v. Sheldon, 6 B. & C. 341; 9 Dowl. & R. 278.

(n) See observations in Harvey v. Kay, Bart. 9 Bar. & Cres. 356; Fox v. Clifton, 6 Bing. 791; 4 Moo. & P. 676; Doubleday v. Muskett, 7 Bing 117; 4 Moo. & P. 750; Ex parte Langdale, 18 Ves. 300.

(o) Ante, 38, note (i); Fox v. Cliston, 6 Bing. 786, 794; 4 Moo. & P. 676; and see cases there put by Tindal, C. J., as to what constitutes a representation of this nature.

(p) Vice v. Ludy Anson, 7 B. & C. 409; and see cases supra; and Vere v. Ashby, 10 Bar. & Cres. 288; Carter v. Whalley, 1 Bar. & Adol. 13.

(q) Id. ibid.

(r) Offly r. Ward, 1 Lev. 234; Tooker's Case, 2 Co. Rep. 67; Lingan v. Payne, Bridgman, 129.

(8) See the older cases, Pinckney v. Hall, 1 Salk. 126; 1 Lord Raym. 175, S. C.; Anon. Styles, 870; Smith v. Jarves, 2 Ld. Raym. - v. Layfield, 1 Salk. 292; Anon. 13 Mod. 345; Lane r. Williams, 2 Vern. 227; id. 292, S. C.; Harrison r. Jackson, 7 T. R. 207; Bac. Abr. Merchant, C.; Vin. Abr. Partners, A. And the more modern cases, Sutton v. Gregory, Peake Adden. 150; Shirreff r. Wilks, 1 East, 48; Swan v. Steele, 7 East, 210; Ridley r. Taylor, 13 East, 175; Ex parte Bonbonus, 8 Ves. 542; Ex parte Gardom, 15 Ves. 286; Wintle v. Crowther and another,1 Tyrw. 210; 1 Cromp. & J. 310, S. C.

The general rule is, that the act or agreement of one partner, seemingly with reference to and in the course of the partnership business and

^{(1) \} Drafts may be drawn on a firm by name, in anticipation of a partnership, and if accepted after one is formed, the acceptance binds the partnership. Westcott v. Price, Wright, 220. \ (2) Hart v. Withers, 1 Penn. R. 285, except it be to release a debt. M'Bride v. Hagan, 1

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law as to liability of partners is thus laid down by *Tindal, C. J. (t), " By III: Modes the general rule of law relating to partnerships in trade, each member of it of becomis liable to the debts and engagements of the whole company contracted in ing a Par-This is a consequence not confined to the law of By Partthe course of the trade. this country, but extending generally throughout Europe; and it is founded nerpartly on the desire to favour commerce, that merchants in partnership may obtain more credit in the world, and more especially on the principle that the members of trading partnerships are constituted agents, the one for the other, for entering into contracts connected with the business and concerns of the partnership, so that by the contracts of the agent all his principals are bound. But to subject a person to responsibility as a partner, for the acts of another, done without his express concurrence, he must stand in one or other of these two situations; first, he must at the time of making the contract, whether bill, note, or other instrument, have been actually a partner in the joint concern; or, secondly, admitting that he was not, he must have represented or permitted himself to be represented as such, before or at the

affairs, and material to the carrying on the same, is, in point of law, the act or contract of the whole firm and binding on them, although it violate any private agreement between the partners; Anonymous, 12 Mod. 446; 11 Mod. 40; see per Abbott, C. J. Sandilands v. Marsh, 2 B. & Al. 678, 679. Thus he may sell, Godb. 224; or insure the partnership effects, Hooper v. Lusby, 4 Camp. 66; receive money for the firm, Kemble v. Atkins, Holt, 434; Cowp. 481; release the debts due to it, Tooker's Case, 2 Co. 68; Bac. Abr. Release, D.; Stead v. Salt, 3 Bing 103; and see Cases and Law collected in Chit. jun. on Contracts. 74, &c. But a receipt given by one partner in the name and in fraud of the firm will not bind the latter, Farrar and others v. Hutchinson, t Perry & Da. 437; and the implied authority of a partner does not enable him to execute deeds in the name of the firm, Ball v. Dunsterville, 4 T. R. 313; Harrison v. Jackson, 7 T. R. 207; Holt, C. N. P. 143; 1 Sch. & Lef. 22; and the decisions are contradictory upon the question whether one partner can give a guarantee for the debt of a third person, so as to bind the other without his authority; Ex parte Gardom, 15 Ves. 280; Duncan v. Lowndes and another, 3 Camp. 478; Payne v. Ives, 3 D. & R. 664; Hope v. Cust, cited by Lawrence, J., in Shirreff v. Wilks, 1 East, 53. It seems clear, however, that it would be sufficient to prove a parol acknowledgment from the other partner subsequent to the giving of the guarantee. see 8 Ves. 540; or to show a previous course of dealing in which similar guarantees had been given in the partnership with the privity of all the partners, Sandilands v. Marsh, 2 B. & Al. 678, 678, 679; see Peake, 79; Shirreff v. Wilks, 1 East, 4S; or that the guarantee was given in the course of and as incidental to a transaction falling within the ordinary course of

the business of the firm, 2 B. & Al. 673, 678, 679; Ex parte Nolte, 2 G. & J. 295. A partner cannot without his co-partner's consent bind his co-partner by a submission to arbitration even of a matter relating to the partnership; Stead and others v. Salt, 3 Bing. 101; Adams v. Bankart, 1 C., M. & R. 681; S. C. 5 Tyr. 425; 1 Gale, 48; and see Boyd v. Emnerson, 2 Ad. & El. 184; 4 N. & M. 99, S. C.; sed ride Burnell v. Minot, 4 J. B. Moore, 340. But the subsequent approval and recognition by the firm of the act or contract of one of the partners, or their privity and silence, afford powerful evidence that he was invested with a sufficient prior authority to bind all the partners, S Ves. 540; Duncan v. Lowndes, 8 Campb. 478. But if it clearly appear no partnership existed at the time of the contract, no subsequent act by any person who may afterwards become a partner (not even an acknowledgment that he is liable, nor his accepting a bill of exchange drawn on them as partners for goods sold to his other partner before the partnership,) will make him liable in an action for goods sold and delivered, although he will be liable to an action on the bill of exchange, Saville r. Robertson, 4 T. R. 720: see Chitty, jun. on Contracts, 76; Dolman v. Orchard, 2 Car. & Pa. C. N. P. 104. An executor who, after the death of one of several partners, continues to receive his share for the benefit of infants, is liable on a bill issued by the firm, although his name does not appear in the firm, Wightman v. Townroe and another, 1 Maul. &

(1) Per Tindal, C. J., in Fox v. Clifton, 6 Bing. 795, citing Pothier, Traité du Contrat de Société, ch. 6, s. 1. See as to partnerships and partners in general, Chitty's Commercial Law, vol. iii.

Wend. Rep 326. But a partner may bind his co-partner by contract under seal, made in the name and for the use of the firm in the course of the partnership business, provided the co-partner assents to the contract previous to its execution, or afterwards ratifies and adopts it; and this assent or adoption may be by parol. Cady r. Shephard, 11 Pick. Rep. 400.

And the decisions are contradictory upon the question whether one partner can give a guar-

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III. Modes time of making the contract, either generally to all the world or to several of becom- individuals, or to the plaintiff in particular, or to some person through whom he claims(u)."

Again, it has been observed and decided, that by entering into the partnership, each party reposes confidence in the other, and constitutes *him his general agent as to all the partnership concerns, and it would be a great impediment to commerce, if in the ordinary transactions of their trade, it were necessary that the actual consent of each partner should be obtained, or that it should be ascertained that the transaction was really for the benefit of the firm; hence the act of one, when it has the appearance of being on behalf of the firm, is considered as the act of the rest, and whenever a bill is drawn, accepted or indorsed, by one of several partners, as on behalf of the firm, during the existence of the partnership, and it gets into the hands of a bond fide holder, the partners are liable to him, though in truth one partner only negotiated the bill for his own peculiar benefit, without the consent of his copartners (x).

(u) Fox v. Clifton, 6 Bing. 791; Doubleday r. Muskett, 7 Bing. 117; ante, 38

(x) Admitted in Shirreff v. Wilks, 1 East. Decided in Swan v. Steele, 7 East, 210; 3 Smith's Rep. 199, S. C.; Ridley v. Taylor, 13 East, 175; Baker v. Charlton, Peake, 80; Lane v. Williams, 2 Vern. 277; Arden v. Sharpe, 2 Esp. Rep. 524; Wells v. Masterman, 2 Esp. Rep. 731; Jacaud v. French, 12 East,

In Swan and others v. Steele, 7 East, 210, A. B. and C. traded under the firm of A. and B. in the cotton business, C. not being known to the world as a partner, and A. and B. traded as partners alone, under the same firm, in the bus ness of grocers; in which latter business they became indebted to D. and gave him their acceptance, which not being able to take up when due, they, in order to provide for it, in-dersed in the common firm of A. and B. a bill of exchange to D. which they had received in the cotton business, in which C. was interested; but such indorsement was unknown to C., of whom D., the indorsee, had no knowledge at the time; and it was decided that such indorsement in the firm common to both partnerships of a bill received by A. and B. in the cotton businese, bound C. their secret partner in that business, and that consequently C. was liable to be sued by D on such indorsement, the latter not knowing of the misapplication of the partnership fund at the time. Lord Ellenborough, C. J., said, " It would be a strange and novel doctrine to hold it necessary for a person receiving a bill of exchange indorsed by one of several partners, to apply to each of the other partners, to know whether he assented to such indorsement, or otherwise that it should be roid; there is no doubt, that in the absence of all fraud on the part of the indorsec, such indorsement would bind all the partners. There may be partnerships where none of the existing partners have their names in the firm; third persons may not know who they are; and yet they are all bound by the acts of any of the partners in the name or firm of the partnership. The distinction. is well settled, that if a creditor of one of the partners collude with him to take payment or security for his individual debt out of the

partnership funds, knowing at the time that it is without the consent of the other partner, it is fraudulent and void; but if it be taken bond fide without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner in giving such security can disaf-firm the act; if the interests of the plaintiffs in the bill were once well vested, no subsequest knowledge that such indorsement was made without the consent of the partners, will divest; and it would be highly inconvenient that it should; because, if the plaintiffs had been apprised at the time that the partner who indoned the bill had no authority to do so, they might have obtained some other security for their demand."

In Ex parte Bonbonus, 8 Ves. 542, Lord Chancellor Eldon said, "This petition is presented upon a principle which it is very difficult to maintain; that if a partner for his own ac-commodation pledges the partnership, as the money comes to the account of the single partner only the partnership is not bound. I cannot accede to that; I agree, if it is manifest to the persons advancing money that it is upon the sepurate account, and so that it is against good faith that he should pledge the partnership, then they should show that he had authority to bind the partnership. But if it is in the ordinary course of commercial transactions, as upon discount, it would be monstrous to hold that a man borrowing money upon a bill of exchange, pledging the partnership without any knowledge in the bankers that it is a separate transaction, merely because that money is all carried into the books of the individual, therefore the partnership should not be bound. No case has gone that length. It was doubted whether Hope r. Cust was not carried too fur, yet that does not reach this transaction, nor Shirrest v. Wilks, as to which I agree with Lord Kenyon, that as partners, whether they expressly provide against it in their articles (as they generally do, though unnecessarily), or not, do not act with good faith, when pledging the partnership property for the debt of the individual, so it is a fraud in the person taking that pledge for his separate debt. The question of fact, whether this was fair matter of discount, or, being an antecedent * y)@

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*And where a partnership firm is pledged by the acceptance of a bill of ex- III. Modes change by one partner in the name of the firm, the partnership, of whomso- of becomever it may consist, whether they are named or not, and whether the partners By partare known or secret partners, will be bound, unless the title of the person ner. who seeks to charge them can be impeached (y). And if a bill, accepted in a partnership firm, is applied, with the knowledge of the party who takes the bill, in part only to the separate use of the partner who actually accepts it, a secret partner, not known to the party who takes the bill, is liable in respect of so much of the amount as is not to the knowledge of the taker applied to the separate use of the partner who accepts the bill(z).

So it has been held that one partner has an implied anthority to sign, on behalf of the firm, a promissory note for the weekly payments under the Lords' Act(a); and one partner may act for the whole firm as by procura-

tion, and indorse a bill in that manner (b).

And this rule prevails, although by the terms of the partnership deed, the bound, partners were prohibited from circulating any bills or notes, if the holder potwithwere ignorant of that circumstance at the time he received the same; though standing on proof of such restrictive clause, and that the bill was issued by one part- of Partnerner without the concurrence and in fraud of the others, the holder must prove ship prothat he gave value for it(c). And though at law the executor of a deceased hibited partner could not be sued, yet in equity the amount of a bill or note issued

separate debt of Rogers, the discount was obtained merely for the purpose of paying that debt, by the application of the partnership funds, which question is brought forward by the affidavits, though not by the petition, must lead to farther examination. If the partners are privy and silent, permitting him to go on dealing in this way, without giving notice, the question will be, whether subsequent approbation is not for this purpose equivalent to previous consent. In Fordyce's case, Lord Thurlow and the Judges had a great deal of conversation upon the law; and they doubted upon the danger of placing every man with whom the paper of a partnership is pledged, at the mercy of one of the partners, with reference to the account he may afterwards give of the transaction. There is no doubt, now the law has taken this course, that if under the circumstances the party taking the paper can be considered as being advertised in the nature of the transaction, that it was not intended to be a partnership proceeding. as if it was for an antecedent debt, prima facie it will not bind them; but it will, if you can show previous authority, or subsequent appro-bation; a strong case of subsequent approbation raising an inference of previous positive authority. In many cases of partnership, and different private concerns, it is frequently necesmary for the salvation of the partnership that the private demand of one partner should be satisfied at the moment, for the rain of one partner would spread to the others, who would rather let him liberate himself by dealing with the firm. The nature of the subsequent transactions therefore must be looked to as well as that at the time." And see Sanderson v. Brooksbank and another, 4 C. & P. 286; Sutton v. Gregory, Peake's Add. Cases, 150; Lacy v. Woolcott,

2 D. & R. 460; M'Nair v. Fleming, Mont. on Part. 32,(n). Davison v. Robertson, 3 Dow, 229; sed vide Ex parte Goulding and Davy, 2 Glyn & J. 118: 8 Law J. 19, S. C.; Stoveld v. Shepperton, 1 Law J. 6, K. B. Holder of partnership bill putting same into hands of one member of firm to obtain payment from another, not affected by a representation of the former that the bill has been paid, unless at the time of such representation the bill was produced in proof thereof; Featherstone v. Hunt, 1 B. & C. 118, S. C.; 2 D. & R. 238; 1 Law J. 49, K. B.

(y) Wintle v. Crowther, 1 Cro. & J. 316; 1 Tyrw. 214, S. C.; Lloyd v. Ashby, 2 B. & Ad. 23. See further as to secret partners, post,

(z) Wintle r. Crowther, 1 C. & J. 316.

(a) Meux v. Humphrey, 8 T. R. 25; Burton v. Issitt, 5 B. & Al. 267.

(b) Williamson v. Johnson, 1 B. & C. 146; 2 Dow. & Ry. 292, S. C.

(c) Grant r. Hawkes and another, K. B. Guildhall, 4th June, 1817. Action against the several defendants as partners in the Butterly Company and as acceptors of a bill, at the suit of the plaintiff as indorsee. The defendants having proved that by the articles of the company, the members were prohibited from circulating any bills or notes, Lord Ellenborough said, "An indorsee may recover on a bill against partners in a concern, though the drawing or accepting were contrary to agreement between them, and by one of the partners in fraud of the rest; but then the indorsee must show that he gave value." Scarlett and Reader for plaintiff. Topping, Jervis, Marryatt, Garney, Gazelee, Peake, &c. for defendants. Bellamy, attorney for plaintiff. Anstice for one of defendants. And see Puller v. Roe, Peake, 197; Mont. Bank, Law 8d ed. 248.

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III. Modes in the name of the firm, though in fraud of the deceased partner, might be of becom-recovered from such executor by a bona fide holder(d).

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Liability, whether Name be used in Form or not.

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By part-

*It is immaterial whether or not each partner be particularly named in the firm or on the face of the bill, or whether he be included under the comprehensive description "Company," or "Co." or whether or not he be known to the holder; for per Bayley, B. "We are of opinion, that where a partnership name is pledged, the partnership, of whomsoever it may consist, whether the partners are named in the firm or not, and whether they are known or secret partners, will be bound, unless the conduct or title of the person who seeks to charge them can be impeached(e)." And upon this principle it has been held that a secret partner in a partnership of three persons is bound by an acceptance in the name of the two ostensible partners, and for a debt due from an old firm before such secret partner became But if a particular partnership is carried on in the name of one individual only, without the words "and Co." then if he issue a bill in his own name only, for his own separate use, his partner will not be liable in such case of misapplication, because in that case no partnership firm is pledged(g), though if the bill had been really issued for the benefit of the firm he would be liable (h).

But it is not compulsory to sue a Secret Partner. When it is apparent on the face of a bill or note, or distinctly known to the holder, that a person was a co-partner, and jointly liable, he must sue him jointly accordingly, or the action may be defeated by a plea in abatement(i). But where a person was a sleeping or secret partner unknown at the time, the circumstance of a holder afterwards discovering that he was a

(d) Lane v. Williams and others, 2 Vern. 277, 292. Newberry and Williams (the latter the defendant's late husband), were partners. Newberry issued the note in the name of the firm in their shop, and received the money from the plaintiff, but which money was not brought into the trade. Williams died, and afterwards Newberry. The plaintiff first filed a bill against the executors of Newberry, but there being a deficiency of assets, he fled the present bill to have satisfaction out of the estate of Williams; and per cur. the money being paid at the shop, the note of one partner binds both; and though at law the note stands good only against the executor of the surviving partner, who was Newberry, who received the money, and signed the note, yet it is proper in equity to follow the estate of Williams for satisfaction; and decreed it accordingly.

See also Devaynes v. Noble, I Meriv. 568; and Anderson v. Maltby, Ero. C. C. 423; 2

Ves. jun. 244, 265.

(e) Wintle v. Crowther and Coombs, 1 Tyrw. R. 215; 1 Cromp. & Jerv. 310, S. C.;

ante, 42.

(f) Lloyd r. Ashby, Rowland and Shaw, 2 Bar. & Adol. 23, 29. A., R., and O., carried on businoss as partners under the firm of Ashby and Co. from February, 1820, to May, 1824, when O. retired, and the other two partners, A. and R. agreed to liquidate all the debts due from the partnership; and they continued the business as partners under the firm, of Ashby and Rowland. In June, 1824, Shaw agreed to become a member of this last-

mentioned partnership, as from the 18th May preceding, but his name was not to be introduced, and the business was still carried on under the names of Ashby and Rowland only. In July, 1824, II. being indebted to L. drew a bill of exchange in his favour upon "Ashby and Co.," which bill was accepted by the partner Rowland in the names of "Ashby and Rowland." II. the drawer of the bill had hed dealings with the firm of A., R., and O.; but whether that firm was indebted to him when the bill was drawn did not appear; nor did it appear that there had been any dealings between the drawer and A., R. and Shaw, after the entrance of Shaw into the partnership. The name of Shaw was never used or made known to any person dealing with the firm-Held, that L., the plaintiff, being a bond fide holder for adequate value, and there having been no fraud, all the defendants were liable. Et per curiam, "Notwithstanding the variance between the names to which the bill is addressed, and those in which it is accepted, we are of opinion that the three defendants must be taken to be the persons designated by the acceptance in the name of Ashby and Rowland, and that the acceptance binds them all."

(g) Ex parte Boletho, 1 Buck, 100, as explained by Bayley, B. in Wintle v. Crowther

and another, 1 Tyrw. R. 214.

(h) South Carolina Bank v. Case, 8 Bar. & C. 433; 2 M. & R. 459, S. C. And see Thicknesse v. Bromilow, 2 C. & J. 425.
(i) See cases, 1 Chitty on Pleading, 6th

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partner does not deprive him of his option to sue or proceed against him III. Modes jointly, or omit him as a defendant; and, in the latter case, the non-joinder of becom-

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cannot be pleaded in abatement (k). And where a bill of exchange has been drawn, accepted, or indorsed in By Partthe name of a firm, (as "Saunders, Brothers, & Co. London,") without ner. stating particularly the names of each of the partners, a person who becomes

holder may, if he think fit, sue only those known to *him to be partners at [*44] the time he received the bill, and though he is at liberty to sue all who he afterwards discovers to be partners, he is not compellable to do so(l), and the same rule prevails in equity and in bankruptcy, where a holder has, in the case of a secret partner, the option of proving against the joint estate or separate estate(m).

There is no difference, as to liability, between a general partnership and Liability in

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(k) Per Lord Tenterden, in Mullet v. Hook, Mood. & M. 98, overruling Dubois v. Ludert, 5 Taunt 609; and see next note.

(1) De Mantort v. Saunders, 1 Bar. & Adol. The declaration was upon a bill of exchange, drawn upon two persons, by the names of Saunders, Brothers, and Co .- Plea, that the promises in the declaration were made by two other persons named in the plea jointly with the defendants. Issue thereon. The defendants proved, that although they carried on business in London, under the firm of Saunders, Brothers, and Co., two other persons named in the plea, who resided at the Mauritius, where the bill was drawn, were in fact in partnership with them, and that the plaintiff resided at the Mauritius. It was nevertheless holden, that upon this evidence the jury were properly desired to find for the plaintiff, if they thought the holder of the bill had reason to consider that the defendants alone constituted the house of 8. B. and Co., the question being with whom the plaintiff contracted. And per Parke, J. It seems to me that the case was properly left to the jury, to say whether the plaintiff, at the time when he took the bill, had any reason to know that Wiche and W. S. Saunders were partners in the house in London upon which the bill was drawn. It is true, that in Dubois r. Ludert, 5 Taunt. 609; 1 Marsh. 246, S. C. it was decided that a defendant might plead in abstement a secret partnership, although the plaintiff had no means of knowing of that partnership; but the decision in that case is at variance with the decision of Lord Kenyon, in Doe v. Chippenden. (cited in Abbott on Shipping, 76); of Lord Ellenborough, in Baldney v. Kitchen, 1 Stark. R. 338; and of Lord Tenterden, in Mullett v. Hook, (M. & M. 88, ante, 48, note(k)). Those cases establish that upon such a plea as that pleaded in this case, the only question is, with whom the contract was made? When the plaintiff took a bill of exchange, drawn upon Saunders and Co. in London, he must have understood that that bill would be paid by the persons who were the ostensible partners in that house, and therefore, when it appeared that the defendants were the two partners who transacted the business in London, it was incumbent on them to show that the plaintiff had trusted the other two persons;

for if a person contract with two persons, he may Partnersue them only; if, after the contract be made, ship. he discover that they had a secret partner, who had an interest in the contract, he is at liberty to sue that secret partner jointly with them, but he is not bound so to do. I think, therefore, that the case of Dubois v. Ludert cannot be supported. The two persons who carried on the business at the Mauritius must be considered as dormant partners in the house in London, the jury having found that the plaintiff had no reason to consider that they were such partners, the issue joined on the allegation in the plea, that the promises mentioned in the declaration were made by the defendant jointly with the other two persons named in the plea, was properly found in favour of the plaintiff. Taunton and Patteson, Justices, concurred. Rule refused.

So in Ex parte Hamper, 17 Ves. 403, Lord Eldon, (citing Benfield's case, decided by Lord Loughborough, 5 Ves. 424,) mentions it as clear law, that a dormant partner, not being an ostensible contracting party, the creditor, though he may if he chooses, is not bound to go against him. And subsequently, in Ex parte Norfolk, 19 Ves. 455, after noticing the decision of the Court of Common Pleas in Dubois v. Ludert, that a visible partner may plead that there is a dormant partner, he says, "That is new to me, and contrary to the course in bankruptcy for thirty years. Here it has been taken as unquestionable, that if I deal with A. he cannot, with reference to that transaction, say there is a contract between him and B. of whom I know nothing; thus compelling me to be a joint creditor of those two, whose joint property may be scarcely anything, and not the sole creditor of the only man I knew. I have said in this place, following a series of precedents, that the joint creditors may elect; that a man purchasing from or selling to A., not knowing of any partner, may consider A. as the sole vendor or vendee. He may, finding that B. has taken a share of the profits, elect to go against him also, but cannot be compelled certainly. See also Ex parte Hodgkinson, 19 Ves. 291,

(m) Ex parte Hodgkinson, 19 Ves. 291; Ex parte Norfolk, id. 457, S. P. See last note.

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III. Modes a particular partnership, all the partners in each will be equally liable to a of becom- bonû side holder for the acts of co-partners, when the partnership name has been pledged; for whether persons carrying on trade together as general By Part- merchants on an extensive scale, or in a very particular and limited concern, third persons may equally be led to suppose that a bill, bearing the partnership name, was lawfully issued for the purposes of the joint trade, and are therefore equally entitled to insist on the liability of all the partners(n); and

*45] if two trades are *carried on at the same place, under the same firm, a bill indorsed in the name of the firm by the partners in one trade will bind the partners in the other trade, as between them and an innocent holder; and therefore, where three persons, A. B. and C traded under the firm of A. and B. in the cotton business, (C. being a secret partner,) and A. and B. traded also separately as grocers, and indorsed a bill, the property of A. B. and C., to D., in satisfaction of a debt due from A. and B. only, C. may be sued as indorser (o).

Joint Ownership in a articular Transaction not a Partnership.

But if there be neither a general nor a particular partnership in trade, but merely a joint ownership of property, as in the case of a ship, or only a particular agreement to share in a single transaction, then one of the parties so concerned cannot bind the other by any bill or note not issued pursuant to, or consistent with, the situation of each, or without express authority(p). Therefore, where a person addressed a bill to two owners of a ship, as for necessaries furnished for the same, and one of them accepted the bill in the name of both, it was decided that the other was not liable to a bona fide holder, the bill having been drawn for the separate use of the acceptor(q).

So where there is no subsisting general partnership in trade, and two persons connected only in a particular transaction as farmers agreed to pay for certain articles connected with the concern by bills at three months, and one of them, without the concurrence of the other, accepted bills, in the name of both, at six and twelve months, the other party was holden not to be liable to be sued upon them (r).

Partnership must exist at Date of Bill or Contract(*).

In order to subject a person to liability as a partner, he must have been or appeared so at the date or issuing of the bill or making the contract(t). And if a partnership be only about to be formed, one of the intended partners cannot, in order to raise his share of the capital, issue a bill in the name

(n) Swan r. Steele and another, 7 East 210; ante, 41, note(x). Wintle v. Crowther and Coombes, 1 Tyrw. R. 214; 1 Cromp. & J. 310, S. C.; ante, 42; and per Tindal, C in Anderson v. Brooksbank and another, 4 Car. & P. 286; Baker v. Charlton, Peake, 80; Lacy r. Woolcott, 2 Dow. & R. 460. When no authority to draw, &c. a bill as a partner, post, 46.

(o) Swan v. Steele, ante, 11, note (x). (p) Per Lord Eldon in Ex parte Peele, 6 Ves. 604.

(q) Williams v. Thomas, Hunter, and Latham, 6 Esp. Rep. 18. If a person who supplies stores to a ship, of which there are several owners, takes in payment the bill of the ship's husband (a part owner) only, and settles with him alone, and the other owners, in ignorance of this, allow him to receive large sums of money, which they otherwise would not have done, the latter are discharged, particularly if the bill be ronewed; Reed v. White, 5 Esp. 122; sed vide Robinson v. Read, 9 B. & C. 449, 455, 456; 4 Man. & Ry. 349, S. C.; post, Ch. V. s. iv. Delivery to Paye.

(r) Greenslade c. Dower and another, 7 Bar. & C. 635; 1 Man. & Ry. 640, S. C.; et per Bayley, J. "If several persons are in trade together, a bill accepted by one in the names of the partnership, and in the course of their trading, binds them all. But there is a great difference between such a bill and one drawn for the purpose of founding the partnership. Originally each partner would have to bring in his proportion of the capital, and it would be very unjust to let the acceptance of one for the capital bind all the others; no authority of that nature can be implied, nor does it arise by operation of law, the debt not being a partnership

(s) See as to dissolution of partnership, post. (t) Ante, 38; Dolman v. Orchard and another, 2 Car. & P. 104; Saville v. Robertson, 4 T. R. 720.

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of the firm so to bind them (u). So where the plaintiff had, previously to III. Modes the formation of a partnership, advanced a sum of money to one of the in- of Becomtended partners, to enable him to bocome one of the firm; it was held, that ing a Parthe plaintiff could not recover on a bill afterwards drawn by such party, in the By Partname of the firm, in payment of such advance; and that the other partners ner. might defend the action without giving any notice of the intention to dispute the consideration (x). So, although by a private agreement between partners, they stipulated that their partnership should be considered as commencing from an antecedent period, it was decided that one of the *part-[*46] ners was not liable on a bill issued before the partuership was actually form-

The partnership must also be in a trade or concern to which the issuing Partneror transfer of bills is necessary or usual, for otherwise a copartner, will be in a not be liable for the act of his partner, unless he gave express authority. Trade or Therefore a director or shareholder in a mining(z) or gas-light(a) com- Concern to pany, or a partner in a farm(b), is not liable, like a partner in trade, for which the every bill issued without his authority.

Bills is essential or

In some cases, although it may have been doubtful whether or not a per- assal.

Admission son were liable as a partner, a subsequent approbation, acknowledgment, or of Liability admission, and still more a promise, will preclude him from insisting on his as Partner, non-liability (c), for a strong case of subsequent approbation raises an inference of previous authority. But such acknowledgment must be made by himself or some authorised agent(d), in general, or to the plaintiff, or to some prior holder of the bill, and not in a single instance to an uninterested person(e), or it must be explicit and express(f); and a mere promise to

(u) See per Bayley, J. in Greenslade, v. Dower and another, 7 Bar. & C. 635; 1 Man. & Ry. 640, S. C.; supra, note (r); and Saville v. Robertson, 4 T. R. 720.

(x) Green v. Denkin and others, 2 Stark. R.

(y) In Vere and others v. Ashby and others, 10 B. & C. 288.

(z) Dickinson v. Valpy, 1 0Bar. & C. 128; 5 M. & R. 126, S. C. In an action on a bill of exchange, purporting to be drawn and accepted by a mining company, wherein the plaintiff, an indorsee for value, sought to charge the defendant as a member of that company, it was proved that the bill had been drawn and accepted by order of the directors of the company. It was proved further, that the company had entered into a contract for the purchase of mines, taken a counting-house in London, engaged clerks, and also an agent to reside in the country, and had worked some of the mines; that the defendant having applied to the secretary of the company for shares, some were ap-propriated to him; that he paid an instalment of 151 per share; that he attended at the counting-house of the company, and there signed some deed, and afterwards attended a general meeting of the shareholders; it was held, that assuming this to be sufficient evidence of the defendant's being a partner in the company, it was incumbent on the plaintiff to prove that the directors of that company had authority to bind the other members, by drawing and accepting bills of exchange, and that the plaintiff not

having produced the deed of copartnership, nor given any evidence to show that it was necessary for the purpose of carrying on the business of that mining company, or usual for other mining companies, to draw or accept bills of exchange, there was no evidence to go to the jury of such an authority to draw or accept any bills, and still less to draw or accept bills in this form, which, in effect, were promissory notes.

Semble also, that there was not sufficient evidence to show that the defendant had ever become a complete partner in the company, or that he had held himself out to the world as such partner, id. ib.; and see Vice v. Lady Anson, 7 Bar. & C. 409; ante, 39, note (p).

(a) Bramsh v. Roberts, 3 Bing. N. C. 963;

5 Scott, 172, S. C. Payment by a member of such compeny of bills purporting to be accepted for the directors before the party paying became a member, having been found by a jury as holding out no liability on similar bills bearing date subsequently to such party becoming a member, the court refused to grant a new trial.

(b) Greenslade v. Dower and another, 7 Bar. & C. 635; ante, 45, note (r).

(c) Ante, 39, 41, 42; see Fox v. Clifton, 6 Bing. 776, 786, 794; and Lord Eldon's observations in Ex parte Bonbonus, S Ves. 542; ante, 41, 42; Thicknesse v. Bromilow, 2 C. & J. 425.

 (d) Ante, 39, note(o).
 (e) Ante, 89, and Vice v. Lady Anson, 7 Bar. & C. 409; 1 Man. & Ry. 113, S. C. (f) Ante, 39.

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III. Modes pay attention to an application for payment will not subject him to a liability of become with which he could not otherwise be fixed(g).

But this presumed liability of one partner for the act of his co-partner may But if Hol- be rebutted by proof of fraud or covin between the co-partner and holder, and proof that the latter, at the time he received the *instrument, knew that the partner had no right to pledge the credit of the firm in that transaction, Partner, he and that he was attempting to negotiate the same for his own individual benefit, or for the accommodation of a third person, without the concurrence of his partners, would preclude such holder from enforcing payment from *47] the latter (h). In this and other cases of fraud, where the plaintiff is really a holder for value, the question for the jury now is whether the plaintiff at the time of taking the bill knew of the fraud, and, therefore, took the bill malâ fide(i),(1), and the question is not, as formerly, whether the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man(k), or even whether the plaintiff has been guilty of grown negligence(l); for gross negligence, though it may be evidence of mala fides, is not the same thing.

It has been considered that the mere circumstance of a bill being given for an antecedent debt due from one only of the partners, raises a presumption that the creditor knew that the bill was given without the concurrence of the other partners(m); and in Ex parte Goulding(n), the Vice-Chancel-

(g) Greenslade v. Dower, 7 Bar. & C. 635; 1 Man. & Ry. 640, S. C.; ante, 45, note(r); Perring v. Hone, 4 Bing. 32; 12 Moore, 135. S. C. One of several partners who has himself signed a joint promissory note cannot be made liable by the act of another partner afterwards altering the note, and making it joint and several; and a letter by the first, in answer to an application for payment, that the circumstances should have his earliest attention, is not sufficient to establish his assent to the alteration; for giving attention to a matter is very different from giving assent; and the assent of the other partners would only bind the first with respect to acts necessary to carry on the partnership, and they have no authority to make a joint and several note binding on a partner who does not sign, where the note isnot subscribed in the name of the firm, but by the individuals severally composing it.

(h) See Wintle v. Crowther and another, 1 Tyrw. R. 210; ante, 42; Shireff v. Wilks, 1 East, 48; Arden v. Sharp, 2 Esp. Rep. 524; Wells v. Masterman, 2 Esp. Rep. 731, admitted by Lord Ellenborough, in Swan v. Steele, 7 East, 213; Ex parte Bonbonus, 8 Ves. 542, 544; Ridley v. Taylor, 13 East, 175; Henderson v. Wild, 2 Campb. 561; Hope v. Cust, 1 East, 53; 1 Tyr. R. 216; Watson, 197; Green v. Deakin, 2 Stark. 847. In Heath v. Sanson, 2 Bar. & Adol. 291. It appeared that S. being indebted to a firm in which he was partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt. The payees indorsed it over, and the indorsee sued the parties who appeared to be makers:-Held, that this note was made in fraud of S.'s partner in the second firm, and could not be enforced against him by the payees, and that at least under these circumstances of suspicion the indorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration. It was also held, Parke, J., dissentiente, that in all cases where from defect of consideration the original payee cannot recover on the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior indorsee, though he may have had no notice that such proof will be called for. But the latter doctrine has since been denied. See per Patteson, J., in Whittaker v. Edmunds, 1 Mood. & Rob. 366; 1 Ad. & E. 638, S. C.; post, Part II. Ch. V. s. i. Evidence, Consideration.

(i) Goodman v. Harvey, 4 Ad. & El. 870; 6 N. & M. 372, S. C.

(k) Down v. Hallington, 4 B. & C. 830, and see the cases supra, note (h).

(1) Crook v. Jadis, 5 B. & Ad. 909, S. C.; 3 N. & M. 257; 6 C. & P. 191; Backhouse v. Harrison, 5 B. & Ad. 1098; 3 N. & M. 188,

(m) Ex parte Bonbonus, 8 Ves. 544; ante, 41, note (x); Hope v. Cust, cited in 1 East, 58; Shirreff r. Wilks, 1 East, 48; ante, 39, note(s); Barber v. Backhorn, Peake, 61; Ex parte Agace, 2 Cox's Ca. 312; Wells v. Masterman, 2 Esp. Rep. 731; Green v. Deakin, 2 Stark. 347.

(n) Ex parte Goulding, 2 G. & J. 118; 8

^{(1) {} If a promissory note executed by a partner in the name of the firm be for his individual debt, which is known to the payee, it is a fraud upon the other partners, and does not bind them; nor is it binding upon a person who executes it as surety for the partnership, supposing it to have been authorized by them. Taylor v. Hillyer, 3 Blackf. 433; Hagar v. Mounts, Idem, 57, 261.

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lor said, "after an attentive consideration of the several authorities, I am III. Modea of opinion, that when one partner gives the acceptance of the firm, in pay- of becomment of his separate debt, without authority from his co-partner, such ac- by Partceptance does not bind the firm;" and it has also been considered, that the ner. taking the instrument from one of the partners in his own handwriting, without consulting the others, raises a presumption that there is not any concurrence of the firm(o). And in an action on a bill against three acceptors, by the indorsee, where it appeared that the defendants were partners in a tea speculation, and the drawer, a wine-merchant, drew in payment for wine delivered to one of the three, the judge directed the jury, that if they found that the bill was so drawn without the knowledge and consent of the other two desendants, they were not liable; and the jury sound for the desendant(p). 'And from the cases of Shirrest v. Willks, and *Green v. Dea-[*48] kin(q), a conclusion has been drawn in an excellent work, that if one partner accept in the partnership name a bill drawn on the firm by his own separate creditor for his separate debt, or if for such separate debt he give a promissory note in the name of the firm, it lies upon the creditor to show that his debtor had authority so to give him the joint security of the firm, and that prim? facie the transaction is fraudulent on the part of both debtor and creditor(r). But as a partner may in his individual capacity have a claim upon the firm, in respect of which he might draw, accept, or indorse a bill in the name of the firm, it has in other cases been considered, that the

mere circumstance of the party to whom he delivers it knowing that he was using it for his private benefit, does not of itself necessarily afford sufficient presumptive evidence of collusion to invalidate the transaction, and that the

partner objecting to liability must prove all the facts sufficient to induce a jury to find that the partner really acted fraudulently, and that the holder

Law J. 19, S. C. And see Ex parte Thorpe, 3 Mont. & Ayr. 716; 2 Dea. 16, S. C.; post, Part II. Ch. VIII. s. iv. Bankruptcy.

had notice of the fraud(s)(1).

(0) Hope v. Cust, cited 1 East, 53, and antc, 40, in notes.

(p) Wood v. Holbeck and others, May 28, 1826, cor. Abbott, C. J., at Guildhall.

(q) Ante, 45, note (x).

(r) See Bayley on Bills, 5th edit. 59. (s) Ex parte Bonbonus, S Ves. 542, 544;

and see Houlditch v. Nias, 5 Price, 689, post, 62, n. (f); Henderson v. Wild, 2 Campb. 561. See the cases in note, ante, 41.

Ridley and another v. Taylor, 13 East, 175. The plaintiff sold coals to Ewbank separately, and he in payment drew and indorsed the bill sued on, in the name of his firm, of Ord and Ewbank, on the defendant, which he accepted. It was drawn, indorsed, and accepted some days before it was produced to the plaintiffs. The Court held, that if one partner draw or indorse a bill in the partnership firm, it will primi facie bind the firm, although passed by the one partner to a separate creditor, in discharge of his own debt, unless there be evidence of covin between such separate debtor and creditor, or at least of the want of authority, either express or to be implied, in the

debtor partner, to give the joint security of the firm for his separate debt. And it was held that no sufficient circumstance appeared in that case to raise any presumption adverse to the separate creditor, for taking such joint security, in a case where the bill appeared to have been drawn in the name of the firm, to their own order, eighteen days before the delivery of it to the separate creditor, and to have been accepted and indorsed before such delirery, and to have been drawn for a larger amount than the particular debt; and where, though the indorsement was in fact made by the hand of the debtor partner, yet it did not appear that that fact was known to the separate creditor at the time; and this too in a case where direct evidence might have been given of covin, or want of authority, if it existed; for the action being brought by the separate creditor against the acceptor, either of the partners might have been called as a witness by the defendant, to disprove the authority of the debtor partner to give the joint security; for though, if the separate creditor recovered against the acceptor, he would have his remedy over against the firm; yet the innocent partner would have his remedy over against the other; and the bankruptcy of the debtor partner in the mean time does not

⁽¹⁾ Indorsers of a note made in the name of a firm by a member thereof, without the assent of his co-partner, and passed by him for his individual debt, are not liable for its payment. Williams v. Walbridge, 3 Wend. Rep. 415.

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III. Modes ing a Party. mer.

Particular Prohibition

*49] Of Bill for Injunction to prevent Partners from fraud ulently Partnership name.

Even in transactions in which all the parties are interested, the authority of becom- of one partner to bind the other, by signing bills of exchange, or promissory notes, in their joint names, is only implied, and may be rebutted by express previous notice to the party taking the *security from one of them, that the other would not be liable for it(t). And this even where the partnership was for a specified period (u).

When a partner has discovered that his co-partner is in the practice of improperly drawing, accepting or indorsing bills or notes, in the name of the firm, but to accommodate third persons, or for his separate purposes, be should immediately file a bill in equity, and obtain an injunction to prevent a repetition of such fraudulent and hazardous practices (x). So an injunction abusing the was granted exparte to restrain the negociation of a bill of exchange by a holder, who had given valuable consideration for it, but who had notice that it had been improperly accepted by a partner of the plaintiff in the partnership name(y). But a court of equity will not, it seems, decree that the name of a partner shall be erased (z), nor will an injunction be granted to restrain surviving partners from using the name of a deceased partner in the firm of the trade (a).

3. Dissolution of Parinership.

3. Dissolution of Partnership.—A partnership may be determined or dissolved,-

First. By effluction of time, as where the term agreed upon has run out. Secondly. By act of parties, &c. as either by consent, or, in case of part-

vary the question of competency. And Lord Ellenborough, C. J., said " Prima facie one partner is bound by the indorsement of another in the partnership firm; but that presumption may be cut down by showing collusion; but the difficulty of the case is, that we have not the facts sufficiently before us to show that collusion. If this were distinctly the case of a pledging by one partner of a partnership security for his own separate debt without the authority of the other partners; or if there existed in this case evident covin between one partner and the holder of the partnership security, upon which the action is brought, in order to charge the other partner without his knowledge or consent, either express or implied, for the private advantage of the parties to such covinous agreement, we should have no hesitation to pronounce a bill, drawn and indorsed under such circumstances, void in the hands of the covinous holders, upon the principle laid down in the case of Shirrest and another v. Wilks and others, 1 East, 48; but upon the facts stated, such does not distinctly appear to us to be the case; nor does it appear that there was any such crassa negligentia on the part of the plaintiffs, in not inquiring whether Ewbank, the one partner with whom they dealt, was authorised to dispose of this security (which had originally been partnership property) as his own, as to render this transaction on that account fraudulent, and therefore void."

See observations of Eayley, B., on this and the other cases in Wintle v. Crowther, 1 Tyrw. R. 216; 1 Cromp. & J. 316; ante, 42. And

see also the cases ante, 41, 42. (t) Lord Galway v. Matthew and another, 10 East, 264;-----v. Layfield, 1 Salk. 291; Minnit v. Whitney, 16 Vin. Abr. Partners, A.

244; Bayl. 57, 225; Willis v. Dyson, 1 Stark.

164; Vere v. Fleming, 1 Younge & J. 227. Lord Galway v. Matthew and Smithson, 10 East, 264. The defendants and Whitehouse (since deceased) were in partnership as brewers. Matthew applied to the plaintiff to lead his acceptance for 2007, to enable him to pay excise duties due from the house, and promis in return to give the note of the firm, payable four days before the acceptance, and Matthew drew the note, and signed it for himself and partners. He then got the acceptance discounted, and applied 180l. in payment of partnership debts, reserving enough to himself. The plaintiff, after Whitehouse's death, was obliged to take up his acceptance, and now sued the defendants on the note. Matthew suffered judgment by default, and Smithson proved that the plaintiff, before he took the note, had received notice of an advertisement by him, warning persons not to trust Matthew on his account, and that he would be no longer liable for drafts drawn by the other partners on the partnership account. And Lord Ellenborough held that the plaintiff having taken the note after such warning could not recover, and therefore nonsuited him, and on motion to set aside the nonsuit, the court refused the rule.

(w) Rooth r. Quin, 7 Price, 198.

(x) Master v. Kirton, 8 Ves. 74; Ryan v. Mackmath, 3 Bro. C. C. 15; Ex parte Noakes, 1 Mont. on Part. 93; Newsome r. Coles, 2 Campb. 619; Lawson v. Morgan, 1 Price, 308; post, 52.

(y) Hood v. Aston, 1 Russ. 412. See further Chitty's Eq. Dig. tit. " Practice,-Injunc-

tion," 1056.

(z) Ryan v. Mackmath, 3 Bro. C. C. 15. (a) Webster v. Webster, 3 Swanst. 490.

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nership unlimited in time, by notice, or by the decision of a court of equi- III. Modes ty(b), or an arbitration.

Thirdly. By bankruptcy.

Fourthly. By death.

Where an agreed term of partnership has elapsed, it is expedient to give notice thereof.

If a person be once shown to have been a known partner, or that he had First. By represented himself to be one of several partners, it is incumbent on him in effluxion of general to prove that he had regularly ceased to be such partner before the transaction, in respect of which he is sued, and also by consent of all the Secondly. partners, or according to the terms of such partnership (c). Where a part- By act of nership has been constituted for a term of *years, it cannot be determined &c. without the interference of a court of equity, on adequate ground, such as [*50] gross misconduct of one of the partners. But where a trading partnership is for an indefinite time, it is determinable at any time after reasonable notice(d), or even at any instant(e). Where an order for goods was given by two partners, and afterwards the partnership was dissolved, and the goods were subsequently delivered to one or them, who carried on a separate trade, and a bill for the price was afterwards drawn on the two partners, and was accepted only by the separate trader, it was held that no claim could be made with effect on the other partner (f).

When a person has been ostensibly a partner and retires, he must give Notice of notice of that fact in order to exempt himself from future liability; for other- Reuring or wise those who have previously dealt with the firm, or heard of its existence, tion. may suppose the retiring partner to continue, and give credit to the firm on the faith of his continuing liability (g)(1). So upon a general dissolution of

of becoming a Party. By Part

(b) Lunacy does not, ipso facto, cause a dissolution of partnership, Wrexham v. Hudleston, 1 Swanst 514; and a temporary disorder does not affect the right to a proportion of profits; Pearce v. Chamberlain, 2 Ves. 85. But continuing disorder of mind is ground for a court dissolving partnership; Sayer v. Bennett, 1

(c) Harvey and others v. Sir W. Kay, 9 B. & C. 356. By a deed whereby a joint stock company was established, any shareholder desirous of transferring his shares was to give no-tice at the office of the company that he had agreed to sell the shares, and no person who purchased shares was to be deemed a proprietor until he executed the deed, and the directors, on notice of the transfer of any shares (made in conformity to the rules of the company) were to cause the transfer to be registered in the books of the company, and every person by whom such shares were transferred was immediately after such transfer was registered in the books of the company, to cease to be a proprietor. In an action, in which the plaintiff sought to charge the defendant as a member of the company for goods sold, &c. the letters of the plaintiff, in

which he admitted himself to be a shareholder on the 30th March, 1826, were held to be proof of that fact, although it was not proved that he had ever executed the deed; secondly, there being no proof of any actual transfer of the shares to a purchaser, or of the execution of the deed by him, an entry in the books of the comcany of a transfer to a purchaser on the 28th March, was held not to be evidence that the plaintiff had then censed to be a partner, or if it was prima fucie evidence of that fact, it was rebutted by the letters of the plaintiff of a subsequent date, admitting himself to be a partner. When dissolved by reference to arbitration; Heath v. Sansom, 4, B. & Ad. 172; 1 N, & M. 104, S. C.; post, 51.

(d) Littlewood r. Caldwell, 11 Price, 98, but not so in case of a joint stock company, Van Sandau v. Moore, 1 Russ. 441.

(e) Crawshay v. Fenwick, 1 Swans. 508; Featherstonhaugh v. Fenwick, 17 Ves. 298; Peacock v. Peacock, 16 Ves. 49; Heath v. Sansom, 1 N. & M. 104; 4 B. & Ad. 172, S. C.;

(f) Ex parte Harris, 1 Madd. 583.

(g) Parkin v. Carruthers, 3 Esp. R. 248. In

⁽¹⁾ Where a retiring partner does not give notice of his withdrawal, he remains responsible to those who knew he had been a partner, who are ignorant of his withdrawal, and give credit to those who afterwards carry on business in the partnership name. Bernard r. Torrance, 5 Gill &

Where one of the partners retires from a firm, to discharge him from subsequent transactions, actual knowledge of the dissolution must be carried home to the creditor with whom there was a previous deal. Prentiss v. Sinclair, 5 Vermont, 49.

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III. Modes a partnership, each partner, to rid himself of future liability and risk, should of become give public notice in the Gazette and other papers; and it is prudent also to ing a Party. By Part- give particular and individual notice to every person who had transactions with the firm. A notice of dissolution cannot in general be inserted in the Gazette or other public newspapers, unless all the partners have signed a consent to the publication; and when that cannot be obtained, each retiring partner should give such particular and individual notice, and may also circulate printed hand-bills.

Notice not necessary of a Secret Partner.

But in the case of a secret dormant partner, whose name has never been announced, he may withdraw from a co-partnership without giving any on Returing public or private notice(h). Therefore, where Saunders and others carried on business under the firm of the "Plas Madoc Colliery Company," and Saunders withdrew from the firm, which afterwards became indebted to the plaintiff as indorsee of a bill, accepted in the name of the firm, and no notice was given to the plaintiff or the public of Saunders having withdrawn; it was decided that Saunders was not liable as a partner on the bill, there being no sufficient evidence that he had ever while a partner represented himself as such to the plaintiff, or that he had appeared so publicly in that character that the plaintiff must have been presumed to know it; on the contrary, the plaintiff had stated that he did not know the defendant at the time the bill was drawn(i). So where S. and E. were partners in alum works for an indefinite period, and E. was a dormant partner, and in January, 1829, it was agreed that the settlement of the partnership accounts, and all questions concerning the respective liabilities, and the mode of winding up the affairs, and the manner and time of dissolving the partnership, should be referred to an arbitrator; and it was afterwards agreed that S. and E. should respectively bid for the plant, utensils, and fixtures, and the referee was to declare the highest bidder to be the purchaser, and in April, 1829, S. having been declared the highest bidder became the purchaser, and the works were entirely given up to him; it was held, that the partnership was then dissolved, although the referee had made no order as to the dissolution, and that S. had no authority after that time to bind E. by a promissory note(k). But if an acting partner has stated the existence of the partnership, including the secret part-

> that case it was not proved that the plaintiff had had any dealings with the firm as at first constituted. But Le Blanc, J. laid it down as a clear rule of law, that where there has been a partnership, and any change is made in the parties to it, and no notice is given thereof, any person dealing with the partnership, either be-fore or after such change, has a right to call upon all the partners who first composed the firm.

> See also the observations in Carter r. Whalley, 1 Bar. & Adolp. 13, infra; Perring v. Hone, 4 Bing. 28; 12 Moore, 135, S. C.; ante, 46, n. (g); Doubleday r. Muskett, 7 Bing. 110; Baker v. Charlton, Peak. R. 80; 2 Carr. & P.

> (h) Evans v. Drummond, 4 Esp. Rep. 89; Newmarch v. Clay, 14 East, 239; Heath r. Sansom, 1 N. & M. 104; 4 B. & Ad 172, S.

> C.; post, 51, n. (k).
> Carter v. Whalley and others, 1 Bar. &
> Adolp. 11. Per Littledale, J. "It was incumbent on the plaintiff in this action to prove a contract between the parties whom he named as acceptors and himself as indorsee. If they were

all partners when the acceptance was given by Veysey, that contract is established. But it appears that they had ceased to be so, Saunders having withdrawn. Then it is said that the defendant ought to have proved some notice re-ceived by the plaintiff of this separation, and it is true that if the plaintiff at any previous time knew Saunders to be one of the partners, such notice ought to have been shown. Now, where all the names in the firm appear, it may be presumed that every one knows who the partners are; but where there is only a nominal firm, as in the present case, the fact of such knowledge must be ascertained by express proof. No proof of that kind appears here; and Itherefore think that no contract was established between the plaintiff and Saunders." Parke, J. expressed a similar opinion; and Lord Tenterden, C. J. had so ruled at Nisi Prius.

See also the judgment of Tindal, C. J. in

Fox r. Clifton, 6 Bing. 792, S. P.

(i) Carter v. Whalley and others, 1 Bar. & Adolp. 11, ante, n. (h)

(k) Heath v. Sansom, 4 Bar. & Adol. 172; 1 N. & M. 104, S. C.

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ner, either to the holder or to some number of persons who might have III. Modes communicated the fact, in that case notice would have been requisite(1), of becom-Where a secret partner has retired from the firm, and goods have been sup- ing a Party.

By Partplied previous to the dissolution, and payments have been made by the parner. ties who continue the business subsequent to the dissolution, it is a question of evidence whether such payments are to be applied to the previous or to a subsequent debt(n).

After the dissolution of a partnership by agreement duly notified in the After No-Gazette, one of the persons who composed the firm cannot put the partner-tice of Disship name on any negotiable security even though it existed, or was dated no Bill in prior to the dissolution, or was for the purpose of liquidating the partnership Name of debts, notwithstanding such partner may have had authority to settle the old Firm partnership affairs (n)(1). After the dissolution an indorsement cannot be it. made in the partnership name, but each party must separately sign the indorsement, drawing, or acceptance(o). And after notice of the dissolution of a partnership published in the Gazette, and also sent round to all the customers of the firm, if one of the partners who carries on the business under the old firm draws, accepts, or indorses bills in the name of that firm, the other partners *need not apply for an injunction against his so doing, for they [*52] are not liable upon such bills, although given to a person ignorant of the dissolution of the partnership (p).

Where one of several partners refuses to concur in signing notice of dis- Injunction solution to be inserted in the Gazette, or pending the partnership has improperly issued bills in the name of the firm, it is advisable to file a bill in equity

Newmarch v. Clay, 14 East, 239; and see Carter v. Whalley, 1 Bar & Adol. 11; ante, 50, n. (h); Thompson v. Percival, 3 N. & M. 667; 5 B. & Ad. 925, S. C.; post, 54, n. (u).

(m) Newmarch v. Clay, 14 East, 239; Bodenham v. Purchase, 2 Bar. & Adol. 39.

(n) Kilgour v. Finlyson, 1 Hen. Bla. 155; Abel v. Sutton, 3 Esp. Rep. 108; Watson, 209; Henderson and another v. Wild, 2 Camp.

(1) Evans v. Drummond, 4 Esp. Rep. 89; 561; Wrightson and another v. Pullan and another, 1 Stark. 375, S. C.; 2 Chit. Rep. 121, S. C.; ante, 29, 30, 81.

(o) Per Lord Kenyon, in Abel r. Sutton, 3 Esp. Rep. 110; Dolman v. Orchard, 2 Carr. & P. 104.

(p) Newsome v. Coles, 2 Campb. 617, and Wrightson and another v. Pullan and another, 1 Stark. 375; Ex parte Liddiard, 2 Mont. & Ayr. 87; 4 Dea. & Chit. 603, S. C.

(1) Where a partnership note was made after the dissolution of a firm, by one of the late partners, accepted by the payee with a knowledge of the fact, and transferred by him in payment of an antecedent debt, under an agreement that if the note could not be collected, he would be liable for a part of the original debt, it was held that an action on the note could not

be maintained by the assignee against the partners. Bristol v. Sprague, 8 Wend. Rep. 423.

The fact that sufficient time to give public notice had not elapsed between the dissolution of a firm and the subsequent making of a note by one of the late partners, in the name of the firm, will not excuse the partners from their liability to pay such note in the hands of a bont fide hold-

It seems, that though a partner cannot, after dissolution, bind his co-partner to the payment of a debt by a note, yet he may liquidate a previous account, as by so doing he does not create a debt; that was previously in existence. M'Pherson v. Rathbone, 11 Wend. Rep. 96.

Where one of several partners, during the existence of the partnership, executed a note in the name of the firm for a partnership debt, but did not deliver it to the payee till after the dissolution of the partnership, it was held that such subsequent delivery did not bind the partnership. Woodford et ux. v. Darwin, 3 Vermont Rep. 82.

One partner, after the dissolution of the partnership, cannot charge the firm with any debt which they did not owe before the dissolution. Scott et al. v. Shepard et al., 3 Vermont Rep.

Where O. and P. were partners in trade, and upon the dissolution, P. assigned for value, all his interest in the partnership to O., a court of law will not permit P. by his mere declaration made after such assignment to defeat an action brought in their joint names. Owings & Piet v. Low, 5 Gill & John. 134.

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III. Modes to prevent him from signing or negotiating securities in the name of the firm, of becom- and praying a dissolution (q).

By Part-

ner.
What a sufficient Notice.

With respect to what is a sufficient notice, the usual and most prudent course is to send circular letters or notices to all with whom the parties had dealings(r); for it has been held, that notice in the Gazette is not sufficient against persons who were customers of the firm during the existence of the partnership, and that a particular notice should be given to each. Notice in the Gazette is not conclusive; and in one case Lord Kenyon left it to the jury whether it was probable that the plaintiff had seen the Gazette, itappearing that he lived in London, and took in two daily papers, but not the Gazette, and the jury found for the defendent(s). Notice in the Gazette is a medium of knowledge, but not equivalent to actual knowledge (t). In another case Lord Ellenborough observed, that a man might be supposed to look into a Gazette for notices of dissolution, though he might not look there for carriers' restrictive notices(u). But it appears to be clearly established, that notice in the Gazette is, at all events, sufficient against all persons who have not previously had transactions with the firm (x). And where after the actual dissolution of a partnership, duly notified in the Gazette, one of the parties accepted a bill in the name of the partnership firm, drawn after the dissolution, but dated before it, it was held that an indorsee, who took the bill without notice of the dissolution, could not enforce the bill against the other members of the firm, and a distinction was taken by the court between such case and the case of goods supplied after the dissolution of the partnership, but without notice, by a person who had been in the habit of supplying goods to the firm(y).

Notice of the dissolution may be proved by means of an advertisement in [*53] the public newspapers; but it seems a newspaper, containing *such a notice cannot be read in evidence without previous proof either that the plaintiff read an impression of the same paper, or, at least, that he was in the general habit of reading the paper(z). And even proof of a party's having taken in and read a newspaper for three years will not always suffice, since few people read all the advertisements(a). Evidence of the general notori-

(q) Master v. Kirton, 3 Ves. 74; Ex parte Noakes, 1 Mont. on Partn. 93; Ryan v. Mackmath, 3 Bro. C. C. 15; Newsome r. Coles, 2 Campb. 619; Lawson v. Morgan, 1 Price, 803; and ante, 49.

In Houlditch v. Nias, 8 Price, 689, where on a bill filed to obtain a discovery from a defendant proceeding at law to recover against the plaintiff the amount of a bill of exchange, whether the defendant did not know that it was accepted by one of the partners in the name of the firm for his own private debt, and for an injunction to restrain further proceedings, and that the bill of exchange might be declared to be fraudulently accepted, and ordered to be delivered up to be cancelled; to which the defendant, the plaintiff at law bringing the action, answered, that he had such knowledge-the court refused to grant an injunction to stay proceedings, because there was a defence at law, but as there was a prayer for relief, requiring the bill of exchange to be delivered up to be cancelled, and as one of the defendants had not answered, and there was a direct charge of fraudulent collusion in the bill, which was not sufficiently denied, they ordered the injunction to stay execution.

(r) See Jenkins v. Blizard, 1 Stark. 418. (s) Godfrey v. Macauley, Peake, 155, n.; 1 Esp. R. 371, S. C.

(t) Per Lord Ellenborough, Williams v. Keats, 2 Stark. R. 291.

(u) Munn v. Baker, 2 Stark. R. 255.
(x) Newsome r. Coles, 2 Campb. 617; Gorham r. Thonpson, Peake, 42; Graham r. Honpe, id. 154; Fox v. Hanbury, Cowp. 449; 1 Siderf. 127; Lesson v. Holt and others, 1 Stark. 186; Jenkins and another v. Blizard and another, 1 Stark. 418; 1 Mont. on Partn. 105, 106; Wright v. Pulham, 2 Chit. Rep. 121; 1 Stark 375, S. C.; But see Williams v. Keats, 2 Stark. R. 291; and in Godfrey v. Macauley, Peake, 155, n.; 1 Esp. 371, it seems to have been considered that notice in the Gazette is very weak evidence, if it be not supported by proof that plaintiff saw the Gazette. See Stark. on Evid. part iv. 1078, 1079.

(y) Wrightson and another v. Pullan and another, 1 Stark. Rep. 375, 376; 2 Chit. Rep.

121, S. C.

(z) Jenkins r. Blizard, 1 Stark. 418.
(α) Rowley v. Horne, 3 Bing. 3; 10 Moore,

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ety of the fact of dissolution is not sufficient where no express notice has been III. Modes given, and no advertisement published in the Gazette (b)(1). But an alte- of becomration in the printed checks is sufficient notice of a change in the firm of a inga Party. banking-house to customers who have used the new checks (c). able notice must in all cases be given (d). Where a minute of an agreement between partners to dissolve the partnership, made in order to be advertised in the Gazette, and signed by the parties, and attested, is produced in evidence to prove the dissolution, an agreement stamp is necessary (e); but a mere notice of dissolution, reciting the agreement, need not be stamped(f).

Where the plaintiff knew that the defendants intended to dissolve their partnership, and that they were actually carrying that intention into execution, it was held to be incumbent on the plaintiff, who relied upon a subsequent contract, to show that their intention had been abandoned (g)(2).

The effect of a notice of dissolution may be done away with, if the party Conseby any subsequent conduct induce the world or a particular person to sup-quences of pose that the partnership still subsisted; as by interfering in the management Partner afof the business, allowing his name to be used, or in any way authorizing the terwards parties acting in the concern to make use of his name and credit(h). Where appearing after the dissolution of a partnership between A. and B. and the advertisement of it in the Gazette, A. accepted a bill bearing date previous to the dissolution, for the accommodation of a third person, who indorsed it for value, it was held that B. who permitted his name to remain over the shop in the Poultry, as a member of the firm, after the dissolution of the partnership, and notice of it, and indorsement of the bill, was liable as a partner to a bona fide holder(i). And if a party thus allow his name to be used he is liable, though the holder of the bill knew of the dissolution (j), as where after the dissolution of a partnership, one of the partners informed the plaintiff of the fact, but added that his own name was to continue for a certain time, and afterwards the plaintiff took from the other partner a note drawn in the partnership name, it was held that the plaintiff might sue both the partners on the note (k).

247, S. C; but that was the case of a carrier's notice limiting his responsibility. See Munn v. Baker, 2 Stark. 255.

(b) Graham v. Thompson, Peake Ca. 42.

(c) Barfoot and another v. Goodall and another, 3 Campb. 147.

(d) 16 Ves. 53.

(e) May v. Smith, 1 Esp. Rep. 283.

(f) Jenkins v. Blizard, 1 Stark. 418.

(g) Paterson v. Zachariah, 1 Stark. Rep. 71. (h) See Newsome v. Coles, 2 Campb. 617; Stark. on Evid. part iv. 1081.

(i) Williams v. Keats, 2 Stark. 291.

(j) Brown v. Leonard, 2 Chit. Rep. 120.

^{(1) {} The plaintiff such on a promissory note given by one of two partners, in the copartners ships name or firm, after the dissolution of the partnership, but for a debt due by the copartnership, contracted during its existence. Here circumstances were held sufficient to support an action against both partners, as a partnership contract; there being no evidence that the plaintiff had special notice of the dissolution of the partnership, nor that notice thereof had been generally givenin any Gazette, though it appeared to be afact well known in the neighborhood of the parties. Lamb v. Irby, 2 Brev. Rep. 490. }

⁽²⁾ Notice in the Gazette of the dissolution of a partnership, is sufficient to all persons who had no previous dealings with the firm. Lansing v. Gaine, 2 Johns. Rep. 300. Post, 52, note. Graves v. Merry, 6 Cowen, 701. But as to those with whom the firm has been in the habit of dealing, general notice of the dissolution is not sufficient. Actual notice must be shown; otherwise, as to the latter, the act of one of the former firm, in the partnership name, will bind all the former partners. Id. See Martin r. Walton, 1 M'Cord, 16, S. P. But the publication of notice in a Gazette taken by a bank, the holders of a promissory note, of the dissolution of a partnership, was held to be sufficient, though the defendant had had dealings with the bank. Bank of South Carolina v. Humphreys, 1 M'Cord, 388.

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III. Modes ing a Party By Part-

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A retired partner may give authority by parol to a continuing partner to of become indorse hills in the partnership name, after the dissolution of the partnership. And where the retired partner stated, that he left the assets and securities of the firm in the hands of the continuing partner, for the purpose of winding up the concern, and that he had no objection to his using the partnership name; it Admissions was held, that the jury were justified in finding that the continuing partner of Partner had authority to indorse promissory notes, so left in his hands, in the partafter Dissonership name (l). So *where by a deed of dissolution of partnership a powlution, how far binding, er was reserved to the remaining partners to use the name of the retiring partner in the prosecution of all suits, in an action in which judgment had been obtained by all the partners before the dissolution, it was held, that the remaining partners had authority under that power to give to the defendant a note for the payment of sixpences under the Lords' Act, on behalf of themselves and the retiring partner (m). But an express authority given to one partner after the dissolution of the partnership to receive all debts, owing to, and to pay those due, from the partnership, on its dissolution, does not authorise him to indorse a bill in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership after the dissolution (n).

If A. and B. being partners, dissolve their partnership, and in the deed of dissolution it be stipulated that A. shall receive all debts due to the firm, and afterwards C., a debtor of the firm, accept a bill of exchange drawn by B. for the amount of the debt due to the firm, such stipulation will afford no defence to an action by B. against C. on this bill of exchange, for either partner after a dissolution of partnership may receive debts due to the firm, notwithstanding such a stipulation in the deed of dissolution, and after a dissolution of partnership either partner may give a release to a debtor of the firm(o)(1).

An admission made by one partner, after the dissolution, relative to a previous partnership transaction, will affect the firm (p). But an admission of one partner in an answer to a bill in equity is not admissible evidence against the rest(q).

All Partners continue liable after Dis-Debts contracted during .Partnership.

After the expiration or determination of partnership, all the partners continue liable upon all bills and contracts, which existed at the time of the expiration of the partnership, and no stipulation in a deed of dissolution or othsolution for erwise between the partners themselves can alter or affect such liability (r). And a creditor of a firm does not discharge a retiring partner, by agreeing to carry the debt to the account of the remaining partners, and by taking their bill, and afterwards repeatedly renewing it(s). But by a new express agreement for adequate consideration, there may be such a change of credit as completely to discharge a retiring partner (t). And if A. and B. being

> (1) Smith v. Winter, 4 Mee. & Wels. 454. (m) Burton v. Issitt, 5 B. & Al. 267.

(n) Kilgour v. Finlyson, 1 Hen. Bla. 155; (n) Riguit 7: Impsol, 1 Inc. Dia. 103, Abel b. Sutton, 3 Esp. 109; ante, 29, 30. And see per Abinger, C. B., and Parke, B., in Smith v. Winter, 4 M. & W. 454, 461, 462, post, 819(5)

(o) King v. Smith, 4 Car. & P. 108. (p) Wood v. Braddock, 1 Taunt. 104; Halliday v. Ward, 3 Campb. 32; aliter in the case of part-owners of a ship, Jaggers v. Binnings, 1 Stark. 64; Hooper v. Lusby, 4 Campb. 66.

(q) Rooth v. Quin, 7 Price, 198. (r) 5 B & C. 196; 2 B. & Al. 210; 3 lb.

611. See further, 1 Chit. Pl. 6th ed. 47, 48. (s) David v. Ellice, 5 Bar. & C. 196; and see Kirwan v. Kirwan, 2 C. & M. 617; 4 Tyrw. 491, S. C.

(1) See cases Chitty on Pleading, 6th edit. 47, 48.

⁽¹⁾ After the dissolution of a partnership, no one of the partners is at liberty to use the social name so as to bind the others. Offat v. Breedlove, 4 Miller's Louisiana Rep. 31.

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partners, A. retires, and B. continues the business having the partnership III. Modes effects, and C., a creditor, being told by B. that he must look for payment of becomto him alone, draws a bill of exchange on B. for his debt, and on the bill By Partbeing dishonoured gives B. time to pay; these facts raise a question for the ner. jury whether there was not an agreement between B. and C. that C. should accept B. as his sole debtor, and should take the bill of exchange from him alone, by way of satisfaction for the debt due from both; and if the jury. find that there was such an agreement, it will, coupled with the receipt of the bill from B., be a good defence by way of accord and satisfaction, in an action by C. against A. and B. jointly (u).

*So if upon the formation of a partnership it is proposed that a separate [*55] debt of one partner shall become a joint debt from the firm, to which the creditor assents, by drawing bills which are afterwards dishonoured, and by transferring the accounts, the debt is not separate but joint(x).

Bankruptcy in general operates as an immediate dissolution of a part- Thirdly, nership from the time of the act of bankruptcy, from which the assignees of Dissolution the bankrupt and the solvent partners become tenants in common of the rupley, partnership property (y); and after such act the bankrupt cannot, even before and what the issuing of the commission and the consequent notice to the world, in-Acts of the issuing of the commission and the consequent notice to the word, independence a bill so as to transfer any interest therein(z), unless under the proviational Partner afterwards

sions of the recent Bankrupt Act(a). And even the solvent partner cannot, bind.

(u) Thompson v. Percival, 3 Nev. & M. 167; 5 Bar. & Ad. 925, S. C.; et per curium, "The cases of Lodge v. Dicas, (3 Bar. & Ald. 611,) and David v. Ellice, (7 Dowl. & Ry. 690; 5 Bar. & Cres. 196, S. C.) are said to be authorities against this view of the law. In the former, however, no new negotiable security was given, nor does the difference between the joint liability of two, and the separate liability of one, appear to have been brought under the consideration of the court. In the latter no bill of exchange was given; and that decision on consideration is not altogether satisfac tory to us. We cannot but think that there was abundant evidence in that case to go to a jury (and upon which the court might have decided) of the payment of the old debts by Inglis, Ellice & Co. to the plaintiff, and a new loan to the new firm; which might have been as well effected by a transfer of account, by mutual consent, as by actual payment of money."

(2) Ex parte Whitmore, 3 Mont. & Ay. 627.

(y) Fox v. Hanbury, Cowp. 449 (z) Thomason r. Frere, 10 East, 4:8. Thomason, Underhill and Guest, were partners in trade at Birmingham, and being indebted to the defendants to the amount of 1800/ and creditors upon Gamble and Co. for 1450l. Under the control of the control derhill and Guest, on the 11th of October, 1807, without the knowledge of Thomason, who was then abroad, indorsed to the defendants a bill drawn by Thomason, Underhill and Guest, upon and accepted by the agents of Gamble and Co. for this 1450/. Underhill and Guest had, on the 7th of October, 1807, committed acts of bankruptcy, upon which separate commissions issued on the 19th. The bill for 14501. became due on the 6th December, and was then paid. And to recover this money, the present action was brought by Thomason and the assignces of Underhill and Guest. The house of Thomason, Underhill and

Guest, was still indebted to the defendants beyoud the amount of the sum now sought to be recovered. The plaintiffs were nonsuited by Grose, J. But on a rule nisi for a new trial, the court (Lord Ellenborough absente) held that the indersement having been made after an act of bankruptcy, though before the issuing of the commission, and though for the purpose of paying a partnership debt, was invalid, and they inclined to think that this action being brought to recover the money received on the bill, which had been thus wrongfully indorsed, the defendants had no right to set off their demand upon the firm against this claim by Thomason and the assignees Rule absolute And see Burt r. Moult, 1 C. & M. 525. There, one of the partners, after committing an act of bankruptcy, handed over a bank post bill and some silver to the agent of the drawer of a bill of exchange, accepted by the partners, and which was just about to become due, for the purpose of protecting such bill. Such handing over was found to be a fraudulent preference, and to have been in contemplation of bankruptcy. On the same day, but a few hours later than the time of handing over the note and money, the other partner committed an act of bankruptcy. It was held, that the act of the partner who had committed the act of bankruptcy before he had handed over the property was not binding, and that the assignees of the two partners might recover the value of the property. See also Ramsbottom v. Lewis, 1 Campb. 279, and more fully, post, Ch. VI. But see Lacy r. Woolcot, 2 Dowl. & R. 458; Smith r. De Witts, 2 Dowl. & R. 126; and 6 Geo. 4, c. 16, s. 82 post, Ch. VI. s. i. " Transfer-By whom."

(a) 6 Geo. 4, c. 16, s. 82; and see 2 & 3 Vict. c. 29; Harvey v. Cricket, 5 Maule & Sel. 336; post, Ch. VI. s. i. "Transfer—By

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III. Modes after such act of bankruptcy, in the name of the former partnership, transfer of become a bill belonging to the same (b), unless where the partners held the bill as trustees, and had no beneficial interest, in which case both, or one of them, might, perhaps, notwithstanding the act of bankruptcy, legally indorse(c). But although an act of bankruptancy committed by one of several partners so far determines the partnership as to prevent either the bankrupt or solvent partner from disposing of the partnership property by the indorsement of a bill or note, yet if the bankrupt accept a bill in favour of a bona fide holder, in the name of the firm, though not for a previous partnership debt, his partner will be liable as acceptor; for though in law the partnership is dissolved, 1 *56] yet in fact they both continue to *appear ostensibly to the public as partners; and, therefore, an innocent holder may sue the solvent partner(d). So, a fortiori, the solvent partner may, after a secret act of bankruptcy, committed by his co-partner, render the firm liable by accepting a bill for a previous partnership debt; and if the solvent partner should afterwards also become bankrupt, the innocent holder will be entitled to prove against the joint estate(e). In the case of a solvent partner, therefore, as soon as he is aware of the act of bankruptcy of his partner, or of his insolvency, and apprehends that he will issue or negotiate bills, he should file a bill for an injunction, and give as general and particular notices of the facts as the nature of the case will admit.

Fourthly, of Partnership by Death.

The death of a party is in general a revocation of all express and implied Dissolution authorities given by him, and dissolves the partnership, though it were for a term of years, unless there be an express stipulation to the contrary (f); but in equity the assets of the deceased partner are chargeable, and even a judgment against the survivors does not extinguish the liability of such as-Where A. being a member of a partnership consisting of several individuals drew a bill of exchange in blank in the partnership firm, payable to their order, and having likewise indorsed it in the partnership firm, delivered it to a clerk to be filled up for the use of the partnership, as the exigencies of business might require, according to a course of dealing in other instances; and after A.'s death, and the surviving partners had assumed a new firm, the clerk filled up the bill, inserting a date prior to A's death, and sent it into circulation; it was held that the surviving partners were liable as drawers of the bill to a bona fide indorsee for value, although no part of the value came to their hands(h). And if one of four partners die, and the surviving partners compromise, and obtain bills or notes as a security for a debt due to the original firm, and become bankrupt, such bills or notes are, by reputed ownership, distributable amongst the creditors of the three(i).

> (b) Ramsbottom v. Lewis, 1 Campb. 279; Abel v. Sutton, 3 Esp. R. 110.

> (c) Ramsbottom v. Cator, 1 Stark. Rep. 228; post, Ch. VI. s. i. "Transfer-By whom."

(d) Lacy v. Woolcott, 2 Dowl. & R. 458; Ex parte Robinson, 1 Mont. & Ayr. 18, infra. And see 6 Geo. 4, c. 16, s. 82; post, Ch. VI. s. i. "Transfer—By whom."

(e) Ex parte Robinson, 1 Mont. & Ay. 18; 3 Dea. & Chitty, 376, S. C. See the elaborate judgment of Brougham, C., overruling the decision of the Court of Review, Ex parte Ellis, in the same matter, Mont. & B. 249; 2 Dea. & Chit. 555, S. C. And quære soundness of the distinction between the indorsement and acceptance of a bill by the solvent partner. (f) Crawford v. Hamilton, 8 Madd. 251;

Crawshay v. Maule, 1 Swanst. 509.

(g) Jacomb r. Harwood, 2 Ves. 265; Daniel v. Cross, 3 Ves. 277; Devaynes v. Noble, 1 Mer. 616; ante, 42, note (d)

(h) Usher and another r. William Dauncey and another, 4 Campb. 97. Lord Ellenborough said, that this case came within the principle of Russell v. Langstaff, Dougl. 531, that the power must be considered to emanate from the partnership, not from the individual partner; and that therefore after his death, the bill might still be filled up so as to bind the survivors to pay the bill in the hands of a bona fide holder.

(i) Ex parte Taylor, Mont. R. 240. But if a firm is possessed, as mortgagees, of real estate, which, after the death of one member, remains in the possession of the survivors, it is not in their reputed ownership, id. ib.

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4. How Partners should Sign.—Wherever the law is silent as to the ex- III. Modes tent of the above custom, it should seem that evidence of the usage of mer- of becomchants is admissible, but not otherwise (k); and therefore where two persons By Parts. who were not partners drew a bill on A. B. payable to their order, and ner. separately signed it, not in the name of any supposed firm, and only one of 4. When them indorsed it with his own name; in an action at the suit of an indorsee Evidence against A. B. the acceptor, Lord Mansfield, on a new trial, admitted evi- as to Cusdence to prove, that by the universal usage and understanding of *all the mer- Merchants chants and bankers in London the indorsement was bad, because not signed as to Partby both the payees; and accordingly the defendant had a verdict, notwith- ners is adstanding it was insisted that the validity of the indorsement was a question of and how law, and although the Court of King's Bench, on the motion for a new trial, Partners had previously declared their opinion in the same cause, that when a bill goes are to sign out into the world, the persons to whom it is negotiated are to collect the Bills and state and relation of the parties from the bill itself; and that if they appear [*57] on the bill as partners, it would be of less public detriment to subject them to the inconvenience of being treated as such, than to permit them to deny that they are so; and that persons by making a bill payable to their order, render themselves partners as to that transaction (l)(1).

With respect to the mode in which a bill should be drawn, accepted or How indorsed, by or on behalf of several persons, it has been laid down that abould in whenever a person draws, accepts, or indorses a bill for himself and partner, general he should always express that he does so "for himself and partner," or sign to bind the subscribe "both the names" or "the name of the firm," and that other- Firm. wise it will not bind the partner (m)(2).

But in general when the name of one partner only appears on the bill or note, and not a co-partnership name or firm, his co-partners will not be chargeable upon the instrument, though in fact made or accepted for partnership purposes; and therefore where the plaintiff declared on a note made by T. W. in his own name as on a note made by T. W. and R., and of-

(k) Edie v. East India Company, 2 Burr. 1216, 1221; 1 Bla. Rep. 295, S. C. See Phillips on Evid. 2d edit. 434, 435, 436; Holt, C. N. P. 98, 99, in notes; Mitchell v. Baring, 10 B. & C. 4; 4 Car. & P. 35; M. & M. 381;

Chit. jan. 1454, S. C.

quære. (m) Pinckney r. Hall, 1 Salk. 126; Lord Rnym. 175, S. C.; Carwick r. Vickery, Dougl. 653; Smith r. Jarves, Lord Raym. 1484; The King v. Wilkinson, 7 T. R. 156; Meux v. Humphrey, 8 T. R. 25; Lepine v. (1) Carwick n. Vickery, Doug. 653, sed Bayley, id. 325; Watson, 214.

If two persons indorse a note in virtue of a mutual understanding with each other, to lend their names for the accommodation of the maker, evidence may be left to the jury of such mutual nnderstanding or agreement. Love r. Wall, 1 Hawks, 313.

One joint indorser who has paid the whole amount of a note negotiated at bank, cannot recover from another joint indorser his contribution, without proving the insolvency of the drawer. Pearson v. Duckham, 3 Litt. 386.

(2) An authority to one partner to sign notes in the partnership name, for debts of the firm, may be inferred from such circumstances as will raise a reasonable presumption of the assent of the other partners. Graves v. Merry, 6 Cowen, 701. See Manufacturers' & Mechanics' Bank v. Winship, 5 Pick. 11. It is a well settled rule, that if a bill be drawn by one partner in the name of the firm, or if a bill be drawn on the firm, by their partnership name, and be accepted by one of the partners, all the partnership are bound; although the consent of the other partners should not be obtained, or should be withheld. Le Roy v. Johnson, 2 Peters, 197. See Smith v. Lusher, 6 Cowen, 688. Cumston v. M'Nair, 1 Wend. 457.

⁽¹⁾ If the directors of a turnpike company become the drawer and indorsers of a note, on which money is borrowed for the use of the company, and applied to the payment of its debts, they are, in the absence of any especial agreement, mutually responsible for contribution in case of loss, if payment be made by one, whether by compulsion or voluntarily. Slaymaker v. Gundacker's executors, 10 Serg. & Rawle, 75.

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III. Modes fered to prove that they were jointly indebted, and that they gave the note of becom- for that debt, he was nonsuited, on the ground that this was a separate security, though for a joint debt(n). And it was held in Ex parte Emly(o), and in Emly v. Lye(p), that the indersement of one partner alone does not make the firm liable on the bill, although the money thereby raised may have been applied to partnership purposes, if the indorsement cannot be treated as the indorsement of the firm, and though the latter might be liable to be sued as for money lent(q). So where A. and B. were in partnership, B. being a secret partner, and A. on the partnership account drew bills in his own name only (and not in any partnership firm) on B., who accepted them; it was held on the bankruptcy of A. and B. that the holder of these bills, who was ignorant of the partnership, was not entitled to prove them against the joint estate of A. and B. and the separate estate of B. but that he was entitled to prove them against the separate estates of A. and B.(r). But on the other hand, it is clear that a firm consisting of several persons may carry on business in the name of an individual partner, (just as much as they may adopt a fancy name, or the comprehensive word "company"), and then the whole firm will be bound by an indorsement made by him in his own name only (8); and therefore in a recent case, where Crowder, Clough and Perfect, carried on business in partnership, under the name and firm of "Crowder, Clough and Co." as factors and commission merchants in England, and in America in the name of Clough only; and Clough in America, on a trans-[*58] action connected with the partnership in America, indorsed *bills in his own name only, it was holden that such indorsements must be considered as an indorsement by the firm, and that they were liable as indorsers on those bills(t).

On the other hand it seems that a partner has no power to give a joint and several promissory note, so as to bind his co-partner to be sued separately. At least when a joint note has been given and signed, he cannot atterwards without express consent insert the words, "or severally," so as to alter the

liability of his partner (u).

If a factor of an incorporated company draw a bill on such company, and one member accept it, the acceptance will not bind the company, because it is a private act of the party, and not a public act of the company; and on the same principle, if several persons, each in his individual capacity, employ one factor, and he draw a bill on all of them, and one accept it, the acceptance will not bind the rest(x).

If a bill be directed unto two or more persons, not partners, in these terms, "To Mr. R. A. and Mr. J. B. Merchants, in London;" in this case, it is said, that A. and B., not being partners, ought both to accept the bill, and that if one refuse, the bill must be protested for want of acceptance(y). But it has been recently determined, that where a bill is drawn upon a firm, and one partner writes "accepted" and adds only his own name, it will bind

(p) Emly v. Lye, 15 East, 7; Kilgour v. Finlyson, 1 Hen. Bla. 156.

⁽n) Siffkin v. Walker, 2 Campb. 307.

⁽o) Ex parte Emly, 1 Rose, 61.

⁽q) Id. Ibid.; Denton v. Rodie, 3 Camph. 498; post, 59, note (f); Ex parte Boletho, 1 Bing. 100.

⁽r) Ex parte Husbands, 2 G. & J. 4.

⁽s) Ex parte Boletho, Buck, 100. As explained by Bayley, B. in Wintle v. Crowther

and another, 1 Tyrw. R. 214; and see Lloyd r. Ashby, 2 B. & Ad. 29; ante, 43, n. (f).

⁽¹⁾ South Carolina Bank v. Case, 8 Bar. & Cres. 427; ante, 43.

⁽u) Perring r. Hone, 4 Bing. 32, ante, 46, note (g).

⁽x) Bul. N. P. 270; Mar. 2d edit. 16; Beawes, pl. 228; Molloy, b. 2, c. 10, s. 18.

⁽y) Marius, 16; and see Carwick r. Vickery, Dougl. 653; Bayl. 55.

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the firm(z) if they were in partnership at the time of the acceptance (a). And III. Modes where A., B., and C., being in partnership, A. drew a promissory note, and of becomsigned the same with his own name only, but prefixing to his signature "for A., By Part-B. and Co.," thus-" Sixty days after sight I promise to pay Lord G. or ner. order 2001. value received, for I. M., T. W., and I. S. -J. M." Lord Ellenborough held this sufficient to bind the firm, and made it a joint or several note(b). And where a promissory note, beginning "I promise to pay," was signed by one member of a firm for himself and his partners, it was held that the party signing might be sued separately upon the note, or they might be sued jointly (c). But if a promissory note appear on the face of it to he the separate note of A. only, it cannot be declared on as the joint note of A. and B. though given to secure a debt for which both were liable(d). And where one of two partners drew *bills of exchange in his own name on- [*59] ly, and got them discounted, and applied the proceeds to the partnership account, it was held, that the party advancing the money had no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills(e), though, in a subsequent case, it appearing that all the partners had caused such bills to be issued for the purpose of raising money for the firm, they were held liable to be sued by the persons who discounted the hills for the money as lent, and for interest (f).

We have seen that unless there is a partnership in trade, there is no im- How seve-

ral Per-Trade, are to sign.

(2) Mason v. Rumsey, 1 Campb. 384. A bill was drawn on "Messrs. Rumsey and Co." and T. R. Rumsey, jun. wrote upon it, "Accepted, T. Rumsey, sen." The present action was defended by T. Rumsey, jun. who contended, that even if he were a partner (which he denied) this acceptance would not bind him. It was contended, that if a bill be drawn upon a firm, it must be accepted in the name of the firm, or by one partner for himself and his co-partners, otherwise the holder might protest the bill as the mere signature of a single partner was binding only upon himself. Lord Ellenborough-There is no foundation for the doctrine contended for; this acceptance does not prove the partnership; but if the defendants were partners, they are both bound by it. For this purpose, it would have been enough if the word "accepted" had been written on the bill, and the effect cannot be altered by adding "T. Rumsey, sen." If a bill of exchange is drawn upon a firm, and accepted by one of the partners, he must be understood to exercise his power to bind his co-partners and to accept the bill according to the terms in which it is drawn. The plaintiff had a verdict.

(a) Dolman v. Orchard and others, 2 Carr. & Pa. 105.

(b) Lord Galway v. Matthews and another,

1 Campb. 403; 10 East, 264, S. C. but not the same point. And see Smi h v. Jarves, 2 Lord Raym. 1484.

(c) Hall v. Smith, 1 Barn. & Cres. 407. The form of the note was, "I promise to pay the bearer, on demand, 1l. value received For W. S., W. P. S., and W. R. T.—W. S.' 2 Dowl. & R. 584, S. C. And see March v. Ward, Peake, R. 130. Clark v. Blackstock, Holt, C. N. P. 474. S. P. and other cases, post, Ch. XII. s. iv. "Promissory Notes," &c.

(d) Siffkin r. Walker and another, 2 Camp. Sons, not Partners in 308; Emly v. Lye and another, 15 East, 7.

(e) Emly v. Lye and another, 15 East, 7. (f) Denton r. Rodie and another, 3 Campb. 493. Per Lord Ellenborough, "I think this case is distinguishable from Emly v. Lye. Here I conceive the partner in America had authority from the two others to raise money for the use of the firm, and money was accordingly raised from the plaintiffs upon these bills in pursuance of such authority. The transaction is a loan rather than a discount. I. B. Clough was sent out to America to manage the business of the house there, and to procure homeward investments; the shipments from this country did not form an adequate fund for that purpose. He says himself that he had a carte blanche as to the means he should adopt; he accordingly raises money, for which he gives, as security, bills of exchange, drawn in his own name, upon the house. They know and recognize this mode of dealing; they regularly accept and pay the bills so drawn, till the time of their failure; therefore, although I cannot say they are jointly liable upon the unaccepted bills, I think they are jointly indebted to the same amount, as for mo-ney lent, or money had and received." It was then suggested, that the plaintiffs, upon this supposition, could not claim interest; but Lord Ellenborough thought, that from the course of dealing, the plaintiffs were entitled to interest, although they did not recover upon the written securities. Verdict accordingly. Sed quære as to the liability for money lent. A discounter of a bill cannot treat it as a loan, so far as to call on one whose name is not on the bill, but is confined to those whose names are on it. Per Bayley, B. in Thicknesse v. Bromilow, 2 C. & J. 425, 432.

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III. Modes plied authority for one owner or party to sign a bill or other negotiable inof become strument for his co-owner, and yet there may be many cases in which pering a Party. sons may, for a particular purpose, or in the execution of a trust, or otherwise be jointly interested in such securities; in these cases, unless an express authority be given, all must separately sign their names whether as drawers (g), acceptors (h), or indorsers (i). Thus, if three assignees of a bankrupt deposit money in the Bank of England, they not being partners in trade must all draw checks to draw it out, though where one of them has absconded, a court of equity will order the Bank to pay checks drawn by the other two So if a bill be drawn upon several persons not in partnership, each of them should accept, and an acceptance by one will bind himself only (l); so if a note be payable to A. B. and C. or order, they not being partners, all of them must indorse (m). If a note begin "I promise to pay," and be signed by two persons, it may be treated as joint or several (n), and requires only one stamp if it were the original contract that all should join(0). So if a note is payable to two joint executors, it was held, in America, that one of them cannot transfer it by his separate indorsement (p).

The giving time to, or taking security from, one of several acceptors of a bill or makers of a note, whether or not general partners, will not discharge the other's liability. The law on that subject, however, will be more pro-

perly considered hereafter.

5. One Partner cannot sue another on a Bill in the Partnership firm (p).

*5. When one Partner cannot sue Co-partner.—It is a general rule that one partner cannot sue his co-partner at law for any debt or demand towards which he himself must ultimately contribute (q); and, therefore, if one of several co-partners obtain possession of a bill drawn, accepted, or indorsed by drawn, &c. another partner, for the purposes of the firm, he cannot sue the firm or any member thereof upon the same (r). Therefore, where a member of a company, for the purposes thereof, drew a bill in his separate name on a debtor to the firm, and indorsed it to an agent of the company, and the latter in-*60] dorsed it to another member of the company who had a claim on the company to a larger amount, it was decided that the latter could not sue the drawer, because he being a partner with such drawer would be liable over for contribution(8). So where the plaintiff, a holder of shares in a washing compa-

(g) Ex parte Hunter, 2 Rose, 363.

(h) Bul. N. P. 270.

(i) Carwick v. Vickery, Dougl. 653; ante, 57, 58.

(k) Ex parte Hunter, 2 Rose, 363.

(1) Bul. N. P. 270. In the case of two joint traders, an acceptance by one will bind both, but if ten merchants employ one factor, and he draws a bill upon all of them, and one of them accepts it, this shall bind him and not the rest; Mar. 2d edit. 16; Beawes, pl. 228; Molloy, b. 2, c. 10, s. 18.

(m) Carwick v. Vickery, Dougl. 653; ante,

58, note (y).

n) March v. Ward, Peake R. 130; Clerk

v. Blackstock, Holt, C. N. P. 474.
(o) Clerk r. Blackstock, Holt, C. N. P. 474; and see Ex parte White, 2 D. & C. 334, rost, Ch. V. s. v.

(p) Smith v. Whiting, 9 Mass. R. 334.

(p) But see as to members of banking copartnerships, 1 & 2 Vict. c. 96, continued by 2 & 8 Vict. c. 68, post, Regulations affecting Banking Companies; see also 7 Will. 4 & 1 Vic. c. 73, s. 3, as to Trading and other Companies having Letters Patent under that act. (q) See in general Holmes v. Higgins, 1 Bar. & C. 74; Tengue v. Hubbard, 8 Bar. & C. 345; 2 Man. & Ry. 369, S. C.; 1 Chit. on Pl. 6th ed. 39 to 41.

This general doctrine, that one partner cannot sue his co-partner for any debt towards which he himself must ultimately contribute, was carried still further in another case, where the plaintiff, an attorney, and B. and C. the defendants, had been niembers of a trading company; and after the dissolution of it, B. and C. were sued by the creditors of the company, and they retained the plaintiff as their attorney to defend the action; and in the course of making that defence a bill of costs was incurred, and it was held that as the plaintiff, as a member of that company, would be jointly liable to contrihute to the expense of defending those actions, he could not maintain any action against B. and C. for his bill of costs; Milburn v. Codd and another, 7 B. & C. 419.

(r) Teague v. Hubbard, 8 Bar. & C. 345; Neale v. Sir T. Turton, 4 Bing. 149.

(s) Teague r. Hubbard, S Bar. & Cres. 345;

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ny, draw bills on the directors of the company for goods furnished by him III. Modes and his brother, and the bills were accepted "for the directors" by the secre- of becomtary of the company, who had authority to accept bills drawn by the plain- ing a Party.

By Parttiff's brother, it was held that the plaintiff could not recover on these bills ner. against the company (t).

But if one partner draw on the other partners by name, or on one or more When one of them, and the drawees were individually to accept, as a mode of paying Partner him a sum of money as his share, or otherwise due to him, such drawer another. might recover against them, because by such an acceptance a separate right is acknowledged to exist (u). Such or a similar transaction would be equivalent to an account stated and a specific sum found due, in which case one partner may sue his co-partner at law for the amount(w). If a member of a joint stock company advance money to *the directors of the company, [*61] knowing that it is to be applied in taking up a bill of exchange to which such directors have become a party for the purposes of the company, it is a question for the jury whether the member advanced the money on the credit of the company at large, or on that of the directors individually (x).

6. When Partners affected by the Promise of a Partner.—It has been 6. How laid down as a general position that there is not any instance in which a person has been allowed as plaintiff in a court of law to rescind his own act, one parton the ground that such act was a fraud on some other person, whether the ner will party seeking to do this has sued in his own name only, or jointly with such prejudice Therefore where A., B. and C. carried on trade in partner-the firm ship, and A. was also in partnership with D.; and A. being indebted to the interse. firm of A., B. and C., before the dissolution of that partnership, unknown to D., indorsed a bill and paid over money (belonging to A. and D.), in discharge of the private debt due from A. to A., B. and C.; and immediately afterwards indorsed the same bill to a creditor of the firm of A., B. and C.; it was held, the partnership between A., B. and C. having been dissolved, that A. and D. could not maintain trover against B. and C. for the bill, nor assumpsit for the money paid by A. out of the funds of A. and D. to A., B. and C., in discharge of his private debt: and A. and D. having afterwards become bankrupt, it was also held that their assignees could not maintain such action (y). And if one of several partners has promised

2 Man. & Ry. 369, S. C. It was also held, the acceptor having become insolvent before the bill became due and the drawer having received from him ten shillings in the pound upon the amount of the bill by way of composition, that the plaintiff could not recover the sum so received by the drawer, because that money must be taken to have been received by him in his character of a member of the company, and not on

(t) Neule v. Sir T. Turton and others, 4 Bing. 149; 12 Moore, 365, S. C. Per Best, C. J. "It may be admitted, that if a partner were to draw on other partners by name, and they were individually to accept, he might recover against them, because by such an acceptance a separate right is acknowledged to exist. But that is not the case here, for the bills are drawn on the directors of the company, and accepted for the directors. They are the agents of the company, and accept as agents of the company. The case, therefore, is that of one partner draw-

ing on the whole firm, including himself. There is no principle by which a man can be at the same time plaintiff and defendant. We are clearly of opinion, that these bills being drawn on the directors, are in effect drawn on the company, of which the plaintiff is himself a mem-ber. He cannot be at the same time drawer and acceptor, and the rule therefore which has been obtained for entering a nonsuit must be made

(u) Per Best, C. J. in Nealo v. Sir T. Turton and others, 4 Bing. 149, last note.

(w) Foster v. Allanson, 2 T. R. 478; Fromont v Coupland, 9 Moore, 819; S. C. 2 Bing. 170; Coffee v. Brian, 10 Moore, 841; S. C. 3 Bing. 55; Boville v. Hammond, 9 D. & R. 186; S. C. 6 Bar. & Cres. 149; Rackstraw v. Imber, Holt, C. N. P. 368; 1 Chitty on Pleading, 6th edit. 39, &c.

(x) Colley v. Smith, 2 Mood. & R, 96. The plaintiff had a verdict. (y) Jones v. Yates, 9 Bar. & Cres. 538.

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III. Modes to provide for a bill, or any one of the firm has no title to recover, the firm of becom- cannot sue in breach of such promise; and therefore if A. draw or cause a bill to be drawn, accepted, or indorsed for his accommodation, and indorse By Part- or cause it to be transferred to himself and partners, they cannot sue the party who so signed for accommodation(z); and where A. and B. requested ner. C. to accept bills for their accommodation, and A. being with two others, executors, and trustees for infants, discounted the bills out of funds in his hands as such executor, it was held that the executors, in conjunction with A., could not sue C., and a perpetual injunction was granted.

II. Public Regulations affecting Corporations and Co-part-NERSHIPS.

II. Public Regulations affecting Corporations and Co-partnerships. Banking Companies (b). 7 Geo. 4, с. 46.

Companies.

98.

During privilege England no Banking Company of more

We have already partially considered how far corporations and companies are, in favour of the Bank of England, prohibited from being parties to certain bills of exchange and notes (a). It may now be expedient to notice more fully the recent acts for the protection of the Bank of England, and to point out how far the members of corporations and co-partnerships may be liable for each other's acts, and how they are regulated.

The 7 Geo. 4, c. 46, intituled, "An act for the better regulating copartnerships of more than six persons as bankers in England, and for amending the Act 39 & 40 Geo. 3, c. 28," legalizes corporations and copartnerships of more than six persons for the purposes of banking, and *authorises them *62] to make and issue their bills and notes at any place exceeding sixty-five miles from London, payable on demand, or otherwise, at any place also exceeding II. Public that distance; and to borrow, owe, or take up, any money on any such bills or notes; but provides that such co-partnerships shall have no place of business as bankers(d) within that distance; and that every member shall be liable for the due payment of all bills and notes issued, and for all monies which shall be borrowed, owed, or taken up by the co-partnership, such person being a member at the date of the bill or note, or becoming or being a member before or at the time of the bill or note being payable, or being such member at the time of the borrowing, owing, or taking up any money on such bill or note by the co-partnership, or while any sum on any bill or note is owing or unpaid; or at the time the same became due from the co-partnership, any agreement, covenant, or contract, to the contrary notwithstanding(e). The 3 & 4 Will. 4, c. 98, intituled, "An Act for giving to the Will. 4, c. Governor and Company of the Bank of England certain Privileges, for a limited period, under certain conditions," after continuing to the Bank of England the exclusive privilege of banking upon the conditions therein mentioned, enacts (s. 2.) that during the continuance of the said privilege, no corporation or co-partnership exceeding six persons, shall make or issue in of Bank of London, or within sixty-five miles thereof, any bill of exchange or promissory note, or engagement for the payment of money on demand, or upon which any person holding the same may obtain payment on demand: but provides

(a) See ante, 15 to 18.

(d) That the prohibition is confined to banking co-partnerships, see the cases, ante, 16, 17.
(e) See section 1.

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⁻ v. Adams and another, 1 Younge Ex. Eq. Rep. 117; Richmond v. Heapy and another, 1 Stark. 202; Sandilands v. Marsh, 2 Bar. & Al. 673; Rapp v. Latham and Parry, id. 795; Sparrow v. Chisman, 9 Bar. & C. 241; Jones v. Yates, 9 Bar. & C. 539.

⁽b) See the law relating to, fully discussed in The Bank of England v. Anderson, 4 Scott, 50, S. C. 8 Bing. N. C. 589; 2 Keen, 328.

that nothing in this act or in the 7 Geo. 4, c. 46, shall prevent any corpora- III. Modes tion or co-partnership, carrying on and transacting banking business at any of becomgreater distance than sixty-five miles from London, and not having any house inga Party. of business or establishment as bankers in London, or within sixty-five miles ner. thereof, (except as hereinafter mentioned,) from making and issuing their bills. II. Public and notes, payable on demand or otherwise, at the place at which the same Compashall be issued, being more than sixty-five miles from London, and also in London, and to have an agent or agents in London, or at any other place at than six which such bills or notes shall be made payable for the purpose of payment issue notes only, but that no such bill or note shall be for any sum less than 51. or be payable on re-issued in London, or within sixty-five miles thereof.

Section 3, after reciting that doubts had arisen as to the construction of sixty-five the 39 & 40 Geo. 3, c. 28, and 7 Geo. 4, c. 46, and as to the extent of the miles exclusive privilege of banking thereby given to the Bank of England, declares of (f). and enacts, that any corporation or co-partnership, although consisting of Any Commore than six persons, may carry on the trade or business of banking in pany or London, or within sixty-five miles thereof, provided that such corporation or Partnerco-partnership do not borrow, once, or take up(f) in England any sum or sums ship may carry on of money on their bills for notes payable on demand, or at any less time than Business of six months from the borrowing thereof, during the continuance of the privi- Panking in leges granted by this act to the Bank of England.

Section 4 provides that all notes of the Bank of England payable on de-ty-five mand which shall be issued out of London shall be payable at the place Miles where issued, &c.

Section 6 declares bank-notes to be a legal tender, except at the bank and tain terms. branch banks.

And by the seventh section it is enacted, that no bill of exchange or pro- Usury (h). missory note made payable at or within three months(h) after the date thereof,

(f) Under this act a London Joint Stock Banking Company, consisting of more than six persons, cannot accept a bill of exchange at less than six months date; The Rank of England v. Anderson, 3 Bing. N. C. 589; S. C. 4 Scott, 50; 2 Keen, 328

And where a bank at Kingston, in Upper Canada, drew a bill payable at sixty days after sight, directed to G. P., manager, joint stock bank, London, which was accepted by G. P., who was the manager of the London Joint Stock Bank, but not a shareholder or partner in that concern, in these words, "Accepted at the London Joint Stock Bank, George Pollard;" and by an arrangement between the London Joint Stock Bank and the Canada Bank, the London Joint Stock Bank guaranteed the payment at maturity of all bills of exchange so drawn by the Canada Bank to the extent of 40,000%; it was held, that this transaction was a violation of the exclusive privileges of the Bank of England within the above act and the other acts relating to the Bank; and an injunction was granted accordingly against the London Joint Stock Bank and G. P. and their agents; The Bank of England r. Booth, 2 Keen, 466.

An allegation in a plea to a count on a bill of exchange, that the plaintiffs were a banking company, consisting of more than six persons,

and that they were illegally associated together under 3 & 4 Will. 4. c. 98, is compounded of law and fact, and therefore traversable; and if traversed, makes it incumbent on the defendant to prove that the plaintiffs carried on business as bankers within sixty-five miles of Londox: Ransford r. Copeland, 1 Nev. & P. 671;6 Ad. & Ellis, 482, S. C.

(h) See jost, Ch. Hl. s. ii. Illegality of Consideration.

The period is now extended to treeline months by 7 Will, 4, and 1 Vict. c. 80, and 2 & 3 Vict. c. 37. The latter act also exempts all contracts for the loan or forbearance of money alove the sum of 101, from the operation of the usory laws, see jost, Ch. III. s. i. Illegality of Consideration.

A note payable or demand is within the protection of the above statute, Vallance v. Siddell, 6 Ad. 3. El. 932; 2 N. & P. 78, S. C. And a party discovating a bill or note is not deprived of the breeft of this act by taking a collateral security; Ex parte Knight, 2 Mont & Ayr. 508; 1 Den. 459, S. C. Aliter, if the money be advanced on other securities and the bill or note merely given to avoid usury; Berrington v. Collis, 5 Bing N. C. 332.

A. agreed with B. to lend him 2001, at the rate of one shilling in the pound per month (60%. per cent. per annum), to be secured as follows,

within London or

London, or

thereof, upon cer-*63]

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Companies.

7 Geo. 4,

c. 46.

III. Modes or not having more than three months to run, shall, by reason of any interest of becom- taken thereon or secured thereby, or any agreement to pay or receive or al-By Part- low interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any(i) bill of exchange or promissory II. Public note be affected (k) by reason of any statute or law in force for the prevention of usury, nor shall any person or persons drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or tak-

ing more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forseiture; any thing in any law or statute relating to usury in any part of

the United Kingdom to the contrary notwithstanding.

The 3 & 4 Will. 4, c. 83, intituled "An Act to compel Banks issuing Will. 4, c. Promissory Notes payable to Bearer on demand to make Returns of their Notes in circulation, and to authorise Banks to issue Notes payable in Lon-83. don for less than Fifty pounds," after requiring corporations and co-partnerships, carrying on banking-business, and issuing promissory notes payable to bearer on demand, to keep accounts of the amount in circulation, and make

*64] periodical returns to the Stamp *Office, under a penalty of 500l. for default, enacts, (s. 2) that any corporation or co-partnership, exceeding the number of six persons, carrying on business as bankers, may make any bill of exchange or promissory note of such corporation or co-partnership payable in London, by any agent of such corporation or co-partnership in London, or draw any bill of exchange or promissory note upon any such agent in London, payable on demand or otherwise in London, and for any less amount than 50l. not-

withstanding the 7 Geo. 4, c. 46, s. 2. See post, 819,(6).

The 7 Geo. 4, c. 46, s. 3, repeats the prohibitions in favour of the Bank of England, but authorizes any corporation or co-partnership to discount, in London or elsewhere, any bill of exchange not drawn by or upon any such corporation or co-partnership, or by or upon any person on their behalf.

The 4th section requires that such co-partnership shall, before issuing any bill or note, deliver at the Stamp Office in London an account, containing the name of the firm and members, and places where the business of banking is to be carried on, and the names of one or more members who shall have been appointed public officers, and which account is to be verified by the secretary or other public officer, and to be renewed from time to time.

The 9th section enacts, that all actions and suits and petitions to found any commission of bankruptcy(g) against any persons indebted to such corporation or partnership, and all proceedings at law and in equity, shall be in the name of any one(h) of such public officers of the company, and that in-

dictments may lay the property in one of such officers.

viz.; whenever any portion of the money should be advanced, the borrower was to give a promissory note, payable one month after date, to be renewed as often as it should fall due, and for each renewal one shilling in the pound was to be paid by way of discount; it was held that the promissory notes so given were within the protection of 3 & 4 Will. 4, c. 98, s. 7, and 7 Will. 4 & 1 Vic. c. 80; Holt v. Miers, 5 Mee. & W. 169.

(i) Should be any such bill, &c. See Vallance v. Siddell, 6 Ad. & El. 932; 2 N. & P. 70. S. C. There is the same omission in the 7 Will. 4, and 1 Vict. c. 80, but the mistake is

rectified in the 2 & 3 Vict. c. 37.

(k) Therefore a warrant of attorney given to secure the payment of a bill or note within the act is also protected; Connop r. Meaks, 2 Ad. & El 326; 4 N & M 302, S. C.

(g) See Guthrie v. Fish, 5 Dowl. & R. 24;

3 Stark. 153, S. C.

(h) Two plaintiffs on the part of a banking company having sued as public officers, the court allowed the proceedings to be amended, by striking out the name of one of the plaintiffs on payment of costs, even after issue delivered. Holmes r. Binney, 4 Bing. N. C. 454; 6 Scott, 346, S. C. As to affidavit of debt by public officer, see Spencer r. Newton, 6 Ad. & El. 680; 1 N. & P. 828, S. C.

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The 10th section provides that only one action shall be brought against III. Modea

such public officer.

The 11th section enacts, that decrees of a court of equity against the pub- ing a Party.

By Partlic officer may, by leave of the court, be enforced against every or any mem-ner. ber of such co-partnership as if such members were actually parties to the II. Public suit.

Compa-

The 12th section enacts, that judgments and decrees shall be effectual against the property of the corporation or company, and of every member

The 13th section enacts, that where execution may issue upon any judgment against the public officer, it may be issued against any member for the time being; or if that should be ineffectual, then against any person who was a member at the time when the contract on which the judgment was obtained was entered into, or who became a member at any time before such contract was executed, or any person who was a member at the time the judgment was But then it is provided, that no such execution shall issue as last mentioned without leave of the court(i), nor after three years next after any such person shall have ceased to be a member.

The 14th section provides, that the public officer shall be reimbursed and fully indemnified out of the funds of the co-partnership, or, on failure thereof, by contribution from the other members of such co-partnership, as in the

ordinary cases of co-partnership.

*The act then provides for such co-partnership issuing unstamped notes on [*65] giving bond, and for licences, and subjects the corporations to penalties for omitting returns, or making false returns, and for issuing prohibited bills or notes within the prescribed distance (k).

It having been decided by the court of Exchequer(1) that spiritual per-Spiritual sons, being members of a banking company, are within the prohibition of the persons. 57 Geo. 3, c. 99, s. 3, against such persons being engaged in any trade or dealing for gain or profit, the act of 1 & 2 Vict. c. 110, was passed for the protection of existing co-partnerships, whereby it is enacted that no associa- 1 & 2 Vict. tion or co-partnership already formed for the purpose of carrying on the business of banking or other trade, or dealing for gain and profit, nor any contract entered into by any of them, shall be deemed illegal or void by reason only of spiritual persons being or having been members of such association or co-partnership.

The 1 & 2 Vict. c. 96, enables banking co-partnerships and their mem- Power to bers respectively to sue and be sued in the name of their public officer, in sue and be sued, 1 & sued, 1 & the same manner as if the parties forming the co-partnership, had not been 2 Vict. c. members thereof. The 2d section enacts, that one action may be pleaded 96. in bar of another for the same demand. The 3d section extends the provisions of 7 Geo. 4, c. 46, and 6 Geo. 4, c. 42, (Ireland) to the present act. And the 4th section enacts, that no claim which any member may have in respect of his share, &c. of the joint stock, shall be set off against a demand of the co-partnership (m).

In Scotland(n) and Ireland(o) also, there are acts containing regulations

(i) See Bartlett v. Pentland, 1 Bar. & Ad.

(k) See the enactments, Chit. Stat. 93, 94. See also 9 Geo. 4, c. 23, ib. 1023 to 1026, and post, Ch. IV. Stamps.

(1) Hall v. Franklin, 3 M. & W. 259, ante,

(m) This act, which was only to remain in force till the end of the session of 1839, is continued by the 2 & 3 Vict. c. 68, until 31st

Aug. 1840. See post, 819, (7).
(n) 7 Geo. 4, c. 67, anle, 17, note (r).
(o) 5 Geo. 4, c. 73, and 6 Geo. 4, c. 42; see 5 Geo. 4, c. cix, ante, 18, note (s).

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ing a Party. By Part-

II. Public Companies.

Individual liability as

members.

III. Modes of societies or partnerships, and the modes of suing or being sued in their of become name, or in the name of their public officers (o).

It will be observed that the 7th Geo. 4, c. 46, s. 1, increases the common law liability, which in general only subjects partners to the payment of bills and notes made or re-issued by themselves, and whilst they were all partners, whereas that act subjects them to liability to pay all bills and notes issued even before they became partners, but which still remain unsatisfied. And under the 13th section a person who ceases to be a member of a banking concern continues for three years liable to an execution in respect of every engagement, bill or note, which had existence, and was an outstanding security against the firm, at any time, whether before or whilst he was a partner, and which was not paid or satisfied when he retired, or which, having been paid, was re-issued before he ceased to be a partner. At common law, in the case of a banking concern, a retiring partner remains for six years afterwards liable upon all outstanding bills and notes, and he must take care when he retires, to stipulate and secure himself against them, so as to compel his partners to provide for them, and indemnify him; but such stipulation is in effect a mere private bargain with his partners, and if not fulfilled by them, he still remains liable to third persons as before (p). [*66]

With respect to re-issuable notes, unless on re-issuing the same *after a partner had retired, the name of the firm was altered on the face of them, he might incur a fresh liability to any holder not having had notice of his retiring; but if such alteration in the firm was apparent on the face of the notes, or duly communicated to the public, that would sufficiently protect him against all fresh issued notes; the principle of the case of Barfoot v. Goodall(r)

would in this respect be applicable.

Upon the whole, although under the statute and at common law there are liabilities which may attach on banking parties which it requires due precaution to guard against, yet, exercising ordinary prudence, a person incurs but liule more risk than is incident to most co-partnerships, who could not be made liable to any execution against their persons. It cannot have been intended to take away the ordinary remedies against partners; and in equity a creditor of a firm may proceed against the estate of the deceased, when the survivors There is no difference in principle between the case are unable to pay (s). of a banking-house and any other partnership, as to the equity of the creditor against the deceased partner's estate; and money paid into a banker's constitutes a debt, not a deposit; and a creditor's leaving money in the hands of the surviving partners in a bank does not constitute a new contract, nor operate as a relinquishment of the old security(t). And where bankers upon a deposit of money with them gave deposit notes bearing interest, and the partnership was dissolved, and one of the partners soon afterwards died, and his creditors were called by advertisement, and a new partnership was formed by the survivors and others, who re-issued notes of the former partnership, and paid the interest of the deposit notes for near two years, and then failed, it was held that the assets of the deceased partner were not discharg-And even a judgment at law against a surviving partner is no extin-

56è. (n) Daniel v. Cross, 3 Ves. 277.

⁽p) Ante, 54, 55. (r) Barfoot v. Goodall, 3 Campb. 147.

⁽s) Lane v. Williams, 2 Vern 277, 292, (Chit. jun. 186); Daniel v. Cross, 3 Ves. 277; Anderson v. Malthy, Bro. C. C. 423; 2 Ves.

jun. 144, S. C.; Jacomb v. Harwood, ante, 42, note (d); 2 Ves. 265. (1) Id. ibid.; Devaynes v. Noble, 1 Mer.

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guishment in equity of a claim against the effects of a deceased or retired III. Modes

Original shareholders incur no greater liability than subsequent purchasers $_{By}^{\text{ing a Party.}}$ of shares; each of them is liable to see to the complete payment of every ner. contract entered into whilst he was actually a partner; and the statute seems II. Public further to make him liable also on contracts entered into before he was a Compapartner, but which remain unsatisfied in his time, and which the legislature nies. considers him in effect to have adopted, as if he had personally made them.

By the 7 Will. 4 & 1 Vict. c. 73, intituled "An Act for better enabling Trading Her Majesty to confer certain Powers and Immunities on trading and other Compa-Companies," after reciting and repealing the 6 Geo. 4, c. 91, s. 2, and 4 7 W. 4 & & 5 Will. 4, c. 94, it is enacted (s. 2,) "That it shall be lawful for the 1 Vict. c. crown, by letters patent under the great seal, to grant to any company or 78. body of persons associated together for any trading or other purposes whatsoever, although not incorporated by such letters patent, any privilege or privileges which, according to the rules of the common law, it would be competent to the crown to grant to any such company or body of persons in and by any charter of incorporation."

Section 3 enacts, "That in such letters patent it may be declared that Power to all suits and proceedings on behalf of such company or body *against any sue and be person or persons, whether members or not of such company or body, shall be prosecuted in the name of one of the two officers for the time being to be appointed to sue and be sued on behalf of such company or body according to the directions of the act, and that all suits and proceedings on behalf of any person or persons, whether or not members of such company or body, against such company or body, shall be prosecuted against one of such officers."

Section 4 enacts, "That such letters patent may declare that the mem- Individual bers of such company or body so associated shall be individually liable in liability of their persons and property for the debts, contracts, engagements and liabilities of such company or hody to such extent only nor charge on the line (x). ties of such company or body to such extent only per share as shall be declared and limited by such letters patent."

Section 21 continues the liability of persons ceasing to be members, until the transfer of shares shall be registered.

Section 24 points out the mode in which the individual liability of members shall be enforced.

And by section 29 it is enacted, "That it shall be lawful for the crown, Charters of in any charter of incorporation to be thereafter granted, to limit the duration incorporathereof for any term or number of years, or for any other period whatsoever; and also in any charter of incorporation (whether in perpetuity or for any term or period), either by reference to that act or otherwise, to make the corporation thereby formed, and the officers and members thereof, subject to all of the provisions, liabilities, and directions thereinbefore authorised to be imposed on or required from any unincorporated company or body, or its officers or members, and also to confer on such corporation or its members

pect to members of corporations. In general the members of a corporation are not personally liable at law for the debts of the corporation, but only the corporate funds.

⁽v) Jacomb v. Harwood, 2 Ves. 265. (x) The repealed statute 6 Geo. 4, c. 91. s. 2, (s. 1 of which act repealed the 18th, 19th and 20th sections of the Bubble act, 6 Geo. 1, c. 18) contained a similar provision with res-

By Partner.

III. Modes and officers all the powers or privileges thereinbefore authorised to be conof becom-ing a Party ferred on any unincorporated company or body, or its officers or members; and that all the powers, provisions, clauses, matters and things thereinbefore contained in reference to unincorporated companies or bodies shall accordingly in such case, and so far as the same may be applicable, be considered to belong and apply to such corporation(y)."

II. Public Comp anies.

(y) See the other provisions of this act, Chit. & H. Stat. 1167, et seq.

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*CHAPTER III.

OF THE CONTRACT OR CONSIDERATION ON WHICH A BILL OR NOTE MAY BE FOUNDED.

I. OF THE ADEQUACY OF CONSID	ERA
TION. WHEN ESSENTIAL. CO	NEE
QUENCES OF TOTAL ABSENCE O	
OR SUBSEQUENT FAILURE TO	
LY OR PARTIALLY; OR IN NEG	
ATION, AND WHEN OR NOT A	
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First. Want of Consideration when a 1	De-
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Prior legal Debt not extingu	
ed by subsequent illegality	id.
III. RELIEF AT LAW AND IN EQ	
TY IN CASES OF FRAUD.	OR.
***	OR OR
LLEGALITY. &c.	97

In a proper bill transaction, it was formerly drawn in execution or per-General formance of a previous distinct contract of exchange or bargain, made at one observaplace, to cause another person at a different place to pay or deliver at the the Conlatter, to a third person or his order, a sum of money, and thereby prevent tract or the trouble and risk of actually transmitting the money itself from the first Consideraplace to the latter. But bills soon became the ordinary modes of engaging which a to pay a prior debt at a future day, and at any place, and of completing eve- Bill or Note ry contract to be satisfied by the payment or delivery of money. And now may be founded. a bill or note may, in general, at least in this country, be made in pursuance of any legal contract, and for any adequate and legal consideration. they have these peculiar qualities and privileges, that whether or not a sufficient consideration be expressed on the face of them, the adequacy of the consideration is always presumed; and although the contrary may be proved, yet the claim of a bona fide holder, who has given value for it before it became due, will not, in general, be thereby prejudiced(a). It will be important to keep these peculiar privileges constantly in view.

'(a) See several instances in the following brought was thirteen years old, and that the pages. In Morris v. Lee, K. B. 26 G. 3, it defendant had been swindled out of it. But appeared that the note on which the action was the court held, that however improperly it might

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I. Adequacy of consideration. First Want of Consideration when a Defence (b).

Presumption of Adequacy. We will consider the law upon these points under the above heads.

*I. Adequacy of Consideration.

The general rule seems to be, that when the holder, or the person for whom he is agent or trustee, promised the defendant, either expressly or impliedly, to pay the bill or note drawn, indorsed, accepted, or made by him 69 I for accommodation, or where the defendant received no consideration, and the plaintiff, or the person for whose use he sucs, gave none, then there is a sufficient defence. But in general, it is a presumption of law, that every bill or note, whether expressed or not on the face of it to have been given for value received, was given for adequate value, and consequently it is not, as in the case of other contracts, necessary for the plaintiff, in the first instance, to allege or prove a consideration (c). And although that presumption may, between the original parties(d), or when a holder has not himself given any value, or only a part(e), in general be rebutted (f)(1), yet the onus probandi lies on the defendant, and the holder is not bound to prove that he gave value, until the defendant has first made out a case of fraud, or suspicion of fraud, upon establishing which, the holder must then prove that he received the bill or note before \dot{u} was due(g), and that he, or some other person for whose use he sues, gave value for it (h)(2); but it is not sufficient, in order

have been obtained, a third person, who took it fairly, and gave a consideration for it, was entitled to recover; Bayley on Bills, 5th ed. 500, note 16; and see Smith v. Knox, 3 Esp. Rep. 46, (Chit. jun. 617), post. ;

(b) How pleaded, rost, Part II. Ch. IV. Defence and Pleas.

(c) Philliskirk v. Pluckwell, 2 M. & Sel. 395, (Chit. jun. 903); Ridout v. Bristow, 1 Tyr. Rep. 84; 1 Cro. & J. 231, (Chit jun. 1518); and Guichard v. Roberts, 1 Bla. Rep. 445, (Chit. jun. 371); Crawley v. Crowther, 2 Freem. 257, (Chit. jun. 231). Per Lord Chancellor, "It is now held, and the practice is so, that if a man holds a note for money payable on demand, he need not prove any consideration;" and see Trials per Pais, 501; Meredith c. Short, 1 Salk. 25; 2 Ld. Raym. 760, (Chit. jun. 202); 2 Bla. Com. 446; Selw. N. P. 9th edit. 320.

(d) See Whitaker v. Edinunds, 1 Ad. & El. 638; Heydon r. Thompson, id. 210; 3 N. & M. 319, 324, S. C.; post, Part II. Ch. V. s. i. Evidence .- Consideration.

(e) See Simpson v. Clarke, 2 C. M. & Ros. 342, post, 70.

(f) Per Abbott, C. J., in Holliday v. Atkinson, 5 Bar. & C. 503; S D. & R. 163; (Chit. jun. 1290), S. C., post, 74, note (x).
(g) When defendant bound to prove that bill was indorsed after due; Lewis r. Parker, 4 Ad. & El. 838, S. C.; 6 N. & M. 294; 2 Hurl. & Woll. 46; post, Part II. Ch. V. s. l. Evidence .- Consideration.

(h) See per Eyre, C. J., in Collins v. Martin, 1 Bos & Pul. 651, (Chit jun. 576; Morris v. Lee, K. B., Hil. 26 Geo. 3; cited in Anonymous, 1 Com. Rep. 43, (Chit. jun. 205). and Bayl. 233, 5th edit. note 16; Hayly r. Lane, 2 Atk. 182, (Chit. jun. 294); see also per Buller, J., in Lickbarrow r. Mason, 2 T. R. 71; Poth. pl. 118, 121; Selw. N. P. 9th edit. 320. Per Eldon, C. J. Bank of Ireland v. Beresford, 6 Dow, 237, (Chit. jun. 1032); Charles v. Marsden, 1 Taunt. 224, (Chit. jun. 750); Noel r. Boyd, 4 Dowl. 415

(1) Russell & al. v. Hall, 20 Martin's Louis. Rep. 553. Booker v. Lastrapes, 2 Miller's Louis. Rep. 52. | Stevens v. McIntire, 14 Maine Rep. 14. }

⁽²⁾ The general principles upon this subject seem fully admitted in the United States. It seems, indeed, at one time to have been doubted, whether the want of consideration could be set up even in an action between the original parties to a note; and it was then said, that all the cases cited were cases in which there was, not a want, but a failure of consideration. Livingston r. Hastie, 2 Caines' Rep. 246, and see also the opinion of Livingston, J. in Baker r. Arnold, 3 Caines' Rep. 279. But it is now held that there is no difference in this respect between a want and a failure of consideration; and that each may be set up as a defence not only between the original parties, but also against a holder, claiming by indorsement after the note has become due, or taking it with a knowledge of fraud or other equitable circumstances, entitling the maker to avail himself of the defence. Pearson v. Pearson, 7 John. Rep. 26. Store v. Wadley, 3 John. Rep. Ten Eyck v. Vanderpool, 8 John. Rep. 120. Denniston v. Bacon, 10 John. Rep. 198. Woodhull v. Holmes, 10 John. Rep. 231. Frisbee v. Hoffnagle, 11 John. Rep. 50. Thatcher v. Dinsmore, 5 Mass. Rep. 299. Warner v. Lynch, 5 John. Rep. 239. Baker v. Arnold, 3 Caines' Rep. 279. Tappan v. Von Wagenen, 3 John. Rep. 465. Bayley v. Faber, 6 Mass.

to cast the onus of proving consideration upon the holder, for the defendant I. Adequamerely to show that he received no consideration, as in the case of an ac-cy of Con-

Rep. 451. Slade v. Halsted, 7 Cowen, 322. Hills v. Bunnister, 8 Cowen, 31. Lawrence v. Want of The Stonington Bank, 6 Conn. Rep. 521. Hill v. Buckminster, 5 Pick. 391. Hampton v. Blake- Consideraley, 3 M'Cord, 469. M'Creary v. Jaggers, Ib. 473, note (a). Nixon v. English, Ib. 549. tion when Thompson v. Hale, 6 Pick. 259. A promissory note made on the 3d September, 1817, payable a Defence. on demand, and indorsed on the 25th of May, 1818, is to be deemed over-due, and subject, in the hands of the indorsee, to all infirmities. Nevins r. Townsend, 6 Conn. Rep. 5. But a promissory note given in consideration of the sale of pews, followed with possession by the vendee, cannot be avoided on the ground that the vendor refuses to convey;—I he remedy is by compelling a performance. Freligh v. Platt, 5 Cowen, 494. And the want of consideration may in like manner be set up in an action by a second indorsee against his immediate indorser. Herrick v. Carman, 10 John. Rep. 224. But that a note was made for the accommodation of the maker, and without consideration, is no defence in an action by a bona fide holder for a valuable consideration against an indorser, although he had knowledge of the fact at the time he took the bill. Brown v. Mott, 7 John. Rep. 361. Nor if the action were against an acceptor for the accommodation of the drawer, would the like defence avail, Ibid; nor, as it should seem, even if the holder took the bill after it was due. Ibid. But if the indorser of a promissory note prove that it was put into circulation fraudulently, he may call upon the holder to show what he gave for it, and how it came into his hands. And the indorser is entitled to give such proof, in order to require such explanation from the holder. Holme v. Kursper, 5 Bin. Rep. 469. See also Ball v. Allen, 15 Mass. 438. See also Braman v. Hess, 13 John. Rep. 52, and Olinstead v. Stewart, 13 John. Rep. 238. See Stockbridge v. Damon, 5 Pick. 223.

A promissory note whereby A. "as administrator of P. B. deceased, promised to pay" the

plaintiff a certain sum, " for value received by J. B. and heirs, on demand, with lawful interest until paid," has, on demurrer to the declaration, been held void for want of a sufficient consideration. Ten Eyck v. Vanderpool, 8 John. Rep. 120. And a note made in aid of a fund for the support of a minister of a parish has also been adjudged void for want of consideration. Rontelle v. Cowden, 9 Mass. Rep. 254. A note given by a devisor, in his lifetime, to secure a devisoe in the will against the alteration or revocation of the will, is without consideration and void. Win-

chell v. Lutham, 6 Cowen, 682.

The consideration of a promissory note, may be inquired into as between the original parties, and if there is no consideration for the promise, it is nudum pactum and cannot be enforced by an action. Schoonmaker v. Rose, 17 Johns. 301. Loffland r. Russell, Wright's Rep. 438.

When a promissory note is assigned for a valuable consideration, and in the course of business, the assignee cannot be affected by any transactions between the assignor and the parties to such note, to which the assignee is not privy, and evidence to that effect is not relevant. But such evidence is relevant if it shows that the assignee was a trustee or had notice of the transactions, or did not receive the note in the usual course of business. Harrisburgh Bank v. Meyer, 6 Serge & Rawle, 537.

It has been lately decided in Pennsylvania, that although by an act of assembly passed in the'\
year 1715, the indorsee of a promissory note is to recover "the money mentioned in such note, or so much thereof as shall appear to be due at the time of assignment;" yet if the note be expressly made payable, "without defalcation" and be transferred to an indersee for a valuable consideration and in the course of business, the maker cannot set up failure of consideration, in a suit by the indorsee. Lewis v. Reeder, 9 Serg. & Rawle, 193.

The holder of a note payable to A. B. or bearer, in order to maintain an action upon it, a ust aver and prove that the note was delivered to him for a good consideration. Byington v. Ged

dings, Ohio Rep. Cond. 333.

In an action between the indorser and indorsee the consideration may always be inquired into; and the indorsee cannot recover beyond the extent of the consideration actually paid. Brock v.

In Indiana a note for the payment of a certain sum annually until certain deeds should be executed is, under the statute of that State, like a promissory note under the statute of Anne, a debt Fer se, and may be declared on without the averment of any consideration. Arnold v. I'rown, 3 Blackf. 273.

In an action on a promissory note against the maker by an indersee, to whom it was endorsed before it became payable, and without any notice of a defence, in payment of a pre-existing debt, want of consideration or the failure of it, cannot be given in evidence in defence. Homes v. Smyth, 16 Maine Rep. 177. Nor in an action by subsequent holder to whom it has passed by the indorsee, though the note was thus indorsed on a collateral security for a demand short of its nominal value. Smith r. Hiscock, 14 Maine Rep. 449.

But where a negotiable note has been assigned, but not indorsed, proof by the maker, that there was no consideration, or that the note was fraudulently obtained by the payee, is admissi-

ble. Calder r. Billington, 15 Maine Rep. 398.

A promissory note executed without consideration, and with a view to protect the maker's property from his creditors cannot be enforced against the maker by the proces. Walker v. Mc-Connica 10 Yerg. 228.

Where a partner procured a note to be made to his firm as accommodation paper, and trans-

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mideration.

First. Want of Consideration when

I. Adequa- commodation acceptance (i). And it should seem that although the defendcy of Con- ant is at liberty to prove the want, or failure, or illegality of the consideration, yet when the bill or note on the face of it states an adequate consideration, the defendant is estopped from showing a different consideration, in contradiction to his written admission, as that a note, given by an adminitratrix, and expressed to be "for value received by my late husband," was • Defence, given only as an indemnity, and that the payee had not been damnified(k).

*However, in general, between the original parties, or a holder who has not given full value, the defendant is at liberty to show that he drew, accepted, indorsed, or made the bill or note, for the accommodation of the plaintiff, or of one of them, or of a person for whom he is trustee, who either expressly or impliedly engaged to provide for the bill(l); or the defendant may show that he received no consideration, or none that was in point of law adequate, and thus may entirely defeat the action or reduce the claim. Therefore, where the defendant accepted a bill for the accommodation of the plaintiff, except as to a part(m); and where the plaintiff, as indorsee, had only advanced a part of the money payable by the bill, accepted for the indorser's

(i) Mills v. Barber, 1 M. & W. 425, S. C.; 5 Dowl. 77; 2 Gale, 5; and see Percival v. Frampton, 2 C., M. & R. 180; 3 Dowl. 748, S. C.; post, Part II. Ch. V. s. i. Evidence .-Consideration.

(k) Ridout v. Bristow, 1 Tyrw. Rep. 84; 1 Cromp. & J. 231, (Chit. jun. 1518); and see per Purke, B., in Edwards v. Jones, 2 M. & W. 414, 418, 419, and the cases post, Ch. V. s. i., as to parol evidence of a contingent bar-

gain or agreement to renew. It is a sufficient consideration for a promissory note that it be given by a widow out of respect to the memory of her late husband. Ridout v. Bristow, supra. But in such case it must appear on the face of the record that the maker of the note was the wife of the deceased; Nelson et ux. (late Waterworth) v. Serle (in error), 4 M. & W. 795; 3 Jurist, 290, S. C.; and upon this ground the judgment of the Court of Exchequer in Serle v. Waterworth, 4 M. & W. 9; 6 Dowl. 684, S. C., was reversed. If the wife be also administratrix of her deceased husband there may be a good consideration in the nature of forbearance; id. ib.

(1) Darnell v. Williams, 2 Stark. Rep. 166, (Chit. jun. 998); Wiffen v. Roberts, I Esp. Rep. 261, (Chit. jun. 536); Jones v. Hibbert, 2 Stark. Rep. 304, (Chit. jun. 1009); -Adams and others, Youngo's Ex. Rep. 117; Sparrow v. Chisman, 9 Barn. & C. 304; 4 M. & R. 206, (Chit. jun. 1422); Richmond v. Heapy, 1 Stark. Rep. 202; 4 Campb. 207, (Chit. jun. 952); Jacaud v. French, 12 East, 823, (Chit. jun. 789); Sandilands v. Marsh, 2 B. & Al. 673; Rapp v. Latham, id. 795; Puller v. Roe, Peake's Rep. 197, (Chit. jun. 511); and per Lord Tenterden in Jones v. Yates, 9 Barn. & C. 539, (Chit. jun. 1433); Thompson v. Clubley, 1 M. & W. 212; post, 71, 72; and see Baylis v. Ringer, 7 C. & P.

691, as to agreement not to sue suddenly on note payable on demand.

(m) Darnell v. Williams, 2 Stark. Rep. 166, (Chit. jun. 998); Payee against accepter of a bill for 191. 12s. Defendant proved that he had value only for 101., and that he accepted for the rest to accommodate the plaintiffs. And per Lord Ellenborough, "though this, as to third persons, is a bill for 191. 12s., as between these parties the acceptance is for 10t. only," and that sum having been paid before the action, he nonsuited the plaintiff; see Barber r. Backhouse, Peake's R. 61; post, 78, note (i). In Homan r. Thompson, 6 C. & P. 717, it was agreed between the plaintiff and defendant and H. that the defendant should make his note for 20/, and that the plaintiff should draw on his banker for 201. and pay in this note, and the plaintiff was to have 71. 12s. and the two others 61. 4s. each. The meney was thus procured, and the defendant not wanting his 61. 4s. let H. have it. It was at first agreed, that when the note became due they should contribute their respective shares to meet it; but H. told the plaintiff afterwards that he would provide 121. Ss. towards it; held (per Parke, B.) that if the defendant gave this note for the accommodation of the pluistiff and II., the plaintiff would not be entitled to recover on it; but that if the plaintiff was to advance 20%. and receive 71. 12s. as a gift, the plaintiff would be entitled to recover the whole of the 201. on the note; held also, that if the defendant was to be only security for 121. 8s. he would be liable only to that amount; and that if each was to repay his own share, the plaintiff could only recover 61. 4s. from the defendant; and that H. saying afterwards that he would pay 121. 9s. would make no difference, unless the plaintiff then made a new bargain to release the defendant from liability altogether.

ferred it for his sole benefit in the partnership name, the holder was, on proof of the manner in which the note was created and put in circulation, required to show that he received it bona fide and for a valuable consideration. Bank of St. Albans v. Gilliland, 28 Wend. 811. }

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accommodation(n), neither was allowed to recover more than he had ad- I. Adequavanced. So in an action on a bill for 981. 5s. 3d. by a second indorsee cy, of Conagainst the acceptor, where the pleadings admitted that the acceptance and first indorsement were without consideration, and the issue was whether the First. plaintiff gave value for the indorsement to him; and the plaintiff, instead of Want of Considerarelying on the mere production of the bills, gave evidence of a debt to tion when the amount of 571. due to him from the first indorser, and of another debt a Defence. to the amount of 201. 18s. due to him from his immediate indorser for goods sold, it was held that he was entitled to a *verdict only for the latter amount [*71] (o). And in an action on a note payable on demand, and expressed to be for value received, brought by the executors of A. against the executors of B., where the defendants adduce evidence to show that B. being very ill made his will, and stated that he had left A. 100l. for his trouble in acting as his executor; that three days after A. said to B. that as he was to have 100l. for acting as his executor, it would save the legacy duty if B. would then sign a promissory note for the amount, which B. accordingly did; and that B. recovered and A. died in the lifetime of B.; it was held, that the evidence was admissible, as showing a total failure of consideration, and that the executors of A. were not entitled to recover on the note (p). where an action is brought by several plaintiffs, whether or not general partners, as indorsees, against an acceptor, it is a good defence to show that the acceptance was given to accommodate one of them, or on his promise to provide for the bill, and the innocent co-plaintiffs, however defrauded by this partner, cannot recover at law or in equity (q); and where the defendant accepted bills, at the request of C. and D. for their accommodation, and C., being with E. and F., co-executors of G., and co-trustees of his estate, for the benefit of infants, discounted the bills out of the trust-money in C.'s hands, and indorsed the bills in C. and D.'s names, and deposited such bills in a strong chest with the other trust securities, and C. and D.

(n) Wiffen v. Roberts, 1 Esp. Rep. 261 (Chit. jun. 586), per Lord Kenyon, "Where a bill of exchange is given for money really due from the drawes to the drawer, or is drawn in the regular course of business, in such case the indorsee, though he has not given the in-dorser the full amount of the bill, yet may recover the whole, and be holder of the overplus above the sum really paid to the use of the indorser; but where the bill is an accommodation one, and that known to the indorses, and he pays but part of the amount, in such case he can only recover the sum he has actually paid on the bill." See Jones v. Hibbert, 2 Stark. C. N. P. 304, (Chit. jun. 1009); there defendant accepted a bill for 4151., to accommodate Phillips & Co, who indorsed to their bankers, the plaintiffs, for value, and became bankrupts. The bankers knew it to be an accommodation acceptance, and their demand against Phillips & Co. was only 2651. In an action by them upon this acceptance it was held, that they could recover only that sum, and they had a verdict accordingly; and see Nash v. Brown, MS. post, 74, n. (x); but see Reid v. Furnival, 1 C. & M. 538; post, 79, 80; as to the right of a party who has guaranteed part only of a bill to sue for the whole amount; and Edwards v. Jones, 2 M & W. 414, post, 79, as to the right of a holder for part value to recover full amount, notwithstanding agreement between

parties not to sue except on certain terms.

(o) Simpson v. Clarke, 2 C., M. & R. 342; 1 Gale, 237, S. C. That the plaintiff was not bound to prove consideration until the defendant had first made out a case of fraud or suspicion, see Mills v. Barber, 1 M. & W. 425; ante, 69, note (i).

(p) Solly v. Hinde, 2 C. & M. 516; 6 C. & P. 316, S. C.; see further as to the delivery of a bill or note by way of gift, past 74

a bill or note by way of gift, post, 74.

(q) Sparrow and others v. Chisman, 9 B. & C. 241; 4 M. & R. 206, (Chit. jun. 1422). Action by plaintiffs as indorsees of two bills for 1500l. each, drawn by Peckover, one of the plaintiffs, indorsed by him to himself and coplaintiffs, against the defendant as acceptor. The defendant accepted for accommodation of Peckover, who engaged to pay them, and a verdict having been found for the plaintiffs, a new trial was granted, on the ground that as Peckover was to have provided for the bills, he and his co-partners were precluded from joining in an attempt to enforce payment from the defendant; and see Richmond v. Heapy, 1 Stark. Rep. 262; 4 Campb. 207, (Chit. jun. 952); Jacaud v. French, 12 East, 323, (Chit. jun. 789); Sandilands v. Marsh, 2 Barn. & Ald. 673; Rapp v. Latham, id. 795; Puller v. Roe, Peake's Rep. 117; and Lord Tenterden's observations in Jones v. Yatos, 9 B. & C. 539, S. P.; 4 M. & R. 613, (Chit. jun. 1432).

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sideration.

First. Want of Consideration when

I. Adequa- became bankrupts, a court of equity granted a perpetual injunction, to stay cy of Con- proceedings in an action by C. E. and F. as indorsees, against the defendant as acceptor, because C., one of the plaintiffs, was bound to provide for the payment of the bills; and that the circumstance of C. being a trustee made no difference even in equity (r); and the assignees of such parties, in case they have become bankrupt, are equally subject to the same defence(s). So it a Defence, is a good defence to an action against the drawer, that at the time when the plaintiff discounted the bill he verbally agreed, in case it was dishonoured, not to proceed against the drawer, although the act of drawing prima face amounts to an absolute contract to pay in default of the acceptor(t). And in an action by the indorsee against the acceptor of a bill, it is competent to *72] the defendant to show that the *acceptance was for the accommodation of the plaintiff, and that he has received no consideration from the drawer, and that it was agreed that the bill when due should be taken up by the planuiff(u).

Delivery of Bill for special purpose.

So where a bill has been delivered to a person for a special purpose, be and all persons taking the same with knowledge of the facts must fulfil it; as where a bill has been received by the plaintiff to get discounted, he cannot apply it to his own use in satisfaction of a debt(x); and if he pays it away in discharge of a debt of his own, he will be liable to the party from whom he received it, the same as if he had discounted the bill(y). So where a bill was drawn by A. and accepted by B. for the purpose of being discounted, and having the proceeds applied to the payment of other bills accepted by B., but the other bills, before they became due, were paid by B., who directed A. to hold the first-mentioned bill for his B.'s use, and not to part with it without authority, but A. for his own purposes indorsed it to C. for a valuable consideration, having first informed the latter that it belonged to B., and that he A. had no authority to part with it; it was held that the property in the bill was in B., and that he (although the acceptor of it) might, under these circumstances, maintain an action of trover for the bill against C., and obtain a verdict for damages to the full amount of the bill, subject to be reduced to nominal damages on delivering up the bill(z). And if A., the payee of a bill of exchange, delivers it to H. to get it discounted, and H. takes it to B., who refuses to discount it unless H. will indorse it, which he does, and B. then discounts the bill, but pays over only a portion of the proceeds, and procures it to be discounted; A., after being compelled to take up the bill at maturity, may sue B. for the balance left unpaid, and the question for the jury is, whether A. was in fact the owner of the bill, and not whether H. had so represented him to be in discounting the bill with And where an attorney received a promissory note from the father of a clerk articled to him as his fee for taking him, on an undertaking that the note should not be negotiated until the expiration of a certain period,

⁻ v. Adams and others, 1 Younge's (r) — v. Ad Eq. Ex. Rep. 117.

⁽s) Johnson v. Peck, 3 Stark. Rep. 66,

⁽Chit. jun. 1112).
(t) Per Lord Tenterden, C. J. in Pike r. Sweet, 1 Dans. & Lloyd, 159, (Chit. jun. 1410).

⁽u) Thompson v. Clubley, 1 Mee. & Wels.

⁽x) Delauncy v. Mitchel, 1 Stark. Rep. 489. (Chit. jun. 976); post, 76; Puget v. Forbee, 1 Esp. Rep. 117, (Chit. jun. 510); post, 76; and the observations of Lord Eldon in Smith v.

Knox, 3 Esp. R. 46, (Chit. jun. 617); post, 80, note (d). In an action by indorsee defendant must show distinctly by his plea that he never received any value; Noel v. Rich, 2 Cr. M. & Ros. 360; post, Part II. Ch. IV. Defences and Pleas; as to relief in Equity, &c. see post, s. 3 and Ch. VI. s. ii.

⁽y) Oughton r. West, 2 Stark. Rep. 321. (z) Evans v. Kymer and another, 1 Bar. &

Adol. 528, (Chit. jan. 1512) (a) Bastable v. Poole, 1 Cro., M. & Ros. 410; 5 Tyrw. 111, S. C.

and he did negotiate it contrary to his undertaking, the court compelled him 1. Adeto take it up(b). Considera-

In general there will be a sufficient defence between the original parties when the bill or note was obtained by duress(c), or by fraud(d)(1), or *by First. Want of circumvention, and whilst the defendant was in a state of intoxication(e); or Want or Consideraby false pretence that the party would do something which he immediately tion. afterwards declared he would not perform (f), or where there has been Durens, no consideration(g), or only the semblance of it; as where there had &c. been an agreement all on one side, as in partial restraint of trade without [*73] any adequate consideration, and the note was given in satisfaction of breaches of such agreement for which in law the defendant was not liable to be sued(h), or where there has been a consideration only for a part(i).

So an engagement to pay, whether implied from the mere act of drawing, accepting, or indorsing, or express, may, it seems, be resisted between the original parties if it was gratuitous and not founded on adequate consideration(2). Neither affection nor gratitude, nor an intention to avoid the leg-

where bills have been deposited with an attorney, and he has advanced money on them, and he refuses to account, the court will not compel him summarily to pay over the alleged balance; Ex parte Schwalbanker, 1 Dowl. P. C. 182. (c) Duncan v. Scott, 1 Campb. 100, (Chit.

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jun. 742). Indorsee against drawer of bill. The defendant gave the bill while under duress abroad, and under a threat of personal violence and confiscation of his property, and without consideration. Lord Ellenborough held, that the defendant not having been a free agent when he drew the bill, it was incumbent on the plaintiff to give some evidence of consideration, and no such evidence being given, the plaintiff was nonsuited. See also Thom. on Bills, 123. plea of duress, and no consideration, is bad for duplicity, although the latter defence be badly pleaded; Stevens v. Underwood, 6 Scott, 402, post, Part II. Ch. IV. Defences and Pleas.

(d) Rees v. Marquis Headford, 2 Campb. 574, (Chit. jun. 823). Indorsee against acceptor. The drawer had received no consideration for the bill, and had been tricked out of it by a gross fraud. Lord Ellenborough held that this made it incumbent on the plaintiff to show what consideration he gave for the bill, and not doing so was nonsuited; and see Grew v. Bevan,

8 Stark. 134, (Chit. jun. 1147). Ledger v. Ewer, Peake, R. 216, (Chit. jun. 530); post, 79, note (t). So if a trader get a bill by fraud, and become a bankrupt, it will not belong to the assignees, but to the party de-frauded, especially if there was a promise to return it before the bankruptcy; Gladstone v. Hadwen, 1 M. & Sel. 517, (Chit. jun. 886);

(b) Ex parte Gardner, 2 Dowl. 520. But and even without such promise, Noble v. here bills have been deposited with an attor- Adams, 7 Taunt. 59. But mere imbecility of mind affords no defence, unless there was fraud; ante, 19, note (x). As to pleading fraud, see Connop v. Holmes, 2 C., M. & R. 719, post, Part II. Ch. IV. Defences and Pleas.

(e) Pitt v. Smith, 3 Campb. 33; Gregory v. Frazer, 3 Campb. 454, (Chit. jun. 899); Intoxication is no defence unless fraud also; Northam v. Latouche, 4 C. & P. 140, ante, 18, note (u).

(f) Wienholt v. Spitter, 3 Campb. 376. (Chit. jun. 890). See the case, post, 76.

note (g).
(g) Duncan v. Scott, 1 Campb. 100, (Chit. jun. 742). Ante, 72, note (c).

(h) Young v. Timmins, 1 Cromp. & Jerv. 831; 1 Tyrw. 226, (Chit. jun. 1533). But see the meaning of "adequate consideration," as explained in Hitchcock v. Coker, 6 Ad. & El. 438; 1 N. & P. 796, S. C.; post, 94, note.

(i) Barber v. Backhouse, Peake, Rep. 6., (Chit. jun. 482). In an action on a bill of exchange by the payee, the defendant paid part of the money into court, and it appeared upon the trial that there was no consideration for the other part; Law, however, arged that the payment of the money into court admitted the bill was good for part, and if it was good for part it was good in toto; but Lord Kenyon declared himself clearly of a contrary opinion, upon which the jury found for the defendant, and this case being afterwards mentioned by Lord Kenyon in the course of argument, Law said he was perfectly satisfied with the decision. See Darnell v. Williams, 2 Stark. R. 166, ante, 70, note (m).

(1) { Fallis v. Griffith, Wright, 303. Loffland v. Russell, Idem, 439. Donelson v. Clements, 1 Meigs, 156, 7. }

^{(2) \} As to what is, or is not, an adequate consideration, see the following cases. Kellogg v. Curtis, 9 Pick. 584; Knight v. Priest, 2 Verm. 507; Lapham v. Barret, 1 Idem, 247; Moar v. Wright, Idem, 57; Haven v. Hobbs, Idem, 288; Wentworth v. Wentworth, 5 N. Hamp. 410; Corbery v. Boyle, 20 Louis. Rep. 180; Fenney v. Prince, 7 Pick. 248; Kempton v. Coffin, 12 Idem, 129; Eaton v. Carey, 10 Idem, 211; Vadakin v. Soper, 1 Aikin, 287; Bates v. Starr, 2 Verm. 586; Hall v. Conetant, 2 Hall, 185; White v. Dewilt, Idem, 405; O'Keson v. Barclay, 2 Penn. 581; Aldridge v. Turner, 1 Gill & John. 427; Parker v. Crane, 6 Wend. 647; Seaman v.

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sideration.

I. Adequa- acy duty, constitute sufficient considerations, and if they alone were the cy of Con- considerations, the bill or note cannot be enforced against the maker or his personal representative, unless when in the hands of a bond fide holder for value(k).

First. Want of Consideration when a Defence. What a sufficient tion.

But the debt of a third person(l)(1), or forbearance to his *representative (m), or a debt barred by the statute of limitations(n), or by bankruptcy and certificate(o), or even a mere moral or honorary obligation(p)(2), or respect to the memory of a deceased husband (q), is an adequate consideration. Considera- So an exchange of securities, as of acceptances, where each cross acceptor engages to pay his own acceptances, although there was no other debt or consideration between the parties, constitutes an adequate consideration, and neither party can, in that case, resist the performance of his engagement to

> (k) Holliday v. Atkinson, 5 B. & C. 501, post, 74, note (x). See also Seton v. Seton, 2 Bro. C. C. 610, post, 75, in notes.

(1) Popplewell v. Wilson, in error, 1 Stra. 264, (Chit. jun. 243); cited in Ridout v. Bristow, 1 Tyrw. 84, ante, 69, note (k), and see Coomb v. Ingram, 4 D. & R. 210, (Chit. jun. 1206). The statute against frauds, 29 Car. 2, c. 8, enacts, that " no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement shall be in writing, and signed by the party to be charged;" and the decisions on that act require that the writing shall state the consideration of the promise; Wain v. Walters, 5 East, 10. But although a bill or note does not express the consideration of the engagement it is valid, because this was a mercantile instrument in force before the statute of frauds; and secondly, because the engagement of each party to a bill or note is an original undertaking for himself, and not a promise for the debt of another, although it may have the effect of discharging the debt of a third person. See also Roscoe on Bills, 386. Lord Holt, who, it will be remembered, was a strenuous opposer of promissory notes, and occasioned the 3 & 4 Ann. c. 9, in A. D. 1710, shortly after passing that act contended that a note to pay so much

upon account of the maker's mother was invalid, and that notes could be only given for the debt of the maker. But the plaintiff re-covered. The report concluding, "In this case, Holt, C J. directed a verdict for the plaintiff, but under control, and ordered the postea to be stayed;" Garnet r. Clarke, 11 Mod. 226, (Chit. jun. 229).

(m) Ridout v. Bristow, 1 Tyrw. Rep. 84; 1 Cromp. & J. 231, S. C., ante, 69, note (k).

(n) Hyleing v. Hastings, Ld. Raym. 339; Dean v. Crane, 6 Mod. 309; Quantock v. England, Burr. 2630; Bla. Rep. 703, S. C.; Cowp.

(o) Trueman v. Fenton, Cowp. 544, (Chit. jun. 895); Birch v. Sharland, 1 T. R. 715; Cowp. 290; Brix v. Braham, 1 Bing. 281; 8 Moore, 261, (Chit. jun. 1184); 6 Geo. 4, c. 16, s. 131; 1 Mont. 173; when not, Rose v. Main, 1 Bing. N. C. 357, post, sec. ii. Illegality of Consideration. And see as to discharge under Insolvent Act, 7 Geo. 4, s. 1, post, Part II. Ch. VIII.

(p) Hawkes v. Saunders, Cowp. 290; Lee v. Muggeridge, 5 Taunt. 36; Gibb v. Merrill, 3 Taunt. 311. But semble, that a moral obligation is not in every case a sufficient consideration for a promise; Littlefield v. Shee, 2 B. & Ad. 811.

(q) Ante, 69, note (k).

and void. Rogers v. Waters, 2 Gill & John. Rep. 64.

The fact that a note was payable at a future day, where it appeared that it was made for the purpose of closing an account, for which the maker was not responsible independent of the note. does not furnish the slightest presumption that forbearance was purchased by it; for nothing is more common than the closing of accounts by passing notes payable at future days, without the consideration of forbearance being thought of Ib.

(2) A moral obligation is a sufficient consideration for an express promise. Glass v. Beach, 5 Verm. Rep. 172.

But to make one liable on a promise founded on a moral obligation, it must appear that the obligation is strictly and undoubtedly of such a character. Hawley v. Farrar, 1 Verm. 420.

Seaman, 12 Idem, 391; Sowerwein v. Jones, 7 Gill & John. 335; Dickinson v. Hall, 14 Pick. 217; Parish v. Stone, Idem, 198; Nelson v. Serle, 4 Mee. & Wels. 795; Trask v. Vinson, 20

A promise by one person to indemnify another for becoming a guarantor for a third, is not within the statute of frauds; such promise need not be in writing, and the assumption of the responsibility, is a sufficient consideration for the promise. Chapin v. Merritt, 4 Wend. Rep. 657.

A promissory note given by a member of the vestry of a church, for a debt due, not by him in his individual character, but by the vestry, a corporate body of which he was a member, without any consideration moving to himself, is a promise to pay the debt of another, without consideration

honour his own acceptances (r)(1), and the incurring a liability for the debt I. Adequaor default of another, either as a surety or otherwise, is an adequate considery of Coneration, and entitles the party subject to such liability to sue upon any bills sideration. or notes in his possession, however numerous and extensive, until his liabili- First. ty has been completely discharged; and, therefore, where a banker's accept- Want of ances for his customer exceeded the cash balance in his hands, and accommodation acceptances were deposited with the banker by the customer as a Defence. collateral security, it was held at Nisi Prius, that whenever the banker's acceptances exceeded the cash balance the bankers held the collateral bills for value(s).

So if a bill or note be indorsed as a collateral security, that is an adequate consideration to enable the party to sue thereon, though he advanced no new credit on the bill or note(t).

It appears to have been doubted whether a bill, note or check, delivered As a gift by the maker to the payee as a gift, and without any adequate consideration, (*). but intended by him to be paid, can be enforced as against the donor or his personal representative; but it seems now to be settled that it cannot (x).

(r) Rolfe v. Casion, 2 H. Bla. 571, (Chit. jun. 551); Kent v. Lowen, 1 Campb. 179, note, (Chit. jun. 746); Hornblower v. Proud, 2 B. & Ald. 327, (Chit. jun. 1049); Spooner v. Gardiner, R. & M. 84, (Chit. jun. 1211).

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(s) Posanquet v. Dudman, I Stark. R. 1, (Chit. jun. 904); and Bolland r. Bygrave, Ry. & M. 271, (Chit. jun. 1272); Heywood v. Watson, 4 Bing. 496.

(t) Heywood r. Watson, 4 Bing. 496; 1 Moore & P. 268, (Chit. jun. 1374).

(u) As to the delivery of a bill, &c., as donatio mortis caus' see ante, 2, note (e); and see cases in equity as to imperfect gifts, Cotteen v. Missing, 1 Madd. Rep. 176; Adams v. Claxton, 6 Ves. 226; Howper v. Goodwin, 1 Swanst. 495.

(x) In Nush v. Brown, sittings at Westminster, Trin. 1317, a bill of exchange was accepted by the defendant as a present to the payee, who indorsed it to the plaintiff for a small sum advanced to him. And Lord Ellenborough held that the plaintiff was only entitled to recover so much as he had actually advanced on the bill.

Holliday r. Atkinson, 5 B. & C. 501; 8 Dowl. & Ryl. 163, (Chit. jun. 1290). A promissory note was given by a testator to the plaintiff, an infant aged only nine years, for 1001., payable six months after dute, and expressed to be for value received; and in an action by such payee against the executors of the maker, no evidence of consideration being given, the judge told the jury that the note being for value received, imported that a good consideration existed, and that gratitude to the infant's father, or affection to the child, or an intention to evade the legacy duty, would suffice; the court granted a

new trial, on the ground that this was a misdirection, because though the jury might have presumed that a good consideration was given, yet that those pointed out were insufficient, and it seems to have considered that an intention to evade the legacy duty would not have been a good consideration. And per Abbott, C. J., "I agree that where a note is expressed to be for value received, that raises a presumption of a legal consideration sufficient to austain the promise, but that is a presumption only, and may be rebutted. Now we find that this note was given to a boy only nine years old, whose father was living, and that the donor was in a state of imbecility, and not far from his death. It then became a question for the jury, whether the note was given upon any legal consideration, and I think that the direction given to them as to the sufficiency of gratitude to the father or affection to the son was improper. As at present advised, I should also think that the intention to avoid the legacy duty would not be sufficient, for then the note would not be payable until after the donor's death, and a promissory note is not good as a donatio mortis causa. But if a second verdict should be founded on the latter consideration, the question may be put upon the record." Rule absolute. The cause was not tried again, a compromise having

taken place between the parties.

In Woodbridge v. Spooner, 3 B. & Ald.
285; 2 Chit. Rep. 661, (Chit. jnn. 1073), it seems to have been considered that a note given "for value received, and his kindness to me," was valid; but there it will be observed the first part of the sentence denoted an adequate consideration.

In Tate v. Hilbert, 2 Ves. jun. 111, (Chit.

⁽¹⁾ If the maker of a note gives the holder a new note, with another surety, and takes up the old one, he cannot when called on for payment, enter into the original consideration, because he has by his act, induced the holder to surrender the right which he had against the indorser, who was responsible on the original instrument. The surrender of that security is a good consideration for the new obligation. Coco v. Latour, 4 Miller's Louisiana Rep. 507.

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I. Ade-Considera-

First. Want of Consideration when a Defence.

And therefore a bill indorsed by way of *gift does not subject the indorser to an action at the suit of the indorsee (y). And in a case in equity, it was held, that no absolute gift to take effect immediately cannot be considered as donatio mortis causa, and therefore that such gift of a common check on a banker payable to bearer, and of the party's own promissory note, was not donatio mortis causa, or an appointment or disposition in nature of it, *and was not capable of any greater effect in equity than at law; and it was accordingly ordered, that the bill, as to the check, should be dismissed without prejudice to any action; and as to the note, it being doubted whether an action would lie against the executor for want of consideration, the court of fered to retain the bill, if an account was necessary (z)(1). But although

jun. 510); 4 Bro. C. C. 236, ed. by Belt, Lord Loughborough would not decide that a note was invalid which was delivered as a gift.

Formerly such a bill or note seems to have been considered to be available, Williamson and Ux. v. Losh, Executor, MS. Ashurst, J., Paper Books, 19th vol. 54, Mich. Term, 16 Geo. 8, cited 7 T. R. 851. This was an action of assumpsit against the defendant, as executor of John Losh, deceased, upon the following promissory note:--" I, John Losh, for the love and affection that I have for Jane Tiffin, my wife's sister's daughter, do promise that my executors, administrators, or assigns, shall pay to her the sum of 100%. of money, one year after my decease, and a caldron and a clock, a wainscoat chest, and a bed and bed-clothes, seven pudden dishes: as witness my hand, this 16th day of February, 1763. Witnessed by us, A. B., C. D." Jane Tiffin afterwards intermarried with the plaintiff. Upon the trial a verdict was found for the plaintiff, and a case The defendant admitted he had reserved. proved the will, and had assets sufficient to cover the damages, but contended that there was no consideration in point of law, and that the note could not be recovered upon, and that as the testator was not bound, the executor was not. The court held that the instrument being in writing, and attested by witnesses, the objection of nudum pactum did not lie, and ordered the posten to the plaintiff. This case was afterwards observed upon by Lord Chief Baron Skynner, in delivering the opinion of the judges in Rann v. Hughes, 7 T. R. 351, when he intimated, that so far as this case went on the doctrine of nudum pactum, it was erroneous. It is further observable, that in Williamson v. Mosh the note was void as a promissory note, because it was for the delivery of goods besides the payment of money, and consequently, unless it was founded on a sufficient consideration, it was invalid; and see observations on Rann v. Hughes in Ridout v. Bristow, 1 Tyr. R. 84; 1 Cro. & J. 231, (Chit. jun. 1518).

Seton r. Seton, 2 Bro. C. C. 610. The mother of the plaintiff made a promissory note for 95001., and delivered it to a trustee, as a provision for a child of which she was then pregnant; she afterwards filed her bill to have the

note delivered up; the child, who was then born, together with the trustee, filed their cross bill to have the agreement entered into by the note carried into execution. Upon general demurrer to the bill for want of equity, the court held it was not sufficiently nudum pactum to allow the demurrer.

In Disher v. Disher, 1 P. Wms. 204, (Chit. jun. 230), where the testator, though in no respect indebted to his brother, had signed a note by which he had acknowledged himself indebted to his brother in 50001. and always kept it in his own custody, and the brother knew nothing of it at the time it was signed, and at the testator's death it was found among his papers, it was held to be a matter merely initiate or intended and never perfected, and consequently as no debt at all.

(y) Easton v. Pratchett, 1 C., M. & R. 798; S. C. 3 Dowl. 472; 1 Gale, 33; et per Lord Abinger, C. B. in delivering the judgment of the court; In C., M. & R. 808, 809. "If a man give money as a gratuity, it cannot be recovered back, because the act is complete; yet a man who promises to give money cannot be sued on such promise; and if so, I do not see how a promise in writing, not under seal, can have any binding effect. The law makes no difference between such a promise and a verbal one. There is she same distinction as to a bill of exchange. If a party gives to another a ne-gotiable instrument on which other parties are liable, the man who makes the gift cannot recover the bill back, and the man to whom the bill is given may recover against the other parties on the bill; but it is a very different question whether the giver kinds himself by the indorsement so as to make himself liable thereupon to the Terson to uhom he gives it. There is no decision that he does, and there is a strong authority the other way, and the prevailing opinion in the profession is, that a parol promise of a gift, whether verbal or in writing, will not And see the same case in error, be binding." 2 C., M. & R. S-42; 4 Dowl. 5.19; 1 Gale, 250; 6 C. & P. 736. See also Solly r. Hinde, 2 C. & M. 516; ante, 71, note (p).

(2) Tate v. Hilbert, 2 Ves. jun. 111, (Chit. jun. 510); 4 Bro. C. C. 286, ed. by Belt, S. C.; but see Chaworth v. Peech, 4 Ves. 585.

the maker, it is competent for the defendant to give in evidence that the assignment was made

⁽¹⁾ If an order not amounting to a bill of exchange is accepted by the drawee, without consideration, he is not bound, it being nudum pactum. Atkinson v. Manks, 1 Cowen. 602. In an action brought by the assignee in the name of the payee of a note not negotiable against

as between the donor and donee the delivery of a bill or note by way of gift I. Adequawill not operate so as to subject the former to an action at the suit of the cy of Conlatter, yet such delivery will afford no answer to the other parties to the bill or note in an action by the donee or his indorser; nor will it be a defence Want of to the donor after it has passed into the hands of a bon'i fide holder for val- Considera-

ue(a). A subsequent failure of the consideration for which a bill or note has a Defence. been given, either in the whole (b)(1) or in part, when of definite amount (c), Subsesuch as the non-performance of a condition precedent(d), will frequently, be- quent tween the original parties, and if bankrupts, their assignees(e), and others of Conholding for them, or who have only advanced a part of the consideration, af-sideration.

ford a defence entirely or partially (f): and if a hill or check has been given

tion when

even on a verbal condition, which the drawer finds is to be broken or eluded, he has a right to stop the payment, and may defend an action thereon(g). (a) See Easton v. Pratchett, 1 C., M. & R.

798; ante, 75, note (y); Heydon v. Thompson, 3 Nev. & Man. 319, 324; 1 Ad. & El. 210, S. C.; Whitaker v. Edmunds, 1 Ad. & El. 688; post, Part II. Ch. V. s. i. Evidence.

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(b) See Jefferies r. Austen, Stra. 647; Puget de Bras v. F(rbes, 1 Esp. 117, ((hit. jun. 510); Jackson r. Warwick, 7 T. R. 121, (Chit. jun. 591); Grant v. Welchman, 16 N. P. 274. (Chit. jun. 291); Delauney v. Mitchel, 1 Stark. Rep. 439, (Chit. jun. 976). See also Solly v. Hinde, 2 C. & M. 516; 6 C. & P. 316, S. C.; ante, 71, note (p); Wells v. Hopkins, post, 77, note (m).

(c) See Day v. Nix, 9 Moore, 159, (Chit.

jan. 1210).

(d) Irving v. King, 4 Car. & P. 309, (Chit. jun. 1498); Evans v. Morgan, 2 C. & J. 453;

2 Tyr. 396, S. C.; post, 77, note (h).
(e) Ex parte M'Gae, 2 Rose, 376, (Chit. jun. 954); 19 Ves. 607; ante, 71, and post,

77, note (h).

(f) When partial failure of consideration affords a complete desence to an action for not accepting a bill for the price of goods sold, Head v. Baldrey, 2 Nev. & P. 217; 6 Ad. & El. 59, S. C.

(g) Wienholt r. Spitter, 3 Camp. 376, Action on a banker's check (Chit. jun. 890). drawn by the defendants for the sam of 5321. A house in Westphalia having received a sum of money on account of the plaintiff, directed the defendants, who were their correspondents in London, to pay it to him, but said they could not allow him interest upon it as they had made none themselves. This being communicated to the plaintiff, he at first insisted on interest, but finally agreed on having a check for the principal to give a receipt in full. He accordingly wrote such receipt, and received the check in question in exchange. Having got it into his hands, he said he should prosecute the house abroad for interest before the Chamber of Commerce at Paris. The defendants thereupon ordered payment of the check to be stopped.

Lord Ellenborough.—" If I give a draft upon a condition, and I find the condition is to be eluded, I may stop the payment. This was a conditional delivery of the draft. When it was delivered all still remained in fieri. The

without consideration, and that he had paid the amount to the payer, although he had notice of the assignment previous to the payment. Dunning v. Hayward, 1 Green, 266.

(1) If a note be sold, the consideration stipulated to be paid for it may, in general be recovered, though the note prove to be of no value—but there is an implied warranty that it is genuine, and if it is forged, there is a failure of consideration, and there could be no recovery of that agreed to be paid for it. Marshall v. Peck, &c., 1 Dana Ken. Rep. 612.

Partial failure of the consideration of a note cannot be taken advantage of at law. Harlange.

Read, Ohio Rep. Cond. 578.

A total failure of the consideration of a note may be given in evidence under the general issue without notice; not so as to a partial failure. The People v. Ningara, C. P. 12 Wendell's Rep.

Where the only consideration of a promissory note was a promise by the payee to convey to the maker, on payment of the note, a tract of land if the payee should own it, and if not to buy it of the owner as cheap as he could and let the maker have it for what it should cost; and the payce died insolvent before the note became due, without any title to the land; it was held that the consideration of the note might be considered as having totally failed, and that the maker had a right to treat it as a nullity. Tillotson v. Graves, 4 N. Hamp. Rep. 444.

So, where a note is given for the purchase money of land, the title to which fails. Rice v. Goddard, 14 Pick. 293. See also Hartwell v. M'Beth, Har. Del. Rep. 368; Bowles v. Newby, 2 Blackf. 364; Loffand v. Russell, Wright, 438. But where the defendant relies on a plea of fail-

are of consideration the onus probandi lies on him. Towsey v. Shook, 3 Blackf. 267. The holder of a negotiable note indorsed in blank, who possesses it in good faith and gave for it a valuable consideration, cannot be affected by any failure of consideration, between the parties to it and the original indorsee or holder, Hagan v. Caldwell, 15 Louis. Rep. 280; Alderson v. Chatham, 10 Yorg. 304. }

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I. Adequasideration.

First. Want of

But in these cases the matter which the holder has failed to perform must cy of Con- constitute the basis or principal condition precedent in respect of which the bill was given, or it will afford no defence; and therefore, where A. and B.

were litigant parties in several actions, and C. was the attorney of B. and at a meeting to settle the actions it was agreed, (inter alia,) between A. Considera and B. in the presence of C., that C. should give his promissory note at Defence, two months, as a collateral security for the payment by B. to A. of a sum of 4501.; and it was added, that all the effects which A. had of B.'s should be delivered up to C. as B.'s attorney, and C. signed the note at the meet-*77] ing immediately after the *signing of the agreement; it was held, in an action on the note by A. against C., that the delivery up of the effects was not a condition precedent to the right of A. to claim the money (h). In a late case, where a sum of 400l. belonging to A. was put by him into the hands of B., his solicitor, who laid it out on mortgage, and the deeds were deposited with A.; and interest being in arrear, and A. pressing for payment, B. gave a promissory note payable three months after date to A. for the amount of principal and interest, and it was agreed at the time of giving the note, that A. should deliver up the deeds to B., and should hold the note till the sale of the mortgaged premises should be completed; and when the note became due A. sued B. upon it, though the deeds had not been delivered up, or the sale of the mortgaged premises been completed. The judge having left it to the jury to say whether the note was given on a condition precedent, that the deeds should be delivered up, it was held, that it ought to have been left to them to say what the consideration of the note was, and whether it had wholly failed or not (i).

And there are many cases where it has been decided, that although there was not adequate consideration for the whole amount of the instrument, yet as it could not be readily shown to the jury to what precise extent the consideration had failed, the plaintiff was entitled to recover the whole, leaving the defendant to his cross-action to recover the difference as damages (k) (1). And it seems to be an established doctrine, that the partial failure of consideration will constitute no defence, if the quantum to be deducted on that account be unliquidated, and not in the nature of a certain debt or deduction. Thus, if a bill has been given for the price of goods, it has been held to be no ground of defence to a part, that the price of the goods was exorbitant(1), or that they (having been retained and not returned) have turned out un-So in an action by the drawer against the acceptor of bills sound(m)(2).

defendants, on discovering the plaintiff 's intentions, were fully justified in resisting the demand. The draft in his hands had become a

piece of waste papor." Plaintiff nonsuited.

(h) Irving v. King, 4 Car. & P. 309, (Chit.
jun. 1498); cor. Lord Tenterden, C. J. Scc as to effect of agreement by plaintiff, the drawer, to consign goods to a third party in order to take up defendant's acceptance, and how to be pleaded, Byas v. Wyllie, 1 C., M. & R. 696; S. C. 5 Tyr. 377; 3 Dowl. 524; and see Evans v. Morgan, 2 C. & Y. 458; 2 Tyr. 396, S. C.; as to note given on consideration of plaintiff's delivering up farm. See post, 819, (8).

(i) Richards v. Thomas, 1 C., M. & R.

(k) Per Hullock, B. in Gascoyne v Smith, M'Clel. & Y. Rep. 849, (Chit. jun. 1256); and see Day v. Nix, 9 Moore, 159, (Chit. jun.

(1) Solomons v. Turner, 1 Stark. Rep. 51, (Chit. jun. 942). Aliter, if by inadequacy of value and other circumstances you can prove fraud, so as to show that there was no contract at all; per Lord Ellenborough, C. J., ib., and see post, 78.

(m) Morgan v. Richardson, 1 Camp. 40, n.; 7 East, 482; 3 Smith, 487, S. C.; Fleming r.

(2) In an action on a promissory note given for the price of goods sold with a warranty, it is a good defence that the goods turned out to be of no value. Shepherd v. Temple, 8 New Hamp. Rep. 455.

And in such a case, it is not necessary to show that the goods were returned. Ibid.

⁽¹⁾ In an action upon a promissory note, a total failure of consideration may be given in evi dence to defeat it; but it is otherwise where there is only a partial failure; that can be remedied by a distinct suit. Washburn v. Picot, 3 Devereux's Rep. 390.

of exchange given for goods supplied, which were to be "of good quality I. Adequaand moderate price," and were estimated at about 4001. and the bills given cy of Confor that amount, it is no defence that the goods turned out to be worth much less than the estimated price, and that the acceptor has paid more than the First. real value of the goods on the bills (n)(1). So if a note *be given in consideration of the plaintiff's disclosing to the defendant an improvement in the tion when certain machinery, which turns out to be less beneficial than was anticipated a Defence. by the parties, it is no answer to an action on the note(o).

And where under an agreement between A. and B. for the sale of a lease, B. accepts a bill for the purchase-money and is let into possession of the premises, it is no defence to an action by A. against B. upon the bill, that A. refused to execute an assignment of the lease according to the agree-

See also Gray v. Cox, 4 Barn. & Ald. 108; Laing v. Fidgeon, 6 Taunt. 108; 4 Campb. 169, S. C.; Jones v. Bright, 5 Bing. 533; 8

M. & P. 155, S. C. It is submitted, that it would be more consistent with justice, in practice, to extend rather than narrow the just and equitable right to deduct or reduce a part of the claim on a bill or note, at least when arising in the same transaction, rather than to compel a defendant to pay the whole amount, and then in a cross action, as for unliquidated damages, to endeavour to recover back a part of the money he has thus parted with, perhaps to a person who in the meantime may have become insolvent. The trouble and inconveniences resulting from the investigation of the amount of damages would not be greater in action upon the bill than in a cross-action, which only tends to an increase of costs and frequent loss.

Independently of any bill or note having been given, if any article be sold by warranty, and such warranty be false, and the purchaser has derived no benefit, the vendor can recover nothing, though the article be not returned; and therefore where A. sold to B. saintfoin seed, warranted to be "good new growing seed;" and soon after delivery B. was told that the seed was not good new growing seed, but he nevertheless sowed part, and sold the rest, without giving any notice of the defect to A.; it was held that A. could not recover the price, if the seed did not correspond with the warran-But it should be observed, that it did not appear, nor was it made a point, that the seed was of any value to the Parties who sowed it: Poulton v. Lathinore, 4 Man. & R. 208. See Basten v. Rutter, 7 East, 479; 3 Smith, 496; and cases there cited; Farnsworth v. Garrard, 1 Camp. 88; Fisher v. Samuda, id. 190.

(o) Day v. Nix, 9 Moore, 159.

Simpson, 1 Camp. 40. See Tye v. Gwynne, 2 Camp. 346. From this last case it appears that Morgan v. Richardson was afterwards brought before the King's Bench, and the court approved of the direction of the Chief Justice; and see next note. But if a bill or note be given as the price of goods of a particular growth (as hops) and answering certain samples, it will be a good defence to an action on the bill or note, as showing a total failure of consideration, that the goods delivered did not answer the samples; Wells v. Hopkins, 5 M. & W. 7; 3 Jurist, 797, S. C.; post, Part II. Ch. IV. Defences and Pleas.

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(n) Obbard v. Betham, Mood. & M. 483; (Chit. jun. 1490,) per Lord Tenterden, C. J. "The assignees certainly cannot recover in this action, unless the bankrupt would have been entitled to receive payment on the bills. But the cases cited for the plaintiffs have completely established the distinction between an action for the price of the goods, and an action on the security given for them. In the former the value can only be recovered; in the latter I take it to have been settled by those cases, and acted upon ever since as law, that the party holding bills given for the price of goods supplied, can recover upon them, unless there has been a total failure of consideration. If the consideration fails partially, as by the inferiority of the article furnished to that ordered, the buyer must seek his remedy by a cross action. The warranty relied on in this case makes no difference. In Morgan v. Richardson, ante, 77, n. (m), the hams bought turned out unmarketable; that was just as much a breach of warranty as there is in the present case; for every man selling a commodity warrants it to be of merchantable quality, no purchaser buys except upon that understanding;" and the plaintiff obtained a verdict for the whole

And although the note be in its terms absolute, it is competent for the maker to prove, in order to show a warranty, that it was agreed at the time of making the note, that a deduction should be made, in case the goods should not turn out to be as good as represented. Ibid.

(1) The partial failure of the consideration of a note may be given in evidence to reduce the amount of the plaintiff's recovery. Spalding v. Vandercook, 2 Wend. Rep. 431. In an action on a promissory note, which had been made in consideration of a deed of the

promissor, conveying to the maker all the promissor's right in a tract of land, it is no defence, that the promissor had no interest in the land, unless some fraud is made to appear. Perkin's Admr. v. Bumford, 8 New Hamp. Rep. 522.

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sideration.

Want of Consideration when

1. Adequa- ment(p). So it is no defence to an action by the payee against the maker cy of Con- of a promissory note, that the payee had agreed to convey an estate to the maker in consideration of a sum of money then paid or secured to be paid to the maker (being the sum mentioned in the note) and of a further sum to be paid at a future day, and that such estate had never been conveyed, the plaintiff not having been able to make out his title before the note became a Defence, due, but the contract still remaining open, and plaintiff never having refused to convey (q). Nor in an action by the payee against the acceptor of a bill of exchange drawn for the balance of purchase-money of articles bought at a sale, is it any defence that two months after delivery of the goods to the vendee, the vendor forcibly retook possession of them, for the vendee cannot treat that act as a rescinding of the contract, but must bring trespass(r).

But where a bill has been given for the price of goods fraudulently sold under an express warranty, the breach of such warranty is a bar to an action on the bill, if the defendant, immediately on discovering the fraud, and be-. fore he has derived and substantial benefit from the possession of the goods,

repudiate the contract by returning or tendering them back(s).

*And if the defendant has already paid money, or other bills, exceeding the value of the property sold and delivered to him upon a false and fraudulent warranty or concealment, then it seems that the defendant may entirely resist the payment of any further bills(s). And where the plaintiff having got possession of a shop, but having no business and little money, prevailed on the defendant to enter into partnership and accept a bill for 1001. as the consideration-money for being admitted, and the defendant's friends disapproving of the arrangement, broke it off; Lord Kenyon left it to the jury, whether this was not a fraud on the part of the plaintiff; but told them, that if they thought not, they should take into consideration the damages the plaintiff had really sustained by the non-performance of the contract, and were not obliged to find the whole amount of the bill; and the jury found for the defendant(t).

So where a contract of sale has been rescinded, then the payment of a bill given on the faith of its completion may be resisted, although the damages were uncertain, provided the bill is in the hands of the vendor or his agent (u). But it is no answer to an action on a bill or note, that it was for an apprentice-fee, which ought to have been paid in the first instance, and that the apprenticeship had been put an end to on account of the subsequent misconduct of the master(x); though if the apprentice had been discharged, and the fee was originally agreed to be returned on that event, it might be

otherwise (y).

Secondly. tion when not a Defence. Bill or note East, 486, S. C. in Hands of Third Person for

Value.

In general, the circumstance of a bill or note having been obtained without adequate consideration, or even by duress or fraud, or misapplied by an Considera- agent to his own use, affords no defence where the instrument comes into

(p) Moggridge v. Jones, 3 Campb. 39; 14

(q) Spiller v. Weslake, 2 B. & Ad. 155, Chit. jun. 1536). But semble, per Parke, J. that it would be a good defence if the circumstances were such that the defendant, having paid the amount as a deposit, might recover it back.

(r) Stephens v. Wilkinson, 2 B. & Ad. 820,

(Chit. jun. 1540)

(s) Lewis v. Coagrave, 2 Taunt. 2, (Chit. jun. 771); and see per Lord Ellenborough, in Solomons v. Turner, 1 Stark R. 51; ante, 77, note (l).

(*) Archer v. Bamford, S Stark. Rep. 175, (Chit. jun. 1162).

(t) Ledger v. Ewer, Peake Rep. 216, (Chit. jun. 530).

(u) Lewis v. Coagrave, 2 Taunt. 2, (Chitjun. 771); Ledger v. Ewer, Peake R. 216, (Chit. jun. 530); ante, 73, note (d); Bayl. 5th edit. 493; Hallett v. Lewis, 1 M. & P. 79; (Chit. jun. 1364). What not a rescinding of contract, Stephens v. Wilkinson, 2 B. & Ad. 320, (Chit. jun. 1540); ante, 77, note (n).

(x) Grant v. Welchman, 16 East, 207.

(y) Id. ibid.

the possession of a bond fide holder for value, without notice, and before it I. Adequais due. It is but just, that if one of two innocent persons must sustain a cy of Conloss, he who has suffered a negotiable security with his name attached to it to get into circulation, ought to bear the loss, and seek his remedy against Secondly.

the person who improperly passed the instrument (z).

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And, therefore, although it be agreed between the original parties to the tion when bill or note that payment shall not be enforced except upon certain terms, not a Desuch agreement will not affect a subsequent bon's fide holder for value, fence. though not to its full amount(a). And it should seem, that although the holder has given value for part only of the bill or note, yet he may sue the acceptor or maker for the whole amount, and be holder of the overplus above the sum really paid to the use of the indorser (b). And where A. procured a banking company to advance 100l. on a bill of exchange for 300l. sent to him to get discounted, A. giving the company his guarantee for the amount so advanced, but having no other interest in the bill; it was held, that A. might recover the whole *amount of the bill in an action against the accept- [*80] or, and not merely the amount for which he gave his guarantee(c).

Want of

A fortiori where a person has voluntarily and deliberately signed his name, Accommowhether as drawer, indorser, or acceptor, generally, and without qualification, for the accommodation of another, he ought, if the instrument gets into the hands of a bon? fide holder for value before it is due, to be compelled to pay him to the extent of the consideration advanced upon it, although the latter, at the time he received it, knew that the bill was founded on an accommodation transaction; for it would be inconsistent to permit a person purposely to allow his name to be put in circulation, in order to accommodate another at the expense of a third person, and after having effected that object, and enabled the party so accommodated to obtain goods, money, credit or forbearance, on the faith of the bill, to turn round and complain of his having been placed in a situation of liability, which he voluntarily incurred; and therefore it is settled, that such an accommodation party to a bill must pay such holder, though he received no consideration (d)(1).

(z) See Morris v. Lee, ante, 68, note (a); Noel v. Boyd, 4 Dowl. 415.

(a) Edwards v. Jones, 2 M. & W. 414; S. C. 5 Dowl. 585; 7 C. & P. 663, and see ante,

(b) Id. ib.; Wiffen v. Roberts, 1 Esp. Rep.

261, (Chit. jun. 536); ante, 70, note (n).
(c) Reid v. Furnival, 1 C. & M. 538; 5 Car.

& P. 499, (Chit. jun. 1634)

(d) Per Eyre, C. J. in Collins v. Martin, 1 Bos. & Pul. 651, (Chit. jun. 576). And per Lord Eldon, in Bank of England v. Beresford, 6 Dow, 237; Fentum v. Pocock, 5 Taunt. 193, (Chit. jun. 896); Haly v. Lane, 2 Atk. 182, (Chit. jun. 294); ante, 24, note (a).

Smith v. Knox, 3 Esp. Rep. 46, (Chit. jun. 617). In an action by indorsee against acceptor it was urged that the defendant had accepted for accommodation of the drawer. But Lord Eldon said " If a person give a bill for a particular purpose, and that is known to the party taking the bill, as for example, to answer a particular demand, then the party taking the bill cannot apply it to a different purpose; but where a bill is given under no such restriction, but given merely for the accommodation of the drawer or payee, and is sent into the world, it is no answer to an action brought on that bill, that the defendant accepted it for the accommodation of the drawer, and that that fact was known to the holder." And see Morris r. Lee, ante, 68, note (a)

1 Pardessus, 466, pl. 442. La simple acceptation est en faveur du porteur ou des endosseurs un titre suffisant, parce, qu'il n'est par juste qu'on ait un moyen indirect de les surprendre et qu'on puisse, lorsqu'ils ont acheté la lettre de change sur la foi de l'acceptation dont elle est revêtue, venir, avec des comptes ou des preuvres qui detruiroient cette acceptation pure et simple annoncer qu'elle n'avoit rien de réel ou d'obligatoire.

In an action by the holder against the maker of a negotiable note, founded on a consideration which failed, the defendant is not obliged to prove that the plaintiff purchased with full and cer-

⁽¹⁾ It is no defence in an action on a bill of exchange by the payee against the acceptor, that the bill was accepted without consideration, or in other words was an accommodation acceptance, and that fact known to the payee. Grant et al. v. Ellicott, 7 Wend. Rep. 227.

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I. Adequasideration.

Consideration when not a Defence.

But if bills or notes were accepted or made for a special or particular cy of Con- purpose, then no third person aware of that object can, by obtaining the instruments, or their proceeds, apply the same to a different purpose(e); and Secondly, if a bill has been accepted for the accommodation of the drawer, and any circumstance has since arisen which would render it unjust, still, to use it for that purpose, no person aware of the fact can, by obtaining the bill, render it available against the acceptor; and therefore where an accommodation drawer absconded, and his creditor pursued and obtained the bill from him, it was held that he could not recover from the acceptor (f); and even a payment obtained by a party who knew that it was unjust to obtain it, was considered invalid(g). So if the bon's fide holder of such a bill, afternotice of all the circumstances, should return it as useless, it has been held that he cannot afterwards, by again obtaining possession, acquire a right of action [*81] against the *accommodation acceptor, unless it should appear that he still intended to continue his accommodation (h)(1). And where the plaintiff accepted a bill for the accommodation of one H., who deposited it with the defendant as a security for goods bought of him, and H. afterwards paid for the goods, but he being further indebted to the defendant, the latter refused to restore the bill, and subsequently indorsed it for value to a third person, who sued the plaintiff thereon, and recovered from him the amount with costs; it was held, that the plaintiff might sue the defendant for the amount

> (e) Evans v. Kymer, 1 Bar. & Adol. 529; (Chit. jun. 1512); Delauney v. Mitchel, 1 Stark. Rep. 439, (Chit. jun. 976); Roberts v. Eden, 1 B. & P. 398, (Chit. jun. 615); Treutel r. Baradon, 8 Taunton, 100; 1 Moore, 543, S. C. (Chit. jun. 1002); Buchannan v Findlay, 9 Bar. & Cres. 738; 4 M. & R. 593, S. C. (Chit. jun. 1441); Kay r. Flint, S Taunt. 21; Ex parte Flint, 1 Swanst. 30; Ex parte Frere, 1 Mont. & Quere as to the validity of an agreement substituting a different mode of payment from that provided by the bill or note itself, see per Parke, B. in Edwards v. Jones, 2 M. & W. 414, 418, 419, and ante, 69. (f) Smith v. De Witts, 6 Dowl. & Ry. 120;

Ry. & M. 212, (Chit. jun. 1253). (g) Martin v. Morgan, 3 Moore, 635; 1 Gow,

123, (Chit. jun. 1065).
(h) Cartwright v. Williams, 2 Stark. 340, (Chit. jun. 1023.) A. accepted a bill for the accommodation of B, who delivered it to C. his creditor, to provide for a bill about to become due, and C., before A.'s acceptance became due, returned it to B. as useless; it was ruled by Lord Ellenborough, that C. could not, by subsequently obtaining possession of the bill, acquire a right of action against A., for that he had abandoned the bill which B. held as trustee for A.; sed quære. See the cases, post, Ch. VI. s. i. "Time of Transfer."

tain knowledge of the want or failure of consideration. If the circumstances attending the transfer were such as to put him upon his guard, and he made no inquiry into the consideration, he purchased at his peril. Cone v. Baldwin, 12 Pick. 545.

Where a promissory note payable to the payee or bearer, in nine months, was within three or four days of the date, and for a full and adequate consideration, transferred by the payee to the plaintiffs by delivery merely, the payee saying that the plaintiffs must take it at their own risk, and that he would not be responsible for it, it was held, that these circumstances would not justify the jury in finding that the plaintiffs knew that the note had been obtained by the payee without a valid consideration, or by fraud. Ibid.

If the payor of a note stands by and sees it assigned to a third person, without giving the assignee notice of an existing defence, he shall afterwards pay the amount of the note to the assignee, although the consideration thereof should have entirely failed; and whether his conduct pro-⟨ Gazzam r. Armceeded from ignorance or design. Decker v. Eisenhauer, 1 Penn. Rep. 476. strong's Ex'r, 3 Dana, 556.

Want of consideration is no defence by the maker of a note in an action against him by bonn fide indorsee or subsequent holder, where the note is endorsed before maturity and received without notice of the defence. Homes v. Smith, 16 Maine Rep. 177; Smith v. Hiscock, 14 id.

(1) Where Λ. made a note payable to the defendant or order, which was indersed by the defendant for the purpose of being discounted at bank, for the accommodation of A., who, on its being refused at the bank, negotiated it to a third person at a discount with a knowledge of the circumstances, it was held that this did not amount to a fraud, which could affect the rights of the holder against the parties to it. Powell r. Waters, 7 Johns. 176.

of the bill, as for money paid to his use(i). A distinction is also made be- I. Adequatween a third person, who receives a bill from another, and has actually ad-cy of Convanced to him further money or goods on the credit of a bill, and where he sideration. has not done so, but is merely a creditor on a former account; in the latter Secondly. case, he is frequently to be considered merely as an agent, and not a holder Want of for value, and must therefore prove his debtor's right to the security, where toon when it was unduly obtained, or lost or stolen(k). We shall hereafter consider not a Dethe consequences of receiving an accommodation or other bill after it is fence.

II. Illegality of Consideration or Contract, either as to THE WHOLE OR IN PART, AND WHETHER IN THE CONCOCTION OR TRANSFER, AND HOW IT AFFECTS THE ORIGINAL PARTIES AND BONA FIDE HOLDERS.

Illegality in the consideration or centract upon which a bill or note was II. Illegalfounded or transferred, will, between the parties to the transaction, and all ity of Conpersons aware of the illegality at the time he first received the instrument, or gave value for it, afford a defence to any action at the suit of such party to enforce payment; for however discreditable it may be for a person to repudiate his own engagement, the law cannot permit effect to be given to any security given to secure the performance of such a bargain(m); and in this case, although the instrument may, on the face of it, purport to have been given for an adequate legal consideration, the party will be at liberty to shew that in truth the real transaction was illegal; for if it were otherwise, the law would be eluded by parties purposely mis-stating the facts (n). general, whenever the defendant would be at liberty to insist on the want of consideration as a defence, he may also equally insist that the contract or consideration, or part of it, was illegal(o)(1).] But in the absence of positive

(i) Bleaden v. Charles, 5 Moore & P. 14; S. C. 7 Bing. 246, (Chit. jun. 1524); 9 Law Journ 82; 5 C. & P. 14; and semble, that he might also have recovered the costs of the action brought against him by the holder, had they been mentioned in the particulars of de-mand; see 5 M. & P. 14.

(k) De la Chaumette v. Bank of England,

9 B. & C. 208, (Chit. jun. 1419).
(l) Post, Ch. VI. s. Time of Transfer.
See also post, Part. II. Ch. V. s. i. Eridence—

Consideration.

(m) Lightfoot v. Tenant, 1 B. & P. 554, 555; 1 Fonbl. 345; and the note Holt's C. N. P. 107, where the principles on which illegality of contract vitiates are pointed out.

(n) See observations in Ridout v. Bristow.

1 Tyr. 84; 1 Cro. & J. 231.

(o) Guichard v. Roberts, Bls. Rep. 445. (Chit. jun. 371); Scott v. Gilmore, 3 Taunt. 226, (Chit. jun. 816); Burnyeat v. Hutchinson, 5 B. & Ald. 241; 2 Burr. 1002.

Illegality of consideration, (except in particular cases arising under certain statutes,) does not avoid a note in the hands of a bona fide holder without notice. City Bank v. Barnard, &c. 1 Hall's Rep 70.

Certain directors of the City Bank of New York, for the purpose of controlling the election of its officers, entered into an arrangement for the purchase, upon the account of the bank, of a large amount of its stock, (then held by a certain individual) at a premium of seven per cent. shove its par walue. To effect this object they paid for the stock with the funds of the bank, to the

⁽¹⁾ The defendant sold a ticket to the intestate, in a lottery unauthorized by the laws of this state, which drew a prize of \$50,000. The defendant caused the prize to be discounted for the intestate, who, upon the close of the transaction, permitted him to retain \$10,000 by way of loan, for which the defendant gave his own promissory notes to the intestate. An action for money had and received, being brought to recover the amount thus retained, the defendant set up the illegality of the transaction, under the lottery act as a defence. Held, that the loan of the money formed a good consideration for the assumpsit, and that the illegality of the original acts of the intestate and the defendant, in the purchase and sale of the ticket, could not be introduced as a defence to the action. Hamilton Admr. r. Canfield, 2 Hall's Rep. 526.

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Want of Consideration when not a Defence.

11. Illegali- enactment, a bona fide holder of a bill or note may recover *thereon, if he ty of Con- had not notice of the illegality at the time he became the holder, and we shall presently see that under the recent act of 5 & 6 Will. 4, c. 41, bills and notes secondly, given for an usurious or gaming consideration, or for signing a bankrupt's certificate, or for the ransom of a ship, are not to be void, but to be deemed to have been given for an illegal consideration(p); and, by the second section of that act, the acceptor or maker of a bill or note founded upon a gaming consideration, who pays the amount to a bon? fide holder, may recover the same from the party to whom the bill or note was originally given, as money paid to his use. And even in those cases in which a bill or note is declared void, the bon's fide holder, we shall find, may in general sue his immediate indorser on the bill or note, or for the legal debt or consideration which passed between them, though he could not sue the acceptor of the bill or maker of the note; and he, as well as the original creditor, may always sue the party transferring such void bill or note to him for the original valid debt or consideration in respect of which it was delivered to him(q) (1).

Another consequence may also ensue from illegality in the contract or consideration upon which a bill or note was founded, namely, that if the accept-

(p) Post, 86. Illegality by Statute. (q) Edwards r. Dick, 4 B. & Ald. 212, (Chit. jun. 1079); French v. Birt, sittings at Westminster after E. T. 1930, May 25th, MS.

S. P.; Bowyer r. Brampton, 2 Str. 1155, (Chit. jun. 296); O'Keefe v Dunn, 6 Taunt. 515, (Chit. jun. 937.)

amount of its par value, and transferred the same in trust for the bank. For the purpose of paying the amount of the premium, each director borrowed \$3500 of the bank, by causing his own promissory note regularly indorsed, to be discounted at the bank. In an action brought by the bank upon one of these notes against the indorsers thereof, they were not allowed to set up the illegality of the original transaction as a defence against the note. Ibid.

The want or illegality of consideration of a note transferred before due, cannot be shown in an action by bona fide holder without notice, except where the note is declared roid by statute, as when given upon a usurious consideration, or for money lost by gaming; and it was accordingly held, in an action by such holder, that the defence could not be set up that the note was delivered as an escrow. Vallett et al. v. Parker, 6 Wend. Rep. 615.

Evidence that a note was delivered as an escrow, and that it was fraudulently put in circulation, is admissible; and when the fact is shown, the holder will be bound to prove that he came fairly by the note, and paid value for it. Ib.

A note given on the purchase of real estate held adversely is not void by statute, not being embraced in the provision, "That all gifts and conveyances made for maintenance shall be void."

Where a note is adjudged void by a court, for the want, or failure, or illegality of the considerable with or ration, it is void only in the hands of the original holder of those who are chargeable with, or have had notice of the consideration. 1b.

Although a promise to pay a sum of money, founded upon the forbearing to prosecute a suit, which could not be maintained, is void, for want of consideration; yet the defendant, in order to avail himself of such a defence, must show conclusively, that the suit, which was the foundation of the promise, could not have been prosecuted to effect. Gould v. Armstrong, Hall's Rep. 266.

The plaintiffs, as the holders of certain notes or memorandums, payable to bearer, brought an action of assumpsit to recover their amount. At the trial, the defendant offered to show that the notes were given for a consideration made unlawful by an act of Congress; but he offered no evidence to prove that the plaintiffs were acquainted with the consideration for which the notes were given. Held, that as the act of congress did not make the notes roid, the evidence offered by the defendant, to defeat the recovery, was inadmissible.

A promissory note given in consideration of the purchase of an improvement upon vacant government land, the possession of such land being a trespass is for an illegal consideration, and cannot be recovered. Merrell v. Legrand, 1 How. 150. See Alderson v. Cheatham, 10 Yerg.

Where a note under seal was given for an illegal consideration, it was declared that neither party was entitled to the countenance of a court of justice. Bostick v. M'Claren, 2 Brev. 275. (1) In an action by the bona fide assignee of a promissory note against the assignor, it is no

defence that the note was originally given by the maker to the defendant for an illegal considera-tion. Johnson et al. v. Dickson et al., 1 Blackford's Rep. 256. The assignment of a note is itself a contract, which prima facie, imports a good consideration

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or or maker should refuse to pay on that account, then, perhaps, the omis- II. Illegalision to give regular notice of non-payment to the drawer of the bill, or payee ty of Conof the note, would not preclude the holder from recovering from him, because the illegality and refusal to pay on that account may be considered as equivalent to the want of effects (r).

A contract or consideration is in general legal, if it be not repugnant to the revealed Law of God, to the general policy of the Common Law, or to some Legislative Provision. Illegal considerations have been considered as distinguishable into three heads;—1st. The doing an act malum in se, or malum prohibitum.—2dly. The omission of the performance of some legal duty.—And, 3dly. A stipulation encouraging such crime or omission(s). But any legal distinction between malum in se and malum prohibitum has been properly denied (t). Illegal considerations may be either those void at common law, or those void by statute.

First. Consideration illegal at common law are those which are prejudi- 1. Illegality cial to the community at large, or those which affect the person or interests at Common Law of an individual.

(u). First. Because pre-

Those of the former description arc,

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1st. Any contract made with an alien enemy; and if a bill be drawn upon the comany such transaction, excepting for necessaries when under imprisonment (x), munity. it will not be available after the restoration of peace.

2dly. Stipulations in general restraint of trade; as if a party engage *not [*83] to carry on trade in any part of England; but if the restraint be limited, so as only to preclude the party from trading in a particular place, or within a certain distance, as, for instance, ten miles, and the breach of the stipulation tend apparently to the detriment of the party in whose favour it was made, and a consideration was given by such party, the contract will not be impeached either at law or in equity (y).

(r) See post, Ch. X. s. i. When notice is necessary. It was so held in America, Copp v. M'Dugall, 9 Mass. R. l. Bayl. American

(s) 1 Bla. Com. 57, 58; Co. Lit. 306 b, n. 1; Mitchell v. Reynolds, 1 P. W. 189; Lloyd v. Johnson, 1 Bos. & Pul. 340, 341; Lightfoot v. Tenant, id. 556.

(1) Aubert v. Maze, 2 Bos. & Pul. 375; Sedgwick on Bla. Com. 54; Bensley r. Bignold, 5 B. & Al. 335. Sed Lide Witham r. Lee, 4 Esp. Rep. 264, (Chit. jun. 670)

(u) Illegality of consideration whether by statute or by the common law must be specially pleaded. Rule H. T. 4, Will. 4, title Assumpail, s. 3, post, Part II. Ch. IV. Defences and Pleas. See Martin v. Smith, 6 Scott, 268. (x) Willison v. Pattison and others, 7 Taunt. 439; 1 Moore, 133, (Chit. jun. 993); and see Bendelack v. Morier, 2 H. Bla. 338. But see the exception as to British prisoners in a foreign country in Antoine v. Morshead, 1 Marsh. 559; 6 Taunt. 237, (Chit. jun. 937);

ante, 18; and as to the effect of a subsequent promise to pay, Duhammel v. Pickering, 2 Stark. 90, (Chit. jun. 994); ante, 14, note (g). (y) Hunlock v. Blacklowe, 2 Saund. 156, note 1; Mitchell v. Reynolds, 1 P. W. 190; 10 Mod. 130, S. C.; Co. Lit. 206 b. note 1;

Davis r. Mason, 5 T. R. 118; 1 Powell on Contracts, 167; Chitty, jun. on Contr. 218. A contract entered into by a practising attorney that he would relinquish and make over to B. and G., two other attorneys, his business as an attorney, as far as respected his professional practice in London and one hundred and fifty miles from thence, and all his business as agent for any attorney, and that he would recommend his clients, and permit B. and G. to use his name in the business, was holden valid; Bunn v. Guy, 4 East, 190. An agreement not to set up as surgeon or man-midwife in a certain town, or within twenty miles thereof, is good; Haywood v. Young, 2. Chit. Rep. 407. So is an agreement between two coach-mas-ters, not to oppose each other and charge the same prices; ibid. But where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint is unreasonable in law, and the contract to enforce it void; Horner v. Graves, 7 Bing. 735, recognised in Hitchcock v. Coker, 6 Ad. & El. 438, 454; 1 N. & P. 796, S. C. In the latter case a restraint was held not to be unreasonable because not limited to the life of the plaintiff, or to the time during which he should carry on the business.

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II. Illegali- 3dly. A stipulation repugnant to the Custom and Excise laws of this coun-

ty of Con-try; as smuggling, &c.(z).

aderation. 4thly. Dropping a criminal prosecution, or suppressing evidence, or so-1. At Com-liciting a pardon, or compounding a felony, misdemeanor (a), or other public mon Law. crime (b)(1), unless it be with leave of the court (c).

*84] *5thly. The recommendation to or purchase of an office under government may be often void at common law(d)(2).

With respect to the consideration for a contract in partial restraint of trade, it is now fully settled that the extent or adequicy of the consideration cannot be inquired into, and that the term adequate consideration, as used in Young v. Timmins, 1 C. & J. 331, 1 Tyr. 226, S. C. and most of the other cases on this subject, is to be understood as denoting a legal consideration of some value, and not merely colourable, but not that the consideration must be equal in value to that which the party gives up or loses by the restraint; Hitchcock r. Coker, 6 Ad. & El. 438, supra. The entering into partnership is sufficient to support a contract of this nature; Leighton r. Wules, 3 M. & W. 545. See post, \$19(9).

(z) Biggs v. Lawrence, 3 T. R. 454; Banks v. Colwell, id. 81; Vandyck v. Hewitt, 1 East, 37; 1 Campb. 383; Lightfoot v. Tenant, 1 B. & P. 551; Guichard v. Roberts, 1 Bla. Rep. 445, (Chit. jun. 371); Johnstone v. Sutton, Dougl. 254; 1 Marsh. on Ins. c. 5; Holt's Rep. 107, note. See Hodgson v. Temple, 5 Taunt. 181; Meux v. Humphries, 3 Carr. & P. 79.

But note that there is a distinction between a smuggling transaction obviously in fraud of the revenue, and a breach of mere revenue regulation. See arguments and decision, Brown v. Duncan, 10 B. & C. 93; and Wetherell v. Jones, 3 B. & Ad. 221. Sed quære us to distinction between breaches of laws passed for revenue purposes and others. See per Parke, B., in Cope v. Rowland, 2 M. & W. 149, 163.

(a) In Elworthy v. Bird, 2 Sim. & Stu. 872, it was considered that an indictment for a misdemeanour might be compromised, but not for a felony. But semble there is no such distinction, Edgecombe v. Rodd, 5 Fast, 294; Galton v. Taylor, 7 T. R. 475.

(b) Johnson r. Ogilby, 8 P. W. 279; Collins r. Blantein, 2 Wils. 349.

But where a party who had paid away a forged acceptance to the plaintiff applied to him for it, and indorsed to him in lieu a bill accepted by the defendant, the plaintiff was allowed to recover; Lord Elleuborough holding, that to bar the right of the indorsee it was necessary to show that the bill had been indorsed as a consideration for compounding a prosecution for forgery, to which the indorser was linele; Wallace v. Hardacre, 1 Camp. 45, (Chit. jun. 740); and see Harding v. Cooper, 1 Stark. R. 467, S. P., (Chit. jun. 978).

An agreement to use interest to procure a

convict a pardon is an illegal consideration; Norman r. Cole, 3 Esp. Rep. 253. Sed ride 1 Roll. Ab. 11, pl. 5, 2; Hob. 106; 1 Leon. 180.

(c) By leave of court, or subsequent assent, the arrangement may, it seems, be legalized; Peeley v. Wingfield, 11 East, 46; Brett v. Tomlinson, 16 East, 293; Harding v. Cooper, 1 Stark. R. 467; Pilkington v. Green, 2 B. & P. 151; Sugars v. Brinkworth, 4 Camp. 46; post, 85, note (y). A defendant prosecuted by parish officers for disobeying an order of maintenance was convicted and sentence deferred by the court with a view to an arrangement; in the meantime he was committed to prison, and the officers demanded of him a sum considerably exceeding the amount of maintenance due, but part of which was to cover costs. A. paid part, and gave a note for the remainder: he was then brought before the court, fined ls. and discharged. It did not appear whether or not the particulars of the arrangement were communicated to the court, but A. made on complaint when brought up. In an action afterwards brought upon the note, it was held that no irregularity appeared in the compromise, and that the note was legal; Kirk v. Strichwood, 4 B. & Ad. 421; S. C. 1 N. & M. 275, (Chit. jun. 1622); see Baker r. Townsend, 1 Moore, 120, where an assault with various other matters in dispute, and costs, were referred to arbitration by the sessions after conriction, and the court of Common Pleas held it right. Secus, where a misdemeanor wholly of a public nature was compromised by consent of the committing magistrates without trial; Edgecombe c. Rodd, 5 East, 294. See 4 Bla. Com 363, 364.

(d) Harrington v. Du Chatel, Bro. C. C. 114. See 1 Hen. Bla. 322; 8 T. R. 89; Wador v. Martin, 4 B. & C. 319; 6 Dow. & Ry. 364, S. C. An action cannot be supported upon an agreement for the sale by the owner, of the command of a ship in the East India Company's service, made without the sanction and in violation of the bye laws of the Company; 8 T. R. 89. But a contract for the exchange of the command of East India ships, entered into with the knowledge of the company, is good; Richardson v. Mellish, 2 Bing. 247; 9 Moore, 435, S. C. See Chitty's Statutes, tit. "Offices, sale of;" Aston r. Gwinnell,

8 Younge & J. 136.

So of a note given for compounding a misdemeanor. Jones v. Rice, 18 Pick. 440. }
(2) A note given to a sheriff on an arrest in lieu of a bail bond is void, as contrary to the stat-

⁽¹⁾ Any promise, founded upon the consideration of compounding a felony is void, Mattocks v. Owen, 5 Vermont Rep. 42. Vincent v. Groom, 1 Yerg. 430. Plumer v. Smith, 5 New Hamp. 553. Roll v. Raguet, Ohio Rep. Cond. 342.

6thly. Every illegal wager repugnant to the principles of general pol- II. Illegaliicy(e); as a wager between voters on the event of an election (f), upon the ty of Conevent of a war(g), or concerning the produce of any particular branch of the sideration. revenue, &c. as of the hop duties(h); and cricket, a horse-race, or a foot-race 1. At Comagainst time, is a game within the statue 9 Ann. c. 14, s. 1(i). So a wa-mon Law. ger as to the mode of playing an illegal game (k), or on a dog(l), or a cock (m), or prize (n) fight, is illegal; so is a wager on an abstract question of law, in which the parties have no interest(o); and the court has power to refuse to try any question on a wager(p).

In general restraint of marriage (q).

Procuration of marriage(r). 8thly.

Future illicit cohabitation, but past cohabitation is a legal consid-9thly. eration(s).

10thly. An agreement, the natural effect of which is to induce a public officer to neglect his duty, is invalid; thus, a promissory note given for a sum in gross, though in effect to indemnify a parish against a bastard child, is illegal, as being contrary to the general policy of the law, as well as the letter of the 6 Geo. 2, c. 31(t).

11thly. It seems that an agreement between the defendant, being the town clerk and clerk of the peace of a borough, and the plaintiff, to recommend the latter to parties who might want an attorney to *conduct prosecu- [*85] tions arising in the town-clerk's office for reward to the former, is illegal(u).

(e) See Gilbert v. Sykes, 16 East, 150. (f) Allen v. Hearne, 1 T. R. 56; Beeley v. Wingfield, 11 East, 46; Pilkington v. Green, 2 B. & P. 151.

(g) Lacaussade v. White, 7 T. R. 535; Allen v. Bearne, 1 T. R. 57.

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(h) Atherford v. Beard, 2 T. R. 610; Shirley v. Sankey, 2 B. & P. 130.

(i) Jetireys v. Walter, 1 Wils. 220; Lynal

v. Longbotham, 2 Wils. 36.

- (k) Brown v. Leeson, 2 Hen. Bla. 43. Money lent to play at an illegal game cannot be recovered back; M'Kinnell v. Robinson, 3 M. & W. 484.
 - (l) Egerton v. Furzman, Ry. & Mo 213.
- (m) Squires v. Whis'ten, 3 Campb. 140.
 (n) Semb Hunt v. Bell, 7 J. B. Moore, 212. (0) Henkin v. Guerss, 12 East, 247. Sed
- vide Cowp. 37. (p) Chitty's Stat. tit. "Gaming," note
- (a); Hastelow v. Jackson, 8 B. & C. 221; 2 M. & Ry. 209, S. C.

(q) Hartley v. Rice, 10 East, 22, qualified

Gibson v. Dickie, 3 M. & Sel. 463; Lowe v. Peers; Burr. 2225; Wilmot, 364; 2 Vern. 215; 2 Atk. 540; 10 Ves. 429.

(r) Co. Litt. 206 b, and see ante, 94,

note (f).

(s) Ex parte Mumford, 15 Ves. 289; Gibson r. Dickie, 3 M. & Sel. 463; Walker v. Perkins, Burr. 1568; Marchioness of Annan-dale v. Harris, 2 P. W. 432; Turner v. Vaughan, 2 Wils. 339; Hill v. Spencer, Amb. 641. Ex parte Cottrell, Cowp. R. 742; Wightwick v. Banks, and Gray v. Rooke, Forrest, 153. Past cohabitation is a legal consideration to sustain a bond, but it is not a sufficient consideration to sustain a mere promise, unless defendant seduced the plaintiff; Binnington v. Wallis, 4 Barn. & Ald. 650.

(t) Cole v. Gower, 6 East, 110, (Chit. jun. 712); and see Watkins r. Hewlett, I B. & D. 1; 3 Moore, 211, S. C.; Clarke v. Johnson, 3 Bing. 424; 11 Moore, 319, S. C.

(u) Hughes r. Statham, 4 B. & C. 187; 6

Dow. & Ry. 219, S. C.

ute respecting sheriff's bonds. Strong v. Tompkins, S John. Rep. 93. A note given by an insolvent to his creditor to induce him to sign his petition under the insolvent law, with a blank in it for the date to be filled up after his discharge, is void, against the general policy of the law. Nor can such note be revived by a subsequent promise to pay it. Pyne r. Eden, 3 Caines' Rep. 213. So a note given to a creditor to induce him to withdraw his opposition to the debtor's discharge under an insolvent law is void. Wiggin r. Bush, 12 John. Rep. 306. See also on the point of illegal consideration, Little v. Obrien, 9 Mass. Rep. 423. Jones v. Caswell, 3 John. Cas. 29.

There seems to be some difference of opinion in the United States in respect to wagers. In Massachusetts the Courts have held wagers policies void at common law, upon the general ground that all wagers are injurious to public morals. Amory v. Gilman, 2 Mass. Rep. 1. In New York, however, actions on wagers are held to be maintainable at common law, Bunn v. Riker, 4 John. Rep. 426. Campbell v. Richardson, 10 John. Rep. 406 But wagers against principles of public policy are universally held void; as wagers upon the event of a public election. bid. Mount v. Waite, 7 John. Rep. 434. Lansing v. Lansing, 8 John. Rep. 454. M'Cullum v. Gourlay, 8 John. Rep. 147.

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II. Illegali-ty of Consideration.

But the release by an Excise officer of a person apprehended for 12thly. penalties under the Excise laws, will be a sufficient consideration for a note, provided the commissioners approved of his taking it(x), and this although 1. At com- he had no previous authority (y).

mon Law.

An engagement to indemnify a sheriff in the execution of a law-13thly. ful or apparently legal act, is good(z); but where the act to be done by him would be a violation of his duty, the agreement to protect him from the consequence is invalid (a).

Secondly. Because affecting interests of individu-

Of the second description of illegal contracts and considerations at common law, are those affecting individuals only; thus,

1st. Any stipulation prejudicial to the feelings or interests of a third person, and made without his concurrence; as a wager upon the sex of a third person(b), or whether an unmarried woman had had or would have a child(c), or to libel another (d), or

2dly. Contrary to the benevolent intent of others(e); as a secret stipulation, before a composition-deed is signed, that one of the creditors shall have a larger dividend or a better security than the rest, is void (f)(1); or a stipulation to receive money in consideration of not opposing the discharge of an insolvent debtor(g). A bill or note given for such purpose cannot be such

(x) Pilkington v. Green, 2 B. & P. 151; Becley v. Wingfield, 11 East, 46.

(y) Sugars v. Brinkworth, 4 Campb. 46. (Chit. jun. 914). This was an action against the maker of a promissory note. The note was

given by the defendant for the amount of penalties, of which he had been convicted before magistrates, under the excise laws, to prevent an execution issuing against his goods. On the part of the defendant, it was contended, that there was no legal consideration for the note, as it was the plaintiff's duty to have levied the amount of the penaltics, and not to have taken any security. Lord Ellenborough. "The defendant gave the promissory note at two months, in redemption of his goods, which were liable to be instantly sold for what they could fetch. This surely was sufficient consideration. I do not think any previous consent by the commissioners of excise, or the magistrates, was necessary for the arrangement." Verdict for plaintiff. Vide Pilkington v. Green 2 R & P 151, S. P.

(z) Cro. Jac. 652; 1 Lord Raym. 279; 1 Sid. 132

(a) 10 Co. 102; Cro. Eliz. 199; Yelv. 197; Tidd's Prac. 9th edit. Index, tit. Sheriff; Chit. jun. on Contracts, 221, 222.

(b) Da Costa v. Jones, Cowp. 729; Harvey v. Gibbons, 2 Lev. 161; Eastbrook r. Scott, 3 Ves. 456; Gilbert v. Sykes, 16 East, 150. A wager between two coach-owners, whether or not a particular person would go by one of their coaches, is illegal, as exposing that person to inconvenience; Eltham v. Kingsham, 1 B. & Ald. 683.

(c) Ditchburn v. Goldsmith, 4 Camp. 152. (d) Stockdale v. Onwhyn, 5 B & C. 13, 173.

(e) Jackson v. Duchaire, 3 T. R. 551. (f) Cockshott v. Bennet, 2 T. R. 763; Leicester r. Rose, 4 East, 372; Spurrett v. Spiller, 1 Atk. 105; Jackson v. Lomas, 4T. R. 166; Cooling v. Noyes, 6 T. R. 263; Bryant v. Christie, 1 Stark 329; Jackson v. Davison, 4 B. & Al. 695, 697; Lewis v. Jones, 4 B. & C. 511, 515; Ex parte Sadler, 15 Ves. 55; Knight v. Hunt, 5 Bing. 432, 3 M. & P. 18, S. C.; Britten v. Hughes, 5 Bing 460; 3 M. & P. 77, S. C. See the cases fully collected in Chitty, jun. on Contracts, 225; 3 Chit. Com. Law, 713. And see further, post, Part II. Ch. IV. Defences and Pleas.

(g) Murray v. Reeves, 8 B. & C. 421; Rogers v. Kingston, 2 Bing. 441; 10 Moore, 97.

So an agreement between an insolvent and one of his creditors, to secure to the latter a claim on the future effects of the debtor, in consideration of the creditor withdrawing his opposition to the discharge or otherwise, is void as a fraud on the other claimants; Jackson v. Davison, 4 B. & Al. 691. So an agreement between a bankrupt and the petitioning creditor to abandon the fint, is illegal; Davis r. Holding, 1 M. & W. 159, post, 93, note (p). But an agreement by a friend of the bankrupt to pay all his creditors in full if a commission of bankruptcy is stopped, is good; Kayle r. Bolton, 6 T. R.

^{(1) {} In the case of a general assignment of a debtor's property, to be rateably divided among such of his creditors as shall execute the assignment and thereby discharge their demands, a promissory note given by the debtor to a creditor, in order to induce him to become a party to the sasignment, is fraudulent and void. Case v. Gerrish, 15 Pick. 49. }

upon, though the composition with the creditors *be not effected(h). And II. Illegaliif the debtor has been obliged to pay the amount of such bill or note to a ty of Conbona fide holder, he may recover back the same from his original creditor in an action for money had and received (i), although the instalments due upon 1. At Comthe composition have not all been paid (j). But where the bill has not been mon law. negotiated, and the debtor pays the amount thereof to his original creditor, this will be deemed a voluntary payment by the debtor, and cannot be recovered back(k). After a composition-deed has actually been signed by all the creditors, a bill or note, affording a better security to one of them, not before stipulated for, has been deemed valid(l). It has, however, been held in bankruptcy, that if the bankrupt enter into a composition-deed, by which the creditors release him from his debts, a promissory note subsequently given to a creditor for the remainder of his debt is nudum pactum, and consequently a bad petitioning creditor's debt(m).

3dly. So an agreement in fraud of a surety, or party collaterally interested, is illegal(n). It has been considered that an agreement to allow poundage to a third person for recommending customers is void as a fraud

on third persons(o).

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4thly. At common law, a wager is legal, if it be not an incitement to a breach of the peace, or to immorality, or if it do not affect the feelings or interest of a third person, or expose him to ridicule, or libel him, or if it be not against sound policy, or merely to try a point of law(p). But a judge may refuse to try a mere wagering question, except to recover back the money from a stakeholder (q).

Some considerations, as well as contracts, are declared to be ty by invalid by statute; as usury(s), gaming, certain horse-racing wagering po-

It seems an agreement that a surety should continue liable, and that he should not afterwards have recourse to the principal debtor, notwithstanding the creditor signed an agreement to accept from the principal five shillings in the pound in full satisfaction of the debt, would be invalid; Lewis v. Jones, 4 B. & C. 514; 6 D. & R. 557, S. C. When surety not discharged by composition with principal; Cowper v. Smith, 4 M. & W. 519, infra, note (n).

(h) Wells v. Girling, 1 Brod. & Bing. 447; 4 J. B. Moore, 78, (Chit. jun. 1051)

(i) Smith v. Cuff, 6 Maule & S. 160, (Chit. jan. 991); Turner v. Hoole, D. & R., N. P. C. 27. But see note (k), infra.

(j) Alsager v. Spalding, 6 Scott, 204; 4

Bing. N. C. 407, S. C.
(k) Wilson v. Ray, 2 Perry & Dav. 253, overraling Turner v. Hoole, 1 D. & R. N. P. C. 27.

(1) Feise v. Randal, 6 T. R. 146, (Chit. jun. 450).

(m) Ex parte Hall, 1 Dea. 171, post, Part II. Ch. VIII. s. iv. Bankruptcy.

(n) Pidcock and others v. Hinton and another, 3 B. & C. 605; 5 D. & R. 505, S. C.; 3 Chit. Com. Law, index, tit. Guarantee; 3 D. & R. 664; 3 Bing. 71; Jackson v. Duchaire, 3 T. R. 551; and see Lewis v. Jones, 4 B. & C. 514, ante, 85, note (f).

Where the plaintiffs advanced 2600l. to C. upon the security of an indenture of mortgage executed by C., and a promissory note for 2600l. in which the defendant joined as a surety, and at the time of the advance C. owed the plaintiffs 800l. which was deducted from the 2600l, but the recital of the mortgage deed, which was read by the plaintiff's agent in the presence of the defendant, stated untruly, that the 8001. had been paid; it was held, that this was a fraud in law which released the defendant from his liability on the promissory note; Stone v. Compton, 5 Bing. N. C. 142; 6 Scott, 816, S. C.

But where a guarantee provided that the plaintiffs were to have full liberty to extend the period of credit to G., and to hold over or renew bills, notes, or other securities, given by him, and to grant to G. and the persons liable upon such bills, notes or securities, any indulgence, and to compound with him or them respectively, as the plaintiff's might think fit, without the same discharging or in any manner affecting the liability of the defendant by virtue of the guarantee:" it was held, that under the express terms of the guarantee the security was not discharged by the compounding with and the release of the principal debtor; Cowper v. Smith, 4 Mee. & Wels. 519.

(o) Wyburn v. Stanton, 4 Esp. Rep. 179;

see 4 East, 190; 1 Sim. & Stu. 74.

(p) Bull. N. P. 16; Good v. Elliot, 8 T. R. 693; Henkin v. Guerss, 12 East, 247; Gil-

bert v. Sykes, 16 East, 150. (q) Chitty's Col. Stat. tit. Gaming, in notes; 7 Price, 540; and Hasleton v. Jackson, 8 Bar.

& C. 221; 2 M. & Ry. 209, S. C. (r) Must be specially pleaded; see note (s), anie, 82.

(s) But see 2 & 3 Vict. c. 37, post, 88.

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Usury.

II. Illegali- licies, stock-jobbing, trading against the laws of the East India or Russia ty of Concompany, sale of public offices, signing bankrupt's certificates, and others of less general importance. Some of these wholly avoid the security founded
2. By Stat- on such contract or consideration, *even in a bonâ fide holder's hands, others only affect it in the hands of a party to the illegality. We will consider

[*87] the enactments in detail.

With respect to the usury laws as affecting bills of exchange and promissory notes, considerable alteration has been made by recent statutes in favour of these instruments, and indeed since the last act upon this subject(t), the laws against usury, except as to securities upon real property, may be said to be altogether abolished. It will, therefore, be sufficient to notice the several enactments(1).

(t) 2 & 3 Vict. c. 37, post, 88.

(1) The following notice of State enactments concerning this subject, will perhaps be somewhat advantageous. After the name of each State, the rate of interest allowed there, and the provisions against usury, are given. Vermont.-Interest six per cent. Usurious securities are not void, but no more than six per cent. can be recovered, and those who receive more, forfeit the whole usurious interest, and twenty-five per cent interest on the whole sum of the contract in which is reserved more than six per cent. Whether the twenty-five per cent is intended to be. an accruing sum, and if so, when the computation is to commence, and when or whether it is to be merely a forfeiture of the twenty-five per cent. on the contract, without relation to time, has never been satisfactorily decided: the better opinion is supposed to be, that the latter doctrine will prevail. N. Hampshire.—Interest six per cent. Usurious security void to three times the amount of the usury. In certain cases, when the usury is sued, the oath of the defendant to the truth of his plea of usury, is sufficient evidence to authorize the court to make the deduction, unless the plaintiff will make oath that there is no usury. Connecticut.—Interest six per cent. If a person takes more, it is usury, and he forfeits the value of the money loaned. In the construction of this statute, the courts hold themselves to be governed by the English decisions. Rhode Island .- Interest six per cent If usury be taken, the whole interest is forfeited When usury is pleaded, both parties are admitted as witnesses, and, if usury be made out, the plaintiff has judgment for his principal only, and the defendant for costs. | New York.-Interest seven per cent. If usury be taken, securities are absolutely void, and the court of chancery will en-join their prosecution, and order them to be cancelled. The former exception in favour of boat fide purchasers or holders, is omitted, and the person taking usury is guilty of a misdemeanor.

Laws N. Y. 1837, p. 486. North Carolina.—Interest six per cent. Usurious securities void. and double the value lent forfeited. Pennsylvania.—Interest six per cent. If one be convicted of usury, he forfeits the money, &c. lent, one half to Governor, rest to party suing. Virginia—Interest six per cent. Usurious contracts void. Ohio.—Interest six per cent. If any one demands or receives more than six per cent. on any demand, he forfeils the whole debt, one half to county treasurer, rest to informer. Illinois.—Interest six per cent., but any rate can be agreed for. Georgia.-Interest eight per cent. Usurious contracts void, and three times the amount of usury forfeited. Indiana.—Interest six per cent. When usurious contract is sued, defendant must plead usury specially, and if his plea is substantiated, the whole amount of the interest charged is deducted from the principal, and the plaintiff recovers the balance. If the interest exceeds the principal, the excess constitutes a debt of record against the plaintiff, and judgment is rendered for defendant. Rev. Code 1818, 236, 7. Massachusetts.—Interest six per cent. Userious contracts void; and where usurious interest has been received, the value of the loan is forfeited, and may be recovered by indictment or action on the case, one half to the state, and the other to informer. If there be a suit between the original parties to contract, and the defendant swear to usury, the plaintiff must fail, unless he deny the usury on oath. Alabama.—Interest eight per cent. Provisions against usury severe: a forf-citure of the sum loaned with interest; one half to the state, the other to informer, unless he is the borrower, and then the whole to the state. Usurious contracts are void, and if sued the borrower is a competent witness to prove the usury, unless the lender deny on oath what the borrower offers to swear to. Missouri -Interest six per cent, and ten may be contracted for. If usury has been received, it is deducted from principal, and plaintiff recovers balance only; and in such case the plaintiff can recover no interest, and if the money paid and costs amount to more than the principal, the excess is a debt of record against the plaintiff. Mississippi.—Interest eight per cent. where there is no agreement, and parties may contract for as much as they please, provided it is for a bona fide loan of money. Louisians.—Interest five per cent., which, when no stipulation is made for the rate, begins to run from commencement of suit only, and is called judicial interest; but promissory notes and bills of exchange draw interest from the day of protest. By convention ten per cent. may be taken: and the banks may take six per cent., some of them nine, when money is lent for four months

By the statute against Usury, 12 Ann. stat. 2, c. 16, it was enacted II. Illegali-"that no person or persons whatever, upon any contract, should take, direct-ty of Conly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of 5l. for the forbearance of 100l. for 2. By Stata year, and so after that rate for a greater or lesser sum, or for a longer or ute. shorter time; and that all bonds, contracts and assurances whatsoever, made 12 Anne. for payment of any principal or money to be lent, or covenanted to be per- c. 16. formed upon or for any usury, whereupon or whereby there should be reserved or taken above the rate of 51. in the hundred as aforesaid, should be utterly void; and that all and every person or persons whatsoever, who should upon any contract, take, accept, and receive, by way or means of any corrupt bargain, loan, exchange, chevizance, shift, or interest, of any wares, merchandizes, or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment, for one whole year, of and for their money, or other thing, above the sum of 5l. for the forbearing of 100l. for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter term, should forfeit and lose, for every such offence, the treble value of the monies, wares, merchandizes, and other things so lent, bargained, exchanged, or shifted(u).

Lypon this statute it was holden that a bill or note founded upon an usuri- 53 Geo. 8. ous consideration was void even in the hands of a bonû fide holder (x). by the 58 Geo. 3, c. 93, reciting that to be the law, and that in the course of mercantile transactions negotiable securities often passed into the hands of persons who had discounted the same, without any knowledge of the original consideration for which the same was given, and that the avoidance of such securities, in the hands of such bonû fide indorsees, without notice, was attended with great hardship and injustice, it was enacted "that no bill of exchange or promissory note, that should be drawn or made after the passing of that act, should, though it might have been given for an usurious consideration, or upon an usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill or note had been originally given for an usurious consideration or upon an usurious contract." The operation of this statute was that if in an action on a bill or note the defendent succeeded in establishing that it was founded on an usurious contract or consideration, the plaintiff was bound to prove that

(u) For the law as it stood under this act see Chit. Stat. 1091 to 1095, in notes. The act did not affect contracts made abroad; Harvey r. Archbold, 3 Bar. & Cres. 626; 5 Dowl.

**Mazzaredo, 1 Stark. 385; Chapman v. Black, 2 Bar. & Ald. 590, and in Henderson v. Benson, 8 Price, 288. & Ryl. 500, S. C.

(x) Lowe v. Waller, Dougl. 786; Lowes v.



and upwards. There is no special provision against usury: of course, nothing can be recovered which is disallowed by law. Tennessec.—Interest six per cent. Borrower may avoid usury by plea, and the pleadings are to be on oath, and the question tried and decided by a jury. Party taking usury is liable to indictment, and fine to be assessed by the jury. South Carolina.—Interest seven per cent. Usurious contracts are void, and lender forfeits treble the amount of loan: the borrower is a witness to prove usury, unless the lender will swear against him. Maryland. -Interest six per cent. on money, and eight per cent. on tobacco and other commodities. Usurious contracts are void, and the usurer forfeits treble the value of the loan. Maine.-Interest six per cent. Usurer forfeits the value of the loan; the debtor may avoid usurious security by oath, unless the lender will swear against him. Delaware.—Interest six per cent. Usurer forfeits loan, one half to informer, and the other to the state. Kentucky.—Interest six per cent. Usurious contracts void only so far as respects usurious interest. New Jersey.—Interest seven per cent. Usurious contracts void, and lender forfeits loan, one balf to state, and the other to the prosecutor, with costs. Griffith's Law Register, under the head, "Usurious Interest," passim.

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II. Illegali- he gave value for *it and then the defendant must have shown that the plainty of Con-tiff nevertheless had notice of the usury at the time he took the security(z). The act, however, though evidently intended to repeal so much of the 12 2. By State Anne, c. 16, as rendered bills and notes given for an usurious consideration void in the hands of a bonû fide indorsee for valuable consideration, who had no notice of the usury, but not having in fact repealed any of the provisions of that statute, was held to be confined to parties who had discounted or paid a valuable consideration for the bill or note, and not to extend to a party who had taken it in payment of an antecedent debt(a). But by the 5 & 6 5 & 6 Will. Will. 4, c. 41(b), bills and notes given for an usurious consideration are not

4, c. 98, s.

4, c. 41.

to be void, but to be deemed to have been given for an illegal considera-3 & 4 Will. tion(c). And by the 7th section of the late Bank Act, 3 & 4 Will. 4, c. 98, bills and notes at or within three months, or not having more than three months to run, are exempted from the operations of the usury laws(d). This exemption was afterwards extended to bills and notes at or within 7 W. 4 & twelve months or not having more than twelve months to run, by 7 Will. 4 and 1 Vict. c. 80. And now by the 2 & 3 Vict. c. 37, see post 819,(10)

1 Vict. e.

c. 37.

Bills of Ex-Contracts for Loans or Forbearance of Money above 10%. not to be Usury Laws.

intituled, "An Act to amend and extend until the First Day of January One 2 & 3 Vict. thousand eight hundred and forty-two, the Provisions of an Act of the First Year of Her present Majesty for exempting certain Bills of Exchange and Promissory Notes from the Operation of the Laws relating to Usury," it is change and enacted, "that from and after the passing of this act no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money above the sum of ten pounds(e) sterling, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating or affected by transferring any such bill of exchange or promissory note, be void, nor shall the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons or body corporate drawing, accepting, indorsing or signing any such bill or note, or lending or advancing or forbearing any money as aforesaid, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; anything in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom to the contrary notwithstanding; provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements or hereditaments, or any estate or interest therein." Section 2 provides and enacts, "that nothing in that act contained shall

Five per cent. to be considered the legal Rate of Interest, ex-cept, &c.

be construed to enable any person or persons to claim in any *court of law or equity more than five per cent. interest on any account or on any contract

(z) Wyatt r. Campbell, 13th July, 1827, MS. Chitty's Col. Stat. 121 a, and Mood. & *89] M. 80, S. C.

(a) Vallance v. Siddel, 6 Ad. & El. 932; 2

N. & P. 78, S. C. (b) See this act more fully, post, 90, 91,

Gaming. (c) It seems to have been doubted whether this statute really has the effect of rendering such securities available in the hands of a bond

fide holder for value, see per Lord Abinger in Edmunds v. Groves, 2 M. & W. 642, 644; Dowl. 775, 777, S. C.

(d) See this enactment with notes, ante, 68.
(e) The original object in introducing this sum was to guard against a repeal of the Pawnbrokers' Act, but since this is expressly provided against by the third section of the act, quære if not left in by mistake.

or engagement, notwithstanding they may be relieved from the penalties II. Illegalagainst usury, unless it shall appear to the court that any different rate of ity of Coninterest was agreed to between the parties (1)."

It may be observed, that before the late acts, although a substituted secu-2. By statrity or a renewed bill or note for the same amount in the case of usury would ute be equally void as the original usurious contract(f), yet when the usurious bargain had been rescinded, a renewed bill for the principal and interest justly due would be valid(g). It was necessary, however, that the illegal stipulation should be completely reformed and purged of its objectionable parts, and there must have been an express agreement carried into effect to expunge the original bad part of the debt or claim, and the excess of interest must have been returned or allowed for, otherwise a new settlement of the amount would be unavailing(h); and a party could not recover on a new instrument which operated as a security for any usurious interest, although the old securities had been cancelled(i); and a new security or promise to pay the principal was not valid, unless all payments beyond legal interest had been repaid or deducted(j).

A subsequent usurious contract would not invalidate the right to enforce a previous local one(k). So the subsequently taking illegal interest on a valid debt would not invalidate the same(l). But the taking excessive interest was $prim \hat{i}$ facie evidence of an original illegal contract(m)(2).

- (f) Chapman r. Black, 2 Barn. & Akl. 588; Wynne v. Callande, 1 Russ. 293; Preston r. Jackson, 2 Stark. 237; Davies r. Franklin, 1 Barn. & Adol. 142; and see Marchant r. Dodgin, 2 Moore & S. 682.
- (g) Barnes v. Hedley, 2 Taunt. 184; 1 Campb. 165; 2 Stark. 238; and see Marchant v. Dodgin, 2 Moore & S. 632.
 - (h) Id. ibid.

- (i) Preston r. Jackson, 2 Stark. 287.
- (j) Weeks v. Gogerly, Ry. & Moo. 123.
 (k) Pollard v. Scholey, Cro. Eliz. 20; 1
 Saund. 294, 295.
 - (1) Ferrall r. Shean, 1 Saund. 291.
- (m) See observations in Solarte v. Melville, 1 Man. & Ryl. 204; 7 B. & C. 416, (Chit. jun. 1352); but see Fussell v. Brooks, 2 Car. & P. 318.

(2) When a contract is usurious. The requisites to form an usurious contract are, 1. A loan either express or implied. 2. An understanding that the money lent shall or may be returned. 3. That a greater rate of interest than is allowed by the statute shall be paid. The intent with which the act is done is an important ingredient to constitute the offence. Lloyd r. Scott, 4 Peters' Rep. 205

To constitute usury there must be a corrupt agreement. Payment and receipt of usurious interest is, prima facie, evidence of a corrupt agreement. N. Y. Firemen Ins. Co. v. Ely, 2 Cowen, 678.

Where it was agreed between A., a commission merchant in New York, and B., a country trader, that on being furnished with a letter of indemnity, A. would become responsible to a limited amount, and charge for lending his name, if put in funds in time to meet the payment, a half per cent., and two and a half per cent. in all cases of advance; and it appeared that the latter charge was intended, by the parties, as a fair compensation to A. for his trouble in providing for acceptances, which it was the duty of B. to pay, and not as cover for a usurious loan; it was held that the commissions charged under such agreement were not usurious. De Forest et al. s. Strong, 8 Conn. Rep. 513.

Interest taken in advance by a banking institution on discounting a note is not usury. Bank of Utica v. Phillips, 3 Wend. Rep. 408. { State Bank v. Hunter, 1 Dev. 100. Thornton v. The Bank of Washington, 3 Peters, 40. Agricultural Bank v. Bissell, 12 Pick. 586.}

The taking of interest in advance, on discounting a note, by a company not possessing banking powers, does not render the loan usurious. Utica Ins. Co. v. Bloodgood, 4 Wend. Rep. 652.

And this right to take interest in advance, on discounting a note is not confined to banks, bankers and merchants discounting bills in the fair course of commercial business, but extends to in

^{(1) {} Promissory notes payable one month after date, to be renewed as often as they fall due at a discount of one shilling in the pound, (or sixty per cent. per annum) was held to be within the protection of 3 & 4 Will. 4, c. 98, s. 7, and 7 Will. 4. & 1 Vict. c. 80. Holt r. Miers, 5 Mee. & Wels. 168. So an agreement with a debtor that he should pay part of the debt, and should have three months forbearance and accept at that date a bill in payment of the residue and pay for such forbearance a sum exceeding five per cent. was held to be exempted from the usury laws by 3 & 4 Will. 4, c. 98, § 7. King v. Braddon, 2 Per. & Dav. 546. }

(2) When a contract is usurious. The requisites to form an usurious contract are, 1. A loan

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II. Illegal- 'A gaming consideration is declared illegal by the statute 16 Car. 2, c. 7, ity of Con- and 9 Anne, c. 14(0). The first statute avoids all securities whether writsideration.

(n) See the statutes with notes, Chitty's Wilmot's notes, 194; Edwards v. Dick, 4 B. Col. Stat. tit. "Gaming." & Al. 212, (Chit. iun. 1079). 2. By Statute. (o) 1 Pow. 207; Bac. Ab. tit. "Gaming;"

Gaming (n). 16 Car. 2,

dividuals and others having a general right to discount. N. Y. Firemen Ins. Co. v. Ely, 2 Cow-

A note reserving interest negotiated by a broker or agent, who obtains the money on the same for the maker, from a third person, is not usurious in the hands of the holder, although the agent be the payee of the note, and receives 124 per cent. for the negotiation, no part of such sum being paid or agreed to be paid to the person advancing the money. Barretto v. Snowden, 5 Wend. Rep. 181.

An agreement to pay interest upon interest, after the interest has accrued, is not usurious: iven on the settlement of an account, in which compound interest is charged, is not usurious.

Kellogg v. Hickok, 1 Wend. Rep. 521.

It is not illegal to receive compound interest for the giving day of payment of money. Dow v.

Drew, 8 New Hamp. 40.

A promissory note for the payment of a particular sum, with interest from a day anterior to the date of the note, in itself affords no evidence of usury. Marving: Feeter, 8 Wend. Rep.

Nor is it usurious, on selling a note payable at a future day, to take a note for the principal and interest of the note sold computed to the day of sale, without making a rebate. Ib. See

also, Holden v. Pollard, 4 Pick. 178; Levy r. Hampton, 1 M'Cord, 145.

It is not within the scope of these notes to state the general doctrine as to what constitutes neary. But the learned reader will find valuable information as to the doctrine of usery upon discount of notes in the following cases: Atkinson v. Scott's Ex., 1 Bay's Rep. 307. Churchill v. Suter, 4 Mass. Rep. 156. Portland Bank v. Storer, 7 Mass. Rep. 438. Jones v. Hake, 2 John. Cas. 60. Wilkie v. Roosevelt, Payne v. Trezevant, Musgrove r. Gibbs, 1 Dall. Rep. 216. Wycoff v. Longhead, 2 Dall. Rep. 92. Northampton Bank v. Allen, 10 Mass. Rep. 84. Thompson v. Thompson, 8 Mass. Rep. 135. Munn v. The Commission Company, 15 John. Rep. 44. Bennet v. Smith & Phelps, 15 John. Rep. 355. Powell v. Waters, 8 Cowen, 669. Stribbling v. Bank of the Valley, 5 Rand. 182. Whitworth v. Adams, Id. 883. Johnson v. King, 3 M'Cord, 365. Fleming v. Mulligan, 2 M'Cord, 173. To take interest in advance, upon discounting a ninety day note, made to be discounted, the interest being calculated at one fourth of a year, for the ninety days, is usury, and the note, therefore, void. Bank of Utica v. Wagar, 8 Cowen, 398. If a mode of calculating interest, which gives to the creditor more than legal interest, is adopted, and he knows that it will have that effect, it constitutes usury, although the creditor may not suppose that he thereby violates the statute. Childers v. Deane, 4 Rand. 406.

Where in consequence of an usurious agreement, a person is procured to indorse a note given in the usurious transaction, though at the time, he knew nothing of the usurious contract, yet his

indorsement is void. Wilks v. Brummer, 2 M'Cord, 178.

It seems, if a security be given for a debt, a part of which is valid, and part for an usurious consideration, the whole will be infected, though separate notes be given. Fleming v. Mulligan,

ut supra. See Motte v. Dorrell, 1 M'Cord, 350.

Courts will not sanction any kind of artifice or contrivance by which the lenders of money may bope to evade the statutes against usury, and receive more than the levelul rate of interest. Thus, where a proposition is made for a loan of money, and the lender will only consent to lend a part of the money wanted, on condition that the borrower shall receive bank stock, (or any other collateral articles) at a price much above the market value, to make up the deficiency, and the bargain is made on such terms, the contract is usurious and void. Stribbling r. Bank of the Valley, 5 Rand. 132. Where M. requested J. to procure a loan of money for him, stipulating to pay J. 3 per cent. per month. J. accordingly borrowed the money of W. at legal interest, and gave him his note with an indorser. M. paid J. the 8 rer cent. for his own benefit. Held, that the note was not usurious. Coster v. Dilworth, 8 Cowen, 299.

Commission is a fair compensation for the use of the name and credit of the acceptor, but interest is not allowable on advances to take up an acceptance, where there is no agreement to pay any. Segond v. Thomas, 10 Curry's Louis. Rep. 295. So where the holder of a note payable to himself, requested another person to procure it to be discounted, who did so by placing his own name on as indorser and out of the avails retained thirty dollars for his indorsement and trouble, it was held that the transaction was usurious. Steele r. Whipple, 21 Wend. 103. The transfer and guaranty of a note for an expressed consideration less than the face of the note, is not per se usurious; the guarantor when called on for payment being only liable to refund the

amount received by him with interest. Magurgan v. Mead, Id. 285.

Effect of usury. A contract usurious in its inception cannot afterwards be rendered valid, even in the hands of a bont fide indorsee without notice of the usury. Wilkie v. Roosevelt, 3 John. Ca. 206. Payne v. Trezevant, 1 Bay's Rep. 28. See Warren c. Crabtree, 1 Greenl. 167. ten or verbal, given to secure any sum of money exceeding 100l. lost at play: II. Illegalbut the 9 Anne only avoids written contracts(p), and an action of assumpsit ity of Con-

(p) Robinson v, Bland, 2 Burr. 1077; 1 Wills. 67; M'Kenell v. Robinson, 3 M. & W. 2. By Stat-Bla. 260, S. C.; sed vide Young v. Moore, 2 484, 441.

Though a usurious note be void in the hands of a bon1 fide holder, yet a new security given to such holder for the usurious note is good. Stewart v. Eden, 2 Caines' Rep. 150. Chadbourne v. Watts, 10 Mass. Rep. 121. Kilburn v. Bradley, 3 Days' Rep. 268. Jackson v. Heary, 10 Jackson v. Heary, 10 John. Rep. 185. Floming v. Mulligan, 2 M'Cord, 173. Steele v. Franklin, 5 N. Hamp. Rep. 876. And a judgment in the hands of a bon't fide assignee, it seems, is not affected by usury in the original transaction. Wardwell v. Eden, 2 John. Cas. 263. S. C. 1 John. Rep. 581, note. A security originally valid cannot be invalidated by a subsequent usurious transaction between the original parties or privies. Bush v. Livingston, 2 Caines' Cas. in Err., 66; see Whitworth v. Adams, 5 Rand. 333. And no usurious transactions between intermediate parties can affect the title to a note in the hands of a bon2 fide holder. Foltz v. May, 1 Bay's Rep. 496. Johnson v. King, 3 M'Cord, 365. See Whitworth v. Adams, ut supra.

If the payee or indorsee of a valid promissory note gives it up to the maker as part of the consideration for a new note, which is afterwards avoided on the ground of usury, he may recover of the maker the amount of the original note. Ramsdell v. Soule, 12 Pick. Rep. 126.

Where money was lent before the statute of usury, 1783, c. 55, was repealed, and a promissory note was given for its re-payment with lawful interest, and the borrower promised verbally to pay a usurious rate of interest for the loan; it was held, that the note was not rendered void

by the verbal agreement. Butterfield c. Kidder, S Pickering's Rep. 512.

Where a usurious note has been transferred for valuable consideration, and without notice, and a new note is taken by the holder, the usury of the first note cannot be set up in bar of a recovery on the second note. Kent v. Walton, 7 Wend. Rep. 256.

A mortgage taken on a loan of money, including a former usurious loan, is void; the taint of

usury destroys the whole security. Jackson v. Packard, 6 Wend. 415.

Where an acceptance is given in consideration that the party obtaining it will, in a specified period, deliver to the acceptor a quantity of wheat, the acceptor cannot set up usury though the acceptance was afterwards and before maturity, usuriously negotiated. Cameron v. Chappell, 24 Wend. 94. Promissory notes pledged as security for an usurious loan cannot be recovered on in a suit by the lender against the borrower, nor by a third person, who has received them to collect and apply the proceeds to the credit of the lender. Bell v. Lent, Id. 230.

An usurious security given in part for a pre-existing valid debt, does not affect that debt, which may be recovered on the original consideration, or upon a subsequent promise, after the recision of the usurious security. But no promise express or implied based on such usurious security is binding. Hammond v. Hopping, 13 Wend. 505. And the security is equally void whether the un-

lawful excess be actually paid or only promised to be paid, Id.

The bon't fide holder of a usurious note, buying without knowledge of the illegal transaction, held not effected by it. Creed v. Stevens, 4 Whart. 223.

The sale of a valid note at a greater discount than the legal interest, is not usurious, though indorsed by the seller, but the indorsee can recover from the indorser only the sum paid by him with interest. French v. Grindle, 15 Maine, 163. Farmer v. Sewall, 16 Maine, 456. Brittin r. Freeman, 2 Harr. 191.

It is incumbont on an indorser to show himself a boni fide holder, if he would prevent usury

from being set up against him. Hanrick v. Andrews, 9 Porter, 10.

Computation of interest. Taking interest for a portion of a year, computed on the principle that a year consists of 360 days, or 12 months of 30 days each, is not usurious, provided this principle is resorted to in good faith, as furnishing an easy and practicable mode of computation, and not as a cover for usury. Agricultural Bank v. Bissell, 12 Pick. Rep. 586. { See also The Bank of Burlington v. Durkee, 1 Vern. 309. But in the case of the N. Y. Firemen Ins. Co. v. Ely it is decided that casting interest upon the principle that 30 days are the 12th of a year, 60 days the 6th, 90 days the 4th of a year and the three days of grace the 10th of a month, and discounting a note upon such a calculation is usurious. Such a usage among banks, although it were universal, would not prevent its being usurious (2 Cowen, 678.) See also Utica Ins. Co. r. Tillman. 1 Wend. 555.

It is now settled however, by the revised statutes of New York, that, for the purpose of calcalating interest, a month is to be considered as the twelfth part of a year, and as consisting of

thirty days. (See 1 Rev. St. 773, § 3.) }

(Sec also Powell r. Waters, 8 Cowen Rep. 663. Stock c. Parkor, 2 M'Cord's Chan. Rep. 898. Knights v. Putnam, 3 Pick. Rep. 184. | Gibson v. Steurns, 3 N. Hamp. 186; Copeland s. Jenes, Idem, 116; Forbes v. Marsh, Idem, 119; Tilford v. Sumner's Exrs., 2 Yerg. 255; Savings Bank v. Bates, 8 Con. 505; Livingston v. Harris, 11 Wend. 329; Selby v. Morgan, 8 Leigh, 577; Clarkson's adm'r v. Garland, 1 Idem, 147; Cockey v. Forrest, 3 Gill & John. 482; Colton v. Dunbam, 2 Paige, 267; Brockway v. Copp., 3 Idem, 539; Cummings v. Williams 4 World 270. Birch W. Climber 5 Idem, 585; Henrick and M. Sarin Barrish and A. Welling S. Idem, 585; Carbon by Carbon 1 and Williams, 4 Wend. 679; Rice v. Welling, 5 Idem, 595; Herrick v. Jones, 4 M'Cord, 402; Merritt v. Benton, 10 Wend. 116; M'Nairy v. Bell, 1 Yerg. 502; Fulton Bank v. Benedict, 1

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9 Anne, c.

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II. Illegal- will lie to recover money won at play not amounting to 10l. (q). By the 9 ity of Con- Anne, c. 14, s. 1, it is enacted, "that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, 2. By Stat- drawn or entered into (r), or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice-tables, tennis, bowls, or other game or games whatsoever(s), *or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall during such play so play or bet, shall be utterly roid, frustrate and of none effect to all intents and purposes whatsoever, any statute, law or usage to the contrary thereof in anywise notwithstanding."

Under these statutes a bill of exchange or promissory note given for a gambling debt was void, even in the hands of a bona fide holder(t); and a bill, though not drawn for a gaming consideration, yet if it were accepted by the drawer, and delivered by him for such consideration, was void in the hands of a bona fide holder, and could not be enforced against the acceptor(u); and fresh bills given in France on French stamps in lieu of English bills given for money lost at play in England, will still be equally invalid in the hands of the original parties; and on a bill filed, a court of equity will compel them to deliver up such renewed bills(x). But as in the case of usury before the 58 Geo. 3, c. 93(y), a renewed or substituted security given for a gambling debt was held to be valid in the hands of a bona fide hol-

(q) Bulling v. Frost, 1 Esp. Rep. 235.

(r) As to these words, see Henderson v. Benson, 8 Price, 281, (Chit. jun. 1085.)

(s) Any game is within the act; Sigel r. Jebb, 3 Stark. C. N. P. 1, (Chit. jun. 1078). A horse race is, 2 Stra. 1159, though for a legal plate, 2 Bla. Rep. 706; 2 Wils. 309; Shillito r. Theed, 5 M. & P. 303, post, 90, n.(1); a trotting match, Martin v. Smith, 6 Scott, 268; 4 Bingh. N. C. 434, S. C.; so a foot race, 2 Wils. 36; so also semble a game of cricket, I Wils. 220. As to backgammon, see 13 Geo. 2, c. 19, s. 9; 2 H. Blp. 46. It was formerly considered that money lent for the purpose of illegal gaming might be recovered back, see Robinson v. Bland, 2 Burr. 1077; 1 Bla. Rep. 256, S. C.; but a contrary doctrine has since been established, M'Kinwell v. Robinson, 3 M. & W. 434; and see Carman r. Bryce, 3 B. & Al. 179.

(t) Bowyer r. Brampton, 2 Stra. 1153, (Chit. jun. 296). Several notes given by Brampton to Church for money lent to game with, were indorsed by Church to the plaintiff for a full and

valuable consideration, and the plaintiff had no knowledge that any part of the consideration from Church to Brampton was money lent for gaming; and after two arguments upon a case reserved the court held, that the plaintiff could not maintain the action, for it would be making the notes of use to the lender if he could pay his debts with them, and it would tend to evade the act on account of the difficulty of proving notice on an indorsee, and the plaintiff would not be without remedy, for he might sue Church upon his indorsement; and see Bayl. 237; Wilmot's notes, 194; Aliken r. Howell, 1 Nev. & M. 191. In Shillito v. Theed, 5 M. & P. 308; S. C. 7 Bing. 405; 9 Law J. 135, C. P.; 5 C. & P. 303, it was held, that the plaintiff, though an indorsee for valuable consideration, could not recover on a bill given in payment of a bet above 101. lost on a legal horse race.

(u) Henderson r. Benson, 8 Price, 281,

(Chit. jun. 1085).
(x) Wynne v. Callandar, 1 Russ. R. 293. (y) See Cuthbert r. Haley, S T. R. 390.

Hall, 480; Early r. M'Cart, 2 Dana, 415; Crump v. Trytille, 5 Leigh, 251; Brock v. Thompson, 1 Bai. 322; Rowland v. Hoover, 2 How. 769; Roffey v. Greenwell, 2 Per. & Day. 865.

A note without a place of payment designated draws interest according to the law of the place where dated, Hoppins r. Miller, 2 Harr. 185. But where the place of payment is designated, and no interest contemplated till default in payment, interest accrues after default according to the law of the place of payment. Hanrick v. Andrews, 9 Porter, 10. And see Kirk and Lakens r. Fenwicke, 2 Brev. 241. }

As to running accounts between merchants, see Hart v. Dewy, 2 Paige Ch. Rep. 207. That the question of usurious interest is to be left to the jury, see Thomas r. Cutherall, 5 Gill. & John. 23; Bank of Burlington r. Durkee, 1 Verm. 399; Lloyd r. Scott, 4 Peters, 205; Stockett r. Ellicott, 3 Gill. & John. 123; Brittin r. Freeman. 2 Harr. 191. }

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der, if he took it when he was ignorant of the illegality (z). And an action II. Illegaliagainst the indorser of such a bill or note at the suit of a bond fide holder ty of Conmight be sustained(a); for to allow this defence to the drawer or indorser sideration. would be to protect the party who had violated the provisions of the act. 2 By And now by the 5 & 6 Will. 4, c. 41, intituled, "An Act to amend the Statute. Law relating to Securities given for Considerations arising out of Gaming, Usurious and certain other Illegal Transactions," after reciting the 16 Car. 5 & 6 Will. 2, c. 7, 10 Will. 3, (Ireland), 9 Anne, c. 14, 11 Anne, (Ireland), 12 4, c. 41. Anne, st. 2, c. 16, 5 Geo. 2, (Ireland), 58 Geo. 3, c. 98, 45 Geo. 3, c. 72, s. 17, (which makes void all contracts, bills and notes for ransom of any ship, &c.) 6 Geo. 4, c. 16, s. 125, 11 & 12 Geo. 3, (Ireland,—making void all contracts and securities for signing a bankrupt's certificate), and that securities and instruments made void by the recited acts, other than bills and notes made valid by the 58 Geo. 3, c. 93, are sometimes indorsed, transferred, assigned or conveyed *to purchasers or other persons for a valu- [*91] able consideration without notice of the original consideration for which such securities or instruments were given; and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice, it is enacted, "that so much of the Securities recited acts as enacts that any note, bill or mortgage shall be absolutely given for void, shall be and the same is hereby repealed; but nevertheless every note, tions arising bill or mortgage which if this act had not been passed would by virtue of out of Illethe said recited acts or any of them have been absolutely void, shall be deem- gal Transed and taken(b) to have been made, drawn, accepted, given or executed for actions not to be void, an illegal consideration, and the said several acts shall have the same force but to be and effect which they would respectively have had if instead of enacting that deemed to any such note, bill or mortgage should be absolutely void, such acts had re- have been spectively provided that every such note, bill or mortgage should be deemed an Illegal and taken to have been made, drawn, accepted, given or executed for an il- Considerlegal consideration: provided always, that nothing herein contained shall pre- ation(c). judice or affect any note, bill or mortgage which would have been good and valid if that act had not been passed."

Sec. 2 enacts, "that in case any person shall after the passing of this act Money make, draw, give or execute any note, bill, or mortgage for any conside-paid to the ration on account of which the same is by the recited acts of 16 Car. 2, c. Holder of such Se-

(z) George r. Stanley, 4 Taunt. 683, (Chit. jun. 876). The defendant gave the bills in question for the amount of a gaming debt, which, when due, he renewed with the plaintiff the holder, and when the last-mentioned bills became dae, executed a warrant of attorney, and confessed judgment for the amount, whereon execution being levied, a rule nisi was obtained to have the money restored and the warrant of attorney cancelled, but upon cause being shown, the court held that the defendant ought to have availed himself of this ground of defence when he was applied to for the payment of the first bills, and discharged the rule, but permitted him to try an issue whether the plaintiff were implicated. See Davison v. Franklin, 1 B. & Ad. 142, post, 96, and see Day v. Stuart, 6 Bing. 109; 3 M. & P. 334, (Chit. jun. 1448). As to pleading illegality of substituted bill, see Boulton r. Coglan, 1 Bing. N. C. 640; 1 Scott, 588, S. C. post, Part II. Ch. IV. Defences and

(a) Edwards v. Dick, 4 B. & Al. 212, (Chit. jun 1079); per curiam, Bowyer r Brampton. 2 Stra. 1155, (Chit. jun. 296).

(b) In Hitchcock v. Way, 6 Adol. & Ellis, to be paid 943; 2 Nev. & P. 72, S. C., this, as well as on account the following section, was held to be prospec- of the Pertire; and, therefore, in an action against the son to acceptor of a bill of exchange by a bon't fide whom the holder, brought to issue before the passing of same was this statute, but tried after, the defendant originally might avail himself of the 9 Anne, c. 14, and was given. entitled to nousuit if he proved the bill to have been given for a gaming consideration. was said, that where the law is altered by statute pending an action, the law as is existed when the action was commenced must decide the rights of the parties, unless the legislature by the language used show a clear intention to vary the mutual relation of such parties.

(c) A doubt seems to have been entertained whether this act, which professes to render securities given for gaming debts available in the hands of a bona fide holder for value, really has that effect. See per Abinger, C. B. in Edmunds v. Groves, 2 M. & W. 662, 664; 5

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2. By Statute.

II. Illegali- 7, 10 Will. S, (Ireland), 9 Anne, c. 14, and 11 Anne, (Ireland), or by ty of Con- any one or more of such acts declared to be void, and such person shall actually pay to any indorsee, holder or assignee of such note, bill or mortgage the amount of the money thereby secured or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of his Majesty's courts of record."

In an action on a bill of exchange after a verdict for the defendant, on the ground that the bill was drawn originally for a gambling debt, the court will not grant a new trial upon affidavits negativing such defence where there has

been no surprise (d).

Stock-jobbing(e). •92

The statute 7 Geo. 2, c. 8, enacts, "that all wagers and contracts in the nature of wagers, and all contracts in the nature of puts and *refusals relating to the price or value of any stock or securities as therein mentioned, shall be null and void to all intents and purposes whatsoever." A bill of exchange, given in respect of such a transaction, is invalid in the hands of the original parties, and of a person who received it after it was due, or with notice of the circumstances(e). But as this act does not, like the statute against gaming, avoid bills, notes and securities, but only the contracts, it follows, that a bill or note, though founded on a stock-jobbing transaction, is valid in the hands of a bona fide holder, who received it without knowledge

(d) Aliken r. Howell, 1 Nev. & M. 191. (e) See the act with full notes thereon, Chit. Col. Stat. tit. "Stock-jobbing;" and Faikney v. Reynous, 4 Burr. 2069; Sunders v. Kentish, 8 T. Ř. 162; Tate r. Wellings, 3 T. R. 531. The act was made perpetual by 10 Geo. 2, c. 8. A stock-jobbing transaction seems to be thus-"neither buyer nor seller have any stock, but the buyer agrees nominally to buy of the seller stock (sny) 1000l. on a certain day. When that day arrives, if the stock is at a lower price than when the bargain was made, the buyer pays the seller as much per cent. on the 1000l. as the stock hus fallen; but if the stock has risen, the seller pays the buyer in a similar way. The sums so paid are called differences. In fact, a time bargain is a mere wager, the seller betting that the stock will fall, the buyer that it will rise." See 1 C. & P. Rep. 13, n. (a). The stock-broker cannot be compelled to prove the stock-jobbing; but if he refuse to state the consideration, it will be taken that there was no consideration, and the plaintiff must prove himself a bon's fi.le holder for value. See Rawlings v. Hall, 1 C. & P. 11; Thomas v. Newton, 2 C. & P. 606, 607, post, 100, note (u)

Time bargains in foreign funds are not within the act, or illegal at common law, Henderson n the act, of negarial common law, Henderson r. Bise, 3 Stark. Rep. 158; Wells v. Porter, 8 Scott, 141; S. C. 2 Bing. N. C. 722; 2 Hodges, 78; Oakley v. Rigby, 3 Scott, 194; S. C. 2 Bing. N. C. 782; 2 Hodges, 42; Ebsworth v. Cole, 2 M. & W. 31; Robson v. Fallowes, 43; S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 3 Bing. N. C. 292; 2 M. d. S. C. 2 Bing. N. C. 292; 2 M Scott, 43; S. C. 3 Bing. N. C. 392; 3 Hodges, 41; Morgan v. Pebrer, 4 Scott, 230; 3 Bing. N. C. 457, S. C.; nor was dealing in lottery

produces, at a time when lotteries were permitted; Mortimer v. Salkeld, 4 Camp. 42. But jobbing in omnium is within the act; Brown r. Turner, 2 Esp. 631; 7 T. R. 630, (Chit jan. 611). The act does not apply when the seller is really possessed of the stock intended to be transferred, Sanders r. Kentish, 8 T. R. 162; and it suffices if at the time of the sale, through the medium of a broker, the principal be possessed of the stock, although his name be not disclosed by the broker; Child r. Morley, 8 T. R. 610. And a person who has omnium is potentially in possession of stock, and may legally contract to sell out omnium to be replaced in stock; Olivierson v. Coles, 1 Stark. Rep. 496. Stock-brokers are brokers within the 6 Anne, c. 16, and 57 Geo. 3, c. 60, Clarke r. Powell, 4 B. & A. 846; 1 N. & M. 492, S. C.; and unless duly admitted cannot sue for commission; Cope v Rowlands, 2 M. & W. 149. As to right of stock-broker to recover differences paid by him on behalf of his principal, see (hild r. Morley, 8 T. R. 610; Lightfoot v. Creed, 2 Moore, 255; Powle r. Gunn, 6 Scott, 286; 4 Bing. N. C. 445, S. C. It was doubted in the last case whether Spanish and Portuguese bonds were "goods, wares and merchandizes" within the statute of frauds, 29 Car. 2, c. 8, s. 17, so as to require a written contract.

(e) Brown v. Turner, 7 T. R. 630; 2 Esp. 631; post, 95, (Chit. j 611); Aubert v. Maze, 2 Bos. & Pul. 374; Steers v. Lashley, 6 T. R. 61, (Chit. j. 533); Amory v. Merewether, 2 B. & C. 578; 4 D. & R. S6, (Chit. j. 120); where the plaintiffs took the bill after it was due, and

had knowledge of the stock-jobbing.

of the circumstance before it was due(f). Where promissory notes were II. Illegaligiven by a stockbroker for the balance of an account of money advanced by ty of Con-him to be employed in stock-jobbing transactions, against the statute 7 Geo. sideration. him to be employed in stock-jobbing transactions, against the statute 7 Geo. 2, c. 8, part of the consideration consisting of the profits on these transac- 2. By tions, proof under his bankruptcy was restrained to the residue, viz. the mo- Statute. ney received, which he had applied to his own use(g).

A horse-race for a plate under 50l. is illegal(h), but a deposit of 25l. Horse-racaside is sufficient(i). So gaming in the lottery, when lotteries were permitted, was illegal(j); gaming policy on ships and lives, or other events, without being interested therein, is invalid (k).

*Trading against the laws of the East India Company(j) or the Russia Other Con-

Company(k) is also illegal.

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And the sale of an office (1) or of a vote, or bribery at an election, is in- Void by valid(m).

So a Simoniacal contract(n).

A stipulation to a sheriff, in consideration of ease and favour(o).

A contract in consideration of signing a bankrupt's certificate(p).

[*93]

(f) Day v. Stuart, 6 Bing. 109; 3 M. & P. 884, (Chit. j. 1448); and Greenland v. Dyer, (12th June, 1828,) cor. Lord Tenterden, and confirmed on motion for new trial, Chit. Col. Stat. 1033, note (d); 2 Man. & Ryl. 422, (Chit. jun. 1404.)

(g) Ex parte Bulmer, 18 Ves. 313. Money lent and applied by the borrower for the express purpose of settling losses on illegal stock jobbing transactions, to which the lender was no party, cannot be recovered back by him; Cannan r. Bryce, 3 B. & Ald. 179; and see M'Kinnell v.

Robinson, 3 M. & W. 434; ante, 89, note (s).
(h) 13 Geo. 2, c. 19; 18 Geo. 2, c. 34; Whaley r. Pajot, 2 B. & P. 51; Robson r. Hall, Peake's Ca. Ni. Pri. 127; Johnson r. Bunn, 4 T. R. I. A wager of above 101. on a horse race is illegal, though the race be legal; Clayton r. Jennings, 2 Bla. Rep. 708; Goodburn v. Marley, 2 Stra. 1159; Blaxton r. Pye, 2 Wils. 309; Macallister v. Haden, 2 Campb. 438, 439; Shilitto v. Theed, 5 M. & P. 303; 7 Bing. 405, S. C.; ante, 90, note (1).

(i) Bidmead v. Gale, 4 Burr. 2432.
(j) Deey v. Shee, 2 T. R. 617; Seddons v. Stratford, Peake's Rep. 215; Wyatt v. Bulmer, 2 Esp. Rep. 538, (Chit. j. 575); Respecting the abolition of latence at Go. 4. 60 the abolition of lotteries, see 4 Geo. 4, c. 60. 2 Will. 4, c. 2, and 6 & 7 Will. 4, c. 66.

(k) 19 Geo. 2, c. 37; Kent v. Bird, Cowp. 583. Does not extend to foreign ships; Nantes t. Thompson, 2 East, 385; 14 Geo. 3, c. 48. The insurer must have a pecuniary interest in the life insured; Halford v. Kymer, 10 B. & C. 724. A policy upon the sex of a person is wagering within the 14 Geo. 3, c. 48; Roebuck v. Hamerton, Cowp. 737; but a wager to be within that act must assume the shape of a policy of insurance; Good v. Elliott, 3 T. R. 690; Morgan v. Pebrer, 4 Scott, 230; S. C. 8 Bing. 457; 8 Hodges, 3. See the acts with notes, Chit. Stat. 619, 622.

(f) Lightfoot v. Tenant, 1 B. & P. 552.

(k) Grose v. La Page, Holt, C. N. P. 105. (l) 5 & 6 Ed. 6, c. 16; 49 Geo. 3, c. 126;

Chit. Col. Stat. "Offices, Sale of," 740; 3 Y. & J. 136; Blackford v. Preston, S T. R. 93; Parsons r. Thompson, 1 H. Bla. 322; Layng c. Paine, Willes, 571; Com. Dig. "Officer," K. 1; Bac. Ab. "Officer," F.; Stackpole r. Earle, 2 Wils. 133; Balmer v. Bate, 2 B. & B. 673; 6 Moore, 28, S. C.; Harrington v. Kloprogge, 2 B. & B. 678; 2 Chit. Rep. 475, S. C. As to offence at common law, ante, 84, note (d).

(m) 2 Geo. 2, c. 24; Anonymous, Lofft, 552; Sulston r. Norton, 3 Burr. 1235; The King r. Pitt, 1 Bla Rep. 390; Allen v. Hearn, 1 T. R. 56; Webb v. Smith, 4 Bingh. N. C.

373; 6 Scott, 147, S. C

(n) 31 Eliz. c. 6; Totteridge v. Mackelly, Sir W. Jones, 341; Co. Litt. 206 b; Layng v. Paine, Willes, 575, n. (a); Bac. Abr. "Simony;" Doe d. Watson v. Fletcher, 8 B. & C. 25. See the act with notes, Chit. Stat. 150 to 152. See also 7 & S Geo. 4, c. 25, and 9 Geo. 4, c. 94, ib. 1134, 1135; Alston v. Atlay. 6 Nev. & Man. 686.

(o) 23 Hen. 6, c. 9; Rogers r. Reeves, 1 T. R. 418; Samuel v. Evans, 2 T. R. 569; Sell.

Prac. 129 to 137; 1 Pow. 173.

 (p) 6 Geo. 4, c. 16, s. 125; Smith v. Bromley, Doug. 696; Cockshott v. Bennett, 2 T. R. 673; Nerot v. Wallace, 3 T. R. 17; Sumner r. Brady, 1 Hen. Bla. 647.

Before the late act 5 & 6 Will. 4, c. 41, (unte, 90, 91,) a bill given to a creditor to induce him to sign a bankrupt's certificate, was void in whosesoever hands it might be, and whatever the consideration given by the holder; although a bill given to a creditor merely to keep him from taking sleps to oppose the certificate would be good in the hands of a holder for value without notice; Birch v. Jervis, 8 Car. & P. 879, (Chit. jun. 1409); but by the operation of that statute such bill will now be valid in the hands of a bona fide holder for value.

So a bill or note in consideration of not opposing the discharge of an insolvent debter would be void; Murray v. Reeves, 8 B. & C.

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sideration.

2. By Statute.

11. Illegalia And a contract to ransom any British ship or goods captured by an enemy ty of Conic declared unlawful (q). So there are some prohibitory statutes, as the act And a contract to ransom any British ship or goods captured by an enemy 55 Geo. 3, c. 194, s. 21, which prohibits persons from recovering for medicines, unless they prove that they have been regularly certificated apothecaries; and if a note be given for medicines, the apothecary cannot recover without adducing the like evidence (r).

Other Prohibited Transactions.

Besides these and many other cases of contracts and securities, expressly declared by statute to be void, there are other cases in which *the legislature have prohibited a transaction, and a bill or note having been given to [*94] carry into effect such prohibited contract, the instrument has been held void Thus a bill of exchange, part of the consideration for which consists of spirituous liquor, sold in quantities of less than twenty shillings value, is wholly void, though the other part of the consideration was money lent, because such sale of spirits is contrary to the statute 24 Geo. 2, c. 40(t). So a bill for a share of the profits of an unlicensed theatre, or for money paid in procuring performers and dresses for such theatre, is invalid(u). And it has been held that no action can be supported by the plaintiff on a note given to him by the defendant as an apprentice fee, if it appear that the indenture executed was void by the statute 8 Anne, c. 9, for want of insertion of such premium therein, and a proper stamp in respect to the same, although the plaintiff did, in fact, maintain the apprentice for some time, and until he absconded (x). But it was held no objection to an action on a promissory note, that it was given as part of the consideration of an indenture of apprenticeship for less than seven years, by being antedated, such indenture being, by the statute of Elizabeth, only voidable and not void(y).

By the 6 Geo. 4, c. 91, the 18th, 19th, and 20th sections of the 6 Geo.

421; 2 Man. & R. 423, S. C.; Rogers v. Kingston, 10 Moore, 97; 2 Bingh. 441, S. C. So a note to a commissioner under a commission of bankruptcy, for his whole debt, pending the commission, is void; Hayward v. Chambers, 5 B. & Ald. 753; 1 D. & R. 411, S. C., (Chit. jun. 1187); and the certificate itself will likewise be void; Horn r. Jones, 4 B. & Ad. 78; 1 N. & M. 627, S. C.; and see Robson v Calze, 1 Doug. 228; Holland v. Palmer, 1 B. & P. 95, there cited.

An agreement between a petitioning creditor, who has sued out a fiat in bankruptcy, and the bankrupt, that the former shall abandon the prosecution of the fiat, and that the bankrupt shall accept a bill of exchange for a certain amount, is illegal even as between the bankrupt and the petitioning creditor, and the bill of exchange accepted by the bankrupt in pursuance of such an agreement is void, and no action can be maintained upon it; Davis v. Holding, 1 Mee. & Wels. 159; 1 Gale, 380, S. C. And a bill of exchange for part of a debt given by a bank-rupt, after commission, and before certificate, to his assignee, who was also petitioning creditor, and had proved for the residue of his debt, was held void in the hands of the assignee, both as being contrary to the general policy of the bankrupt law, and as being contrary to the spirit of the 5th section of 6 Geo. 4, c. 16; Rose v. Main, 1 Bing. N. C. 857; 1 Scott, 127, S. C. (q) Statute 45 Geo. 3, c. 72; Webb v.

Brooke, 3 Taunt. 6, (Chit. jun. 804). But a bill or note for the ransom of a ship is now valid in the hands of a bon't fide holder for value; 5 & 6 Will. 4, c. 41, ante, 90, 91.

(r) Blogg r. Pinkers, Ry. & Moo. 125, (Chit. jun. 1227).

(s) See principle in Bensly v. Bignold, 5 B. & Ald. 335; Hodgson v. Temple, 5 Taunt. 181; Langton v. Hughes, 1 Maule & S. 593.

(t) Scott v. Gilmore, 3 Taunt. 226, (Chitjun. 816), infra, note,(c); and see Cruikshanks v. Rose, 5 C. & P. 19; 7 Moo. & R. 100, 101, S. C.; but see Spencer v. Smith, 3 Camp. 9, (Chit. jun. 831). A sale of spirits to a guest is within the act; Burnyeat v. Hutchinson, 5 B. & Ald. 241; unless he also recide in the house; Proctor v. Nicholson, 7 C. & P. 67. And see Cruikshanks v. Rose, supra, and Philpott v. Jones, 2 Ad. & El. 41; 4 N. & M. 14, S. C.; as to the right to apply a general payment to the demand for spirits.

(u) De Begnis v. Armistead, 10 Bing. 107; 3 M. & P. 511, S. C. citing Mitchell v. Cockburne, 5 H. Bia. 379; Bartlett v. Vinorbarth, 252; and Langton v. Hughes, 1 Maule & S. 596.

(x) Jackson v. Warwick, 7 T. R. 121, (Chit. jun. 581); but see Mann v. Lent, 10 Bar. & C. 877, (Chit. jun. 1495).
(y) Grant v. Welchman, 16 East, 207. See

now 54 Geo. 8, c. 94.

1. c. 18, called the Bubble act, are repealed, and the acts prohibited in that II. Illegalistatute are to be dealt with as at common law(z).

By the 29 Car. 2, c. 7, s. 1, sales on a Sunday, in the course of a man's sideration. trade and business, are illegal(a); but there is no objection to a bill being 2. By Status and Survive tute.

dated on a Sunday (b).

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lllegality in part of the contract or consideration in respect of which a bill Illegality or note is made, drawn, or accepted, will preclude the original parties from Transacrecovering the residue on the bill or note, though a lawful debt, and the se-tion. curity must be abandoned, and the original lawful debt alone is recoverable(c)(1).

In considering the effect of usury and of gaming, we have in a *great Effect of measure anticipated and shown the consequences of illegality in general.

Consideration on

Where a third person, having given value for a bill, knew, at the time he Third perbecame the holder, that it was originally founded on an illegal transaction(e), some(d). or where a person became holder of such a bill after it became due, he can-[*95] not recover on it(f). However, a person who, at the request of the holder of a bill, indorses it, and is obliged to pay the contents to a bonû fide holder, may recover the money paid, from the person at whose instance he indorsed

Another consequence of illegality in the transaction between the drawer and drawee has occured in America, where it was decided, that such illegality makes the case the same as if the drawer had no effects in the hands of the drawee; and therefore, in case of illegality, the drawer is not discharged

by the omission to give him notice of non-payment (h).

In those cases in which the legislature has declared that the illegality of the contract or consideration shall make the security, whether bill or note, void, the defendant may insist on such illegality, though the plaintiff, or some other party between him and the defendant, took the bill bona fide, and gave a valuable consideration for it. And the innocent holder can, in such case,

(z) See Josephs v. Pebrer, 3 B. & C. 689; 5 D. & R. 542, S. C.

(a) See Drury v. De Fontaine, 1 Taunt. 131; Josephs v. Pebrer, S B. & C. 238; 5 E. & R. 84, S. C. Scarfe v. Morgan, 4 M. & W. 270. As to contract arising out of subsequent detainer of goods sold on a Sunday, see Simpson v. Nicholls, 3 M. & W. 240, 243, 1 Horn & Hurl. 12, S. C.

(b) Post, Ch. V. s. ii. Time of date.

(c) Scott v. Gilmore, 3 Taunt. 226, (Chit. jun. 816); and see Cruikshanks v. Rose, 5 C. & P. 19, supra, note (t). Action against acceptor. The bill was given to the keeper of a coffee-house, by the drawer, partly for money lent and partly for spirits in small quantities under 20s. worth at each time: nonsuit, on the ground of 24 Geo. 2, c. 40, s. 12. On motion for new trial, Mansfield, C. J. said, "the statute makes the consideration illegal, not merely toid; and the security is entire, and cannot be apportioned; and since it is partly given for an

illegal consideration, the whole bill is void." Sed quære. The case does not state whether plaintiff was indorsee; if plaintiff were the coffee-house keeper, still, as defendant was a stranger to the original transaction, he could not be liable otherwise than on the bill.

(d) See 5 & 6 Will. 4, c 41, ante, 90, 91.
(e) Steers v. Lashley, 6 T. R. 61; 1 Esp. 166, S. C., (Chitty, jun. 533); Wyat v. Bul-mer, 2 Esp. 538, (Chit. jun. 575); Brown v. Turner, 2 Esp. 631; 7 T. R. 630, (Chit. jun. 611); Feise v. Randall, 6 T. R. 146, (Chit. jun. 540).

(f) Brown v. Terner, 7 T. R. 630; Amory v. Merewether, 2 B. & C. 573; 4 D. & R. 86, (Chit. jun. 1200).

(g) Seddons r. Stratford, Peake's N. P. Rep. 215, (Chit. jun. 529); Petrie r. Hanney, 3 T. R. 424; Aubert v. Maze, 2 B. & P. 371.

(h) Copp v. M'Dougall, 9 Mass. Rep. 1; Bayl. American edit. 204.

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⁽¹⁾ Though a note, discounted as security for money lent by the members of an unlawful association, be void; yet the contract of loan remains good; on which an action will lie by the leaders to recover it of the borrower. Utica Ins. Co. v. Kip, 8 Cowen, 20.

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sideration.

II. Illegali- only resort to the party from whom he received the bill, &c. (2) whom he ty of Conmay sue as indorser on the bill(i), or for the debt or consideration(k).

Otherwise not void in hands of bont fide Holder.

But unless it has been so expressly declared by the legislature, illegality of consideration will be no desence in an action at the suit of a bona fide holder for value, without notice of the illegality (l), unless he obtained the bill after it became due(m). Thus in an action by the indorsee against the maker of a promissory note, the defence insisted on was, that the note bad been given for hits against the defendant in a lottery insurance: Lord Kenyon, C. J. thought the plaintiff was entitled to recover, observing, that the innocent indorsee of a gaming note, or note given on an usurious contract, could not recover, but that in no other case could the innocent indorsee be deprived of his remedy on the note; and that a contrary determination would shake paper credit to the foundation (n). And we have seen (o) that now by the 5 & 6 Will. 4, c. 41, a bill or note given for an usurious or gaming consideration, or for signing a bankrupt's certificate, or for the ransom of a ship, will be valid in the hands of a bona fide holder for value. And even before this act a broker receiving an exorbitant brokerage on the *discount of a bill [*96] would not affect its validity in the hands of a bona fide holder(p). bona fide holder of a bill, given for an usurious or gaming consideration, might recover against the indorser of the bill(q) or note(r).

[llegality m general in a Second Indorsement in Blank.

In general, a subsequent illegal contract or consideration of any description, taking place in a second indorsement or transfer of a bill, and not in its inception, nor in a transfer, through which the holder must make title, will not invalidate the same in the hands of a bonû fide holder who took it before it became due(s)(1). And although where a new security is taken in lieu of another, void in respect of illegality, &c. it will be equally invalid in the hands of the party to the first illegal transaction, yet it is otherwise if in the hands of a bona fide holder, ignorant of the illegality (t). And though it has been held otherwise at Nisi Prius, it has since been decided, that after ille-

(i) Bowyer v. Brampton, Stra. 1155, (Chit. jun. 296); Edwards v. Dick, 4 B. & Al. 212, (Chit. jun. 1079); ante, 90, 91.

(k) Bendelack v. Morier, 2 H. Bla. 838, (Chit. jun. 527); Bowyer v. Brampton, Stra. 1155, (Chit. jun. 296); Wyat v. Bulmer, 2 Esp. Rep. 538, 539, (Chit. jun. 575); Witham v. Lee, 4 Esp. 264, (Chit. jun. 670); ante, 90,

(1) Wyat v. Bulmer, 2 Esp. Rep. 538, (Chitjun. 575); Brown v. Turner, 7 T. R. 630, (Chit. jun. 611); Le France v. Dalbiac, Sel. Ca. 71.

(m) Brown v. Turner, 7 T. R. 630, (Chit. jun. 611); Amory v. Merewether, 2 B. & C. 573; 4 D. & R. 86, (Chit. jun. 1200).

(n) Winstanley v. Bowden, Middlesex Sittings after M. T. 41 Geo. 3, B. R. 1 Selw. 2d ed. 402; id. 4th ed. 870; id. 9th ed. 889; and see ante, 89, note (r).

(p) Dignal v. Wigley, 11 East's Rep. 43; 2 Camp. 88, S. C.; Jones v. Davison, Holt's C. N. P. 256. (o) Ante, 90, 91.

(q) Edwards v. Dick, 4 B. & Ald. 212, (Chit. jun. 1079); ante, 95, note (i).

(r) Per cur. Bowyer v. Brampton, 2 Stra. 1155, (Chit. jun. 296); and per Gibbs, C. J. in O'Keefe r. Dunn, 6 Taunt 315.

(s) Ante, 90; Lowes r. Mazzaredo, 1 Stark. 885, (Chit. jun. 968); Parr v. Eliason, 1 East, 92; 3 Esp. Rep. 210, (Chit. jun. 362); Cuthbert v. Haley, 8 T. R. 391; 3 Esp. Rep. 22, Chit. jun. 617); Daniel v. Cartony, 1 Esp. Rep. 274, (Chit. jun. 537); Turner v. Hulme, 4 Esp. Rep. 11, (Chit. jun. 636); Ferrall v. Shaen, 1 Saund. 294, 295, note 1. The endorsee must be unacquainted with the illegal consideration; Chapman v. Black, 2 B. & Ald.

588, (Chit jun. 1057). (t) Ante, 90; Cuthbert v. Haley, 8 T. R. 390, (Chit. jun. 617); Pickering v. Banks, Forr. Rep. 72; Harrison v. Hannell, 1 Marsh. 349; 5 Taunt. 780, (Chit. jun. 916); Parr v. Eliason, 3 Esp. Rep. 210; 1 East, 92, (Chit. 262). jun. 362); Witham v. Lee, 4 Esp. Rep. 264; (Chit. jun. 670); see Barnes v. Headley, 1

(1) { The holder of a note payable to bearer, who won it at cards from the payee is entitled to recover from the maker. Lee's adm'r. v. Ware, 1 Hills 50. Car. Rep. 318.

⁽²⁾ On this point see Payne v. Trezevant, 2 Bay's Rep. 23. Wiggin v. Bush, 12 John. Rep. 306. A bill of exchange expressed to be collateral to a ransom bill, is a contract upon which an action may be sustained at Common Law, the plaintiff and payee being an alien friend. Maisonnaire v. Keating, 2 Gallison, 325.

gal securities have been destroyed by mutual consent, and there is a fresh II. Illegalicontract by the borrower to perform the lawful part of the bargain only, such ty of Con-

fresh contract is valid(u).

By suffering judgment by default; the defendant loses the opportunity of When a Defendant objecting to the insufficiency or illegality of the consideration(x). And the precluded court would not set aside a warrant of attorney given to the holder of a re- from Obnewed bill, unless it were shown that he was privy to the usurious transac-jecting. tion, though the person resisting the payment might be permitted to try in an issue whether the party were so implicated (y). Nor will the court set aside a judgment on the ground that the warrant of attorney was given to secure a gaming debt, if it appear that the party making the application represented to the plaintiff before he purchased the debt that it was a valid debt(z).

The receiving of a bill or note upon an illegal subsequent bargain, but Prior Legal given for a previous legal subsisting debt, will not extinguish such debt, al- Debt not though the security itself will be void(a); but where there was illegality in destroyed by subsethe making the bill, or where the holder has himself been a party to it, he quent Illecannot sue at law, or prove under a commission of bankruptcy, even for the gality. amount of principal and lawful interest(b); and though it was once decided in a case of usury (c), that if deeds or property *had been deposited as a [*97] collateral security, the party guilty of the usury might retain the same, and defend an action of trover or detinue, until he had been paid such principal and interest(d); that doctrine was afterwards overruled, and neither at law(e) nor in equity (f) could the party retain the security. And a court of law would set aside a judgment founded on a warrant of attorney given on an usurious contract, without imposing on the defendant the terms of repaying the principal money and legal interest(g). But if deeds have deen deposited on a legal contract, subsequent illegality will not prejudice the lien(h).

III. Relief at law and in Equity in Cases of Fraud, or Want of Consideration, or Illegality, &c.

When a bill or note has been obtained from a person by fraud or without III. Relief consideration, or on an illegal transaction, and he resolves to resist the pay- in Cases of ment, he should immediately, as in the case of a lost or stolen bill(i), give a Fraud,&c. public caution and notice in the public newspapers or otherwise, of the cir-

C. N. P. 270.

(u) Barnes v. Headley, 1 Campb. 187; 2 Taunt 184

(x) Shepherd v. Chester, 4 T R. 275, (Chit. jun. 480); George r. Stanley, 4 Taunt. 683,

(Chit. jun. 876); ante, 90, note (2) (y) George v. Stanley, 4 Taunt. 683, (Chit. jun 876); ante, 90, note (2).

(2) Davison v. Franklin, 1 B. & Ad 142.

(a) Phillips v. Cockayne, 3 Camp. 119; (Chit. jun. 848); 1 Saund 295, note(1); ante,

(b) Banfield v. Solomons, 19 Ves 84; Fitz-royv Gwillim, 1 T. R 153; Hindle v. O'Brieu, 1 Taunt. 413.

(c) But see now as to usury 2 & 3 Vict. c. 37, ante, 88.

(d) Fitzroy v. Gwillim, 1 T. R. 153. (e) Cowie v. Harris, MS. Chit. Col. Stat.

Camp. 187; overruled in 2 Taunt. 184; Holt's 751, n. (b); Mood. & M. 141; 7 Bing. 97; 4 M. & P. 722, S. C; Parsons v. Heathorn, C. P. 21st December, 1829, per Tindal, C. J. who held, that as the statute of usury avoided the contract of deposit on an usurious bargain, the assignee might support trover without any tender; and see observations in Wood v. Grimwood, 10 B. & C. 679.

(f) Burnard v. Young, 17 Ves. 44. (g) Roberts v. Goff, 4 B. & Ald. 92. But when the affidavit on showing cause completely denied the usury, the court would not interfere, Cole v. Gill, 7 Moore, 353; sed vide 1 B. & P. 270; 1 Taunt. 413. Sometimes however the court would refer the question to the master, or direct an issue.

(h) Wood v. Grimwood, 10 B. & C. 679.

(i) As to which, see post, Ch. VI. s. iii. Transfer—Loss of Bills, &c.

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III. Relief cumstances, fully describing the bill, and stating that it has been obtained by in Cases of fraud and illegality, and that payment will be resisted, taking care to avoid any imputation of such fraud or misconduct to any individual in particular, so as to afford him ground for an action of slander (k). And moreover, when the bills or notes so obtained are for a considerable amount, it may be expedient also to file a bill in equity to restrain the negotiation.

> When fraud, or want of consideration, or illegality, can be established by evidence at law, it is in general just as available a defence at law as in a court of equity, and there is no occasion to resort to the latter tribunal(l); and an action of trover or detinue may be supported to recover back the instrument(m). But it frequently occurs that the defendant has not sufficient evidence of the facts to constitute a defence at law, without the aid of a bill for discovery; and a court of law cannot, as a court of equity, restrain the

negotiation; and in such cases it is expedient to resort to the latter.

*We have just seen that a court of law will, in general, on motion, inter-[*98] fere to set aside a judgment founded on a warrant of attorney given upon an illegal contract(n); but this summary interference is, in general, confined to that particular case, and proceeds on the ground that the defendant bas no opportunity of pleading, or otherwise availing himself of the illegality. In other cases, the defendant must, at law, defend himself in the usual It is said, however, to have been decided, that if in an action on a bill, the defendant will swear that he received no consideration, and this be not contradicted, the court will, on motion, stay the proceedings, although the general rule is not to try the merits by a summary application(o).

Bill in Equity to restrain Negotiation, &c. (p).

A court of equity, when a bill has been obtained or is about to be negotiated fraudulently or without consideration, will, in general, by injunction, restrain the circulation, and either detain, or sometimes compel the holder to deliver it up to be cancelled (q); and they will stay all proceedings in an action on a bill accepted by a defendant for the accommodation of one of the plaintiffs (r); and courts of equity have a concurrent jurisdiction with the courts of law in relieving against bills and notes taken when over due(s), or accepted by one partner in fraud of the others(t); and relief was granted

(k) Stockley v. Clement, 4 Bing. 162; 12 nett, 2 T. R. 673, (Chit. jun. 449).
oore, 376, S. C. The following form may (m) Evans v. Kymer, 1 B. & Adol. 528, Moore, 376, S. C. The following form may be safely adopted:-

" Caution to the public .- Whereas three several bills of exchange, bearing date respectively the 18th July last, drawn by one James Atkinson upon and accepted by me the undersigned Jonathan Tomkins, namely, one for 1001, at three months after date; another for 2001. at six months after date; and the other for 2001. at nine months after date, were severally obtained from me under false pretences, and without any consideration whatever for the same! Now I hereby caution all persons from receiving or negotiating the same or any of them. Every information respecting the above bills will be given on application to Mr. ---, at No. Street, London.

Jonathan Tomkins.

" High-street, Reading, Berkshire. Dated, -

(1) Per Ashhurst, J. in Cockshott r. Ben-

(Chit. jun. 1512.) and see cases, post, interaction, Ch. VI. s. ii. But money had and received will not lie against the bailee of a bill not due at the time of action brought which he has wrongfully deposited at his own bankers, although he has obtained money upon the joint credit of that and other bills; Atkins v. Owen, 4 Ad. & El. 819, S. C. 6 N. & M. 309; 2 Har. & Woll. 59.

(n) Ante, 97, when not, ante, 96. (o) Turner v. Taylor, Easter T. 23 G. 8, K. B. Tidd's Prac. 9th edit. 530; sed quære.

 (p) See post, title Transfer, Ch. VI. s. ii.
 (q) The Bishop of Winchester r. Fournier, 2 Ves. jun. 445, (Chit. jun. 331); and post, 99, note (m)

(r) Hodgson v. Murray, 2 Sim. 515. v. Adams and others, Younge, Exch. (8) -Eq. Rep. 117; ante, 71, note (r). (t) Hood v. Ashton, 1 Russ. 412, (Chit. jun.

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against a bill stated to have been given for value received, but in fact obtain- III. Relief ed by fraud, and for a fictitious consideration(u) (1); and a note obtained in Cases of Fraud, &c. from an infant just after coming of age for extravagant supplies previously made has been set aside (x). So equity will interfere in case of the forgery Bill in So where a bill or note has been given for money Fquity to of the payee's name(y). lost by gaming or other illegality, a court of equity will grant an injunction to Negotiaprevent the winner from parting with it, and this even before service of sub-tion, &cpcena(z); and will decree that it shall be delivered up(a). So if given for procuring a commission in the army (b), or for procuring a marriage (c). although the bill or note was valid in its origin, yet the consideration has failed, equity will interfere; as where an acceptance has been given for goods to be delivered, and the vendor has afterwards refused to deliver But where an action was brought on a bill of exchange which had been given for goods sold and delivered, and the party to whom the goods were sold alleged that he had been fraudulently deceived in his contract, the goods delivered being inferior both in quality and quantity to what he had ordered; it was held, that he could not maintain a bill for an account, and for an injunction to restrain the action, inasmuch as his object was to reduce the amount of the bill of exchange by the damages which he claimed for the alleged *breach of contract; and that as this was not the subject of [*99] set-off at law it could not be the subject of account in equity (e). tiation of a bill has under particular circumstances, been restrained by a court of equity, in order to prevent the holder from depriving the defendant of the advantage of a set-off; as where a person who had been a bankrupt, gave a note to his solicitor in payment of his bill of costs for obtaining his certificate, and the solicitor was indebted to the estate, and the bankrupt had purchased so many debts due from his estate, that the share thereof coming to the bankrupt on account of such purchased debts exceeded the amount of what the solicitor owed, and also the amount of the note (f). So where an agent has indorsed his own name on a bill, which by accident had been drawn payable to him, but for his principal's use, and the latter or his trustee sue such agent as indorser, a court of equity restrained such proceed-And relief has even been afforded after execution levied on a judgment founded on a warrant of attorney given for an illegal consideration(h), but where a defendant has had an opportunity of defending and trying at law, a court of equity will not always relieve if he omit to do so(i). If the defendant, in his answer, admit himself to be holder of the instrument

- (u) Dyer v. Tywrewell, 2 Vern. 122; 2 Freem. 112, S. C., (Chit. jun. 180). But the cases of fraud where a bill has been ordered to be given up, are confined to those where the possession but for the fraud would be that of the plaintiff in equity, Jones v. Lane, 1839, 8 Jurist, 265.
- (x) Brook v. Galby, 2 Atk. 34; Burnard, 1,
- (y) Esdaile v. La Nauze, 1 Younge & Col. 394, post, Ch. VI. s. ii.
- (z) Lloyd v. Gurdon, 2 Swanst. 180, (Chit. jun. 1027).
- (a) Wynne v. Callander, 1 Russ. 293; v. Blackwood, 3 Anstr. 851, (Chit. j. 575).

- (b) Whittingham v. Bouroyne, 3 Anstr. 900. (c) Smith v. Aykewell, 2 Atk. 566; Cotton
- v. Cutlyn, 2 Eq. Abr. 525. (d) Patrick v. Harrison, 3 Bro. C. C. 476,
- (Chit. j. 499). (e) Glennie v. Imri, 3 Jurist, 432, Eq. Ex.
 - (f) Ex parte Harding, 1 Buck, 23.
 (g) Kidson v. Dilworth. 5 Price, 564, (Chit,)
- jun. 1026); ante, 35. (h) Whittingham v. Bouroyne, 3 Anstr. 900; ante, 98, note (d); but see Naylor v. Christie,
- 8 Price, 534. (i) Dunbar v. Wilson, 6 Bro. P. C. 231; and Naylor v. Christie, 8 Price, 584.

^{(1) \} Where a machinist sold a worthless machine for a good one, equity interfered to enjoin the collection of the security given on the purchase, and compelled the seller to account for every part of the purchase money paid to him or his bona fide assignee, but such assignee would not be enjoined from collecting such security. Donelson v. Clements, 1 Meigs, 155.

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III. Relief and the facts as charged, the court will decree the instrument to be delivered in Cases of up; but in other cases he will only be restrained from negotiating it, and left Fraud, &c. at liberty to try at law(k). Where the bill has been already negotiated, the holder, as well as the original party, should be made parties in the suit(l). Where a promissory note had been given under suspicious circumstances, it was decreed that it should be deposited with the registrar of the court, leaving the holder to proceed at law, and if he did not within a reasonable time, then that the note should be delivered up(m). However, if a party has wrongfully obtained possession of a bill of exchange, although under circumstances which would give a complete defence at law, a court of equity will order the delivery up of the instrument, if from the lapse of time or death of witnesses such defence is likely to fail; but the court will refuse such relief in all cases where the possession of the party is not shewn to be inequitable. Therefore, where A. had possession of a bill of exchange accepted by B., which for reasons dehors the instrument he could not enforce against B. in an action; it was held, nevertheless, that B. had no equity to have the bill delivered up to be cancelled, unless he could show that A. had the wrongful possession of it(n). However, if after a bill filed for delivering up bills, the plaintiff has failed at law in an action of trover for them, yet he is still entitled to proceed in equity to have them delivered up(o). It is said that affi-

Bill of Discovery. [*100]

of bills, after an answer denying the grounds for injunction (p). In general, a court of equity will not compel a party, by his answer, *to criminate himself, and consequently no bill can be filed with effect for discovery, if it charge the defendant with acts which would subject him to a criminal prosecution; and the defendant need not plead the statute subjecting him to such prosecution, but may demur to the bill(q). But some acts contain a particular provision, compelling a party to admit the particulars of an illegal transaction. Thus the statute against gaming, 9 Anne, c. 14, s. 3, enacts "that for the better discovery of the monies or other things so won, and to be sued for and recovered back as therein provided (r), every person liable to be so sued shall be obliged and compellable to answer, upon oath, such bill as shall be preferred against him for discovering the sum or thing won at play." And, upon an action brought to recover a sum of money lent upon the security of an I. O. U., and upon a bill filed to discover whether the money had not been lent for the purpose of gaming, it has been held, that the defendant is bound to state by his answer whether it was so lent(s). the act against stock-jobbing, 7 Geo. 2, c. 8, s. 2, contains a similar provision, enacting, "that for the better discovery of the monies or premiums which shall be given, paid, or delivered, and to be sued for and recovered as therein

davits cannot be read in support of an injunction to restrain the negotiation

(k) See the cases above referred to.

(m) Bishop of Winchester v. Fournier, 2 Ves. jun. 445, (Chit. jun. 331).

(n) Jones v. Lane, Ex Eq. 1839, 8 Jurist, 265.

(o) Lisle v. Liddle, 3 Anstr. 649.

(p) Berkly v. Brymer, 9 Ves. 335, (Chit. jun. 692); and see Hanson v. Gardiner, 7 Ves. 311; Smythe v. Smythe, 1 Swanst. 254; 2 Madd. Ch. Pr. 366, note (p).

Madd. Ch. Pr. 366, note (p).
(q) See Fleming v. St. John, 2 Sim. 181;
Whitmore v. Francis, 8 Price, 616; 2 Sim.

192, note (d), S. C.

(r) A bill can only be filed by the loser, and not by an informer; M'Clel. 185; But an answer to a bill filed by the loser may be given in evidence in actions for penalties; Thiatlewood v. Cracroft, 1 Marsh. 497; 6 Taunt. 141, S. C.; Billing v Pulley, 2 Marsh. 125.

(s) Wilkinson v. L'Eaugier, 2 Younge & Contact of the state of

(a) Wilkinson v. L'Eaugier, 2 Younge & Col. 366. It was doubted in this case whether money lent for the purposes of gaming was recoverable in an action at law, and also whether an I. O. U. was a security within the statute 9 Anne, c. 14; ib. 366, 367. With respect to the former it has lately been decided that money so lent cannot be recovered at law; M'Kinnell v. Robinson 3 M. & W. 434.

⁽¹⁾ Lloyd c. Gurdon, 2 Swanst. 180, (Chit jun. 1027). See Folley v. Carlon, 1 Younge, 373, tamen inde; Davies v. Dodd, 4 Price, 176; Macartney v. Graham, 2 Sim. 285, post, Ch. VI. s. iii.

mentioned(t), every person liable to be sued shall be obliged and compella- III. Relief ble to answer, upon oath, such bill as shall be preferred against him in any in Cases of court of equity for discovering any such contract or wager, and the sum of Fraud, &cmoney or premium so given, paid, or delivered." Upon this latter act it has been decided, that it does not compel a party in a court of law to give evidence criminating himself; and therefore in an action on a bill at the suit of an indorsee against the acceptor, it was held, that a stock-broker, the drawer, might refuse to give evidence that the consideration for it was stock-jobbing differences, thoughs uch broker is bound to produce his books(u). But when in an action on a bill or note, the defendant calls the drawer of the first, or payee of the last, to prove the consideration, and he declines to state the consideration, it is then to be taken that there was none, and the plaintiff will fail unless he prove that he gave value for it(x).

Upon a bill of discovery in aid of a defence to an action on a bill of exchange, if the defendant in equity is interrogated as to the consideration given for the bill, he must answer not only as to the consideration which he gave for the bill himself, but as to that which he knows another party to have given (y). And where the bill charged that the defendants had given no consideration for a certain bill of exchange of which they were the holders, but that they were mere trustees of it for the plaintiffs, and that so it would appear if the *defendants would discover and set forth the circumstances [* 101] under which, and the consideration for which, the bill was indorsed to them; and the defendants answered the particular charges, as to circumstances, consideration, &c. but omitted to answer the general charge as to their being trustees, it was held, that the answer was insufficient, the charge that the defendants were trustees being a distinct and substantive allegation (z).

Where an account is decreed to be taken of the dealings and transactions Account. between an attorney and his client, in the course of which the attorney has taken securities from the client, the attorney must not only prove the securities, but likewise the consideration for which they were given. Therefore, where a promissory note was given by the client to his attorney under circumstances of great suspicion, but the client was unable for want of witnesses to prove fraud in the attorney, the court, upon decreeing an account between the parties, directed an inquiry as to whether the attorney could by any and what affirmative evidence prove the consideration for the note(a).

The course of proceedings and evidence to be adduced at law, either to prove or disprove the adequacy of the consideration, will be properly considered in the Chapter on Evidence (b).

(t) This only applies to discoveries as to monies recoverable back, and not to the recovery of penalties under the 5th and 8th sections;

Bullock v. Richardson, 14 Ves. 378.
(u) Rawlins v. Hall, 1 Car. & P. 11, 385; and Thomas v. Newton, cor. Lord Tenterden, 9th June, 1827, at Westminster, MS. and id.

2 Car. & P. 606, (Chit. jun. 1834).

(x) Thomas v. Newton, supra, note (u).

(y) Glengall v. Edwards, 2 You. & Col. 125 (z) Culverhouse v. Alexander, 2 You. & Col. 218.

(a) Jones v. Thomas, 2 You. & Col. 498. (b) Post, Part II. Ch. V.

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*CHAPTER IV.

OF THE STAMPS ON BILLS AND NOTES.

1. OF THE SEVERAL STAMP ACTS RE LATING TO BILLS AND NOTE IN GENERAL 2. THE STATUTE 55 GEO. 3, c. 18-	102	3. Time of impressing the Stamps and Power of Restamping 4. Consequences of Instrument not being Stamped	118 122
IN PARTICULAR	103	Bills, &c. wholly unavailable	id.
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Schedule of Duties, with Notes	id.	Crime	124
Observations and Decisions on the	he	Holder not bound to present or	
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On Foreign Bills	114	When Relief may be obtained in	
Inland	115	Equity, &c.	125
Promissory Notes	id.	5. Consequences of Alterations	
Checks	118	IN A BILL, &c. As TO STAMPS.	id.

As the stamp acts require the stamps on bills and notes to be impressed before they are written(a), and there is no power afterwards to impose the proper stamp (unless in the excepted case of a stamp of equal or higher value but of wrong denomination) after the instrument has been completed (b), it will be proper here to consider this important branch of the law applicable to bills and notes.

I. OF THE STAMP ACTS IN GENERAL.

1. Of the several Stamp Acts relatand Note in general.

Before the statute of the 22 Geo. 3, c. 33, there was no stamp duty imposed on bills of exchange or notes, and they were in all cases made on plain unstamped paper, and indeed were expressly exempted from any stamp duty ing to Bills by the 5 W. & M. c. 21, s. 5; but by the first mentioned statute certain duties were imposed in almost all cases upon these instruments. This and two subsequent statutes (23 Geo. 3, c. 49, and 24 Geo. 3, s. 1, c. 7), as regards the amount of duties, were repealed by the 31 Geo. 3, c. 25, whereby certain larger duties were imposed; and by the 19th section, the stamp must be impressed before a bill or note be printed or written(c). The duties were increased by the 37 Geo 3, c. 90, and which continued in force until the 10th October, 1804, from which day until the 11th October, 1808, the 44 Geo. 3, c. 98, regulated the amount of the duty on bills, notes, &c.; from that day until the 28th September, 1815, the duties on bills and notes were regulated by the 48 Geo. 3, c. 149; and from the last mentioned period to the present time (1840) the amount of the duty is fixed by the 55 Geo. 3, c. 184(d). See post, 819, (11).

> (a) 1 Anne, stat 2, c. 22, s 2 and 8, which is still in force, relates to all instruments, and see 23 Geo. 3, c 49. s 14. (b) 31 Geo. 3, c. 25, s. 19

(c) 23 Geo. 8, c. 49, s. 14; 31 Geo. 3, c. 25, ss. 10, 19; 55 Geo. 8, c. 184, s. 8; Butts v. Swan, 2 Brod. & Bing 84, 88, (Chit. jun. 1084); Green v. Davies, 4 B. & C. 242; 6 Dowl. & Ry. 306, (Chit. jun. 1251); Roderick v. Hovel, 3 Camp. 103; Rex v Chipping Nor-ton, 5 B. & Ald. 412. The only exception is, where the bill or note has been on a stamp of wrong denomination, when on paying a penalty a proper stamp may be afterwards impress-

ed, see post, 120. (d) The 3 & 4 Will. 4, c. 97, s. 16, authorises the commissioners of stamps to provide new dies for stamping instruments, and the 7th section enacts that instruments not stamped with the new dies shall be deemed not duly stamped. See the act, Chit. & H. Stat. 1005. A defence under this statute to an action on a bill of exchange is admissible under the plea of non-acceptance; Dawson v. M'Donald, 2 M. & W. 26; and see M'Dowall v. Lyster, ib. 52; Field v. Woods, 7 Ad. & Al. 114; S. C. 2 N & P. 117; 6 Dowl. 23; post, Part II. Ch. IV. De-

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*II. OF THE 55 GEO. III. C. 184, IN PARTICULAR.

Stamps on Bills and Notes.

By the above act, 55 Geo. 3, c. 184, the prior duties as to amount were 2. Provisrepealed, and new duties as to amount are imposed and enumerated in a jone of the schedule, but all prior regulations not expressly repealed are continued(e); Stamp Act and it is enacted, that all instruments impressed with a stamp of adequate or 55 G. 8, c. greater amount, though of an improper denomination, shall be valid, unless particular. where the stamp used shall have been specially appropriated to any other instrument by having its name on the face of it(f). The act then imposes a penalty of 501. on persons, making, signing, or issuing, or accepting or paying any bill or note not duly stamped (g); and 100l. penalty for making or issuing a post-dated bill or note, so that the time of payment shall exceed two months from the time of issuing the same, without having the higher duty stamped thereon(h); and 100l. penalty for making and issuing(i) a check on a banker post-dated, or not truly dated as to the place of drawing the same, or not in every respect falling truly within the exceptions in favour of checks, unless the same be stamped as a bill, and 201. for receiving or taking such check; and 100l. on the banker or any person paying or permitting payment of the same; nor can be debit his customer with the amount so paid(k). The act then contains regulations as to re-issuable promissory notes, exempts bank notes, and authorises the Bank and Royal Bank of Scotland, and British Linen Company, to issue certain small notes, and prohibits the negotiation of promissory notes made out of Great Britain, unless the same have been previously stamped.

The Schedule, title "Bills of Exchange," and title "Promissory Notes," then prescribes the amount of duties and exemptions as follows:—

Inhand Bill of Exchange (l), draft, or order (m), to the bearer or to Stamps on order, either on demand or otherwise, not exceeding two months after Inland date(n), or sixty days after sight(o), of any sum of money,

(e) Sect 3 and 8. See Field v. Woods, 7 Adol. & El. 114; 2 Nev. & P. 117; 6 Dowl. 23, S. C., where the enactment of 31 Geo. 3, c. 25, s. 19, that no bill, draft, or order, &c. shall be given in evidence or available in law, unless the paper be lawfully stamped, was held to be incorporated in 55 Geo. 3, c. 184, by

(f) Sect. 10. This is the law with respect to receipt stamps, and therefore if a bill is on a receipt stamp it cannot be read.

(g) Sect. 11.

(h) Sect. 12. But bill not void; see Williams v. Jarrett, 5 B & Ad 32; 2 N. & M. 49, S. C.; infra, note (n).

(i) A check is not issued until it is in the

hands of a third party entitled to demand cash for it. See Ex parte Bignold, 2 Mont. & Ayr. 633; 1 Den. 712, S. C.; post, 118.

(k) Sect. 13. To subject a banker to this

penalty it must be shown that he knew of the check having been so issued; Ex parte Pig-nold, 2 Mont. & Ayr. 638: 1 Dea. 712, S. C. Striking balances does not prevent the operation of the act, id ib. A bond to pay all sums a trader may owe a banker, does not cover bal-ances, part of the items of which consists of sums paid by the banker's agent on drafts ille-

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gal under this act; Swan v. Bank of Scotland, 2 Mont & Ayr 656; 1 Dea. 746, S. C.

(1) What is, ante, 10.

(m) Semble, that the words "for the payment" should have been here inserted. As to the stamps on bills and notes in general, see post, Stark on Ev. tit Stamp, " Promissory Note." An unstamped bill is a nullity, and therefore imposes no obligation to present it; Wilson e. Vysar, 4 Taunt. 288. (Chit. jun. 860). But although an indorsement operates against the indorser as a new drawing of the bill by him, yet the instrument remaining the same, no fresh stamp is necessary; Penny v. Innes, 1 C., M. & R. 409; 5 Tyr. 107, S. C.; and see Thicknesse v. Bromilow, 2 C. & J. 425, 431.

(n) The value or amount of the stamp upon a bill of exchange under the stat. 55 Geo. 8, c. 184, sched 1, tit "Pill of Exchange," depends upon the date upon the face of the bill, not on the time it was actually drawn or issued, and therefore the circumstance of its being postdated, and thereby made due more than two months after it was in fact drawn, is immaterial, and does not render a larger stamp necessary; Peacock r. Murrell, 2 Stark. 558, (Chit. j. 1077); Duck v. Braddyll, McClel. 235, S. P. A bill was in fact drawn on the 21st day

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55 G. 8, c. 184.

Stamps on

Bills and Notes.

> Exceeding 2000l. and not exceeding 3000l. 0 15 0 Exceeding 30001. 1 5 0 Inland bill of exchange, draft, or order, for the payment to the bearer, or to order, at any time exceeding two months after date, or sixty days af-

	£	S.	а.
Amounting to 40s. and not exceeding 5l. 5s.	0	1	6
Exceeding 51. 5s. and not exceeding 201.	0	2	0
Exceeding 201. and not exceeding 301.	0	2	6
Exceeding 301. and not exceeding 501.	0	3	6
Exceeding 50l. and not exceeding 100l.	0	4	6
Exceeding 1001. and not exceeding 2001.	0	5	0
Exceeding 2001. and not exceeding 3001.	0	6	0
Exceeding 300l and not exceeding 500l.	0	8	6
Exceeding 500l. and not exceeding 1000l.	0	12	6
Exceeding 1000l. and not exceeding 2000l.	0	15	0
Exceeding 20001. and not exceeding 30001.	1	15	0
Exceeding 3000l.	1	10	0

Inland bill, draft, or order, for the payment of any \ The same duty as on sum of money, though not made payable to the bearer, or to order, if the same shall be deliver- \} the like sum payable ed to the payee, or some person on his or her be- to the bearer or orhalf.

Exceeding 300l. and not exceeding 500l.

Exceeding 500l. and not exceeding 1000l.

ter sight, of any sum of money,

Exceeding 1000l. and not exceeding 2000l.

a bill of exchange for der.

0 6 0

0 8 6

0 12 6

Inland bill, draft, or order, for the payment of any sum of money weekly, monthly, or at any other stated periods, if made payable to the a bill payable to bearbearer, or to order, or if delivered to the payee, \ er, or order, on deor some person on his or her behalf, where the I mand, for a sum equal total amount of the money thereby made paya- | to such total amount. ble shall be specified therein, or can be ascertained therefrom.

The same duty as on

of December for 211., payable two months after date; but on the face of it purported to bear date on the 31st : it was held to require only a stamp of 2s. which is imposed by 55 Geo. 3, c. 184, on bills for that sum not exceeding two months after date. The word "date" as there used, means the period of payment expressed on the face of the bill; Upstone r. M. rehant, 2 B. & C. 10; 3 D. & R. 198, (Chit. jun. 1182); Williams v. Jarrett, 5 Bar. & Adol. 82; 2 Nev. & Man. 49, S. C. And although by section 12, if a bill purporting to be payable at two months from a certain time, be issued before the commencement of that period, without payment of a proportionate duty, the maker

is liable to the penalty; yet the bill so postdated, and bearing the inferior stamp, corresponding with the purport of the bill, is admis-sible in evidence, being on the face of it conformable to the schedule, id. ib.

A bill for 501. with all legal interest, is to be considered, as far as respects the amount of the stamp, as a bill for 50% only; Pruessing r. Ing, 4 B. & Ald. 204, (Chit. jun. 1101); Israel c. Benjamin, 3 Camp. 40, (Chit. jun. 837.)

(o) If payable two months (instead of sixty days) after sight, the bill must be stamped with the higher duty in the next head; Sturdy-r. Henderson, 4 B. & Ald. 592, (Chit. jun. 1110.)

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*And where the total amount of the money thereby | bill on demand for the Bills and made payable shall be indefinite.

The same duty as on a Stamps on sum therein expressed Notes. only.

55 G. 8, c.

And the following instruments shall be deemed and taken to be inland hills, drafts, or orders, for the payment of money within the intent and meaning of this Schedule ;(p) viz.

All drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or though satisfaction of any sum of money; where such drafts or orders shall re-conting quire the payment or delivery to be made to the bearer, or to order, or require Bill stall be delivered to the payer or save person on his or her belief. shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers or other person or persons, for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

And all bills, drafts, or orders, for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee or some person on his or her behalf(p).

Foreign Bill of Exchange (or bill of ex- 1 The same duty as on an Stamps on change drawn in but payable out of (q) Great inland bill of the same Bills. Britain) if drawn singly and not in a set. (amount and tenor.

(p) It was the object of the legislature in framing this provision, to treat as promissory notes and bills of exchange, and to subject to a stamp duty, such instruments as being payable on a contingency, or out of a particular fund, could not in strictness fall under that denomination; per Lord Ellenborough in Firbank v. Bell, 1 B. & Ald. 39. A letter from F. & Co. to their correspondents, S. & Co. requesting them to pay to Messrs. II. C. & Co. or their order, out of the first proceeds that should become due of their stock of gunpowder, then in their hands, six hundred pounds, and charge the same to their account, is an order for the payment of money, and liable to be stamped as a bill of exchange, and not with an agreement stamp, although the letter form part of a subsequent correspondence between the three houses; Butts r. Swan and others, 2 B. & B. 78, (Chit. jun. 1084). See also Firbank v. Bell, 1 B. & Ald. 96; and see Emly r. Collins, 6 Mun. & S. 144, (Chit. jun. 990).

But in a case where A. having consigned goods to B., sent him the following order, "Pay to A. B. the proceeds of a shipment of goods, value about 2000l. consigned by me to you," and C. by writing consented to pay over the full amount of the net proceeds of the goods; it was held that neither of these instruments re-

quired such a stamp as is imposed by this act on drafts, bills, or orders for the payment of money, because no particular sum was named; Jones v. Simpson, 2 B. & C. 318; 3 D. & R. 545, (Chit. jun. 1189); and see Barlow v. Broadhurst, 4 Moore, 471, (Chit. jun. 1088); Crowfoot v. Gurney, 9 Bing. 372. So it is necessary that the instrument should make the money payable to the bearer, or to order, or be delivered to the payee or some person on his behalf; and, therefore, the following letter, sent to the holders of the fund out of which payment is to be made does not require a bill stamp: "We now anthorize you to pay to Mesers. R. & Co. (having revoked the former order in their favour), after you have paid yourselves the balance we owe you from the net proceeds of our shipments to your foreign establishments to the present date, one-half of the remainder of the proceeds of said shipments, provided the same shall not exceed the sum of 5000l. H. & J."; for after delivery to the payee, or some person on his behalf, means a delivery either personally to the payee, or to the home agent or representative of his, and does not mean the person to whom the order is addressed; Hutchinson v. Heyworth, 1 Perry & Dav. 266, 282, 283.

(q) See Amner r. Clark, 2 C., M. & R. 468, ante, 10, note (x).

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Bills and	*Foreign bills of exchange (r), drawn in sets, according to the custom of merchants, for every bill of each set, where the sum			d.
Notes.	made payable thereby shall not exceed 1001.	0	1	6
55 G. 3, c.	And where it shall exceed 100l. and not exceed 200l.	0	3	0
184.	And where it shall exceed 200l. and not exceed 500l.	0	4	0
•	And where it shall exceed 500l. and not exceed 1000l.	0	5	0
	And where it shall exceed 1000l. and not exceed 2000l.	0	7	6
	And where it shall exceed 2000l. and not exceed 3000l.	0	10	0
	And where it shall exceed 3000l.	0	15	0

Exemptions from the preceding and all other Stamp Duties.

Exemptions from
Stamps on
Inland and
Foreign
Bills.

All bills of exchange, or bank post bills, issued by the Govenor and Company of the Bank of England.

Inland and Foreign
Bills.

All bills, orders, remittance bills, and remittance certificates drawn by commissioned officers, masters, and surgeons in the navy, or by any commissioner or commissioners of the navy, under the authority of the act passed in the 35th year of his majesty's reign, for the more expeditious payment of the wages and pay of certain officers belonging to the navy.

All bills drawn, pursuant to any former act or acts of parliament, by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for managing the transport service, and for taking care of sick and wounded seamen, upon and payable by the treasurer of the navy,

Exemptions as to Checks on Bankers.

All drafts or orders for the payment of any sum of money to the bearer(s) on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker(t), who shall reside or transact the business of a banker, within ten miles(u) of the place where such drafts or orders shall be issued(w), provided such place shall be specified in such drafts or orders(x), and provided the same shall bear date on or before(y) the day on

(r) See ants, 10. Where a bill was drawn in Ireland, and blanks left for the date, sum, time when payable, and the name of the drawee, and transmitted to England, where it was completed and negotiated, it was held that this was to be considered a bill of exchange from the time of signing and indorsing it in Ireland, and that an English stamp was not necessary; Snaith and others c. Mingay and others, 1 Maule & S. S7, (Chit. jun. SS0).

So where a bill of exchange was drawn in Jamaica upon a stamp of that island, with a blank for the payee's name, and transmitted to England, where a bon's fide holder filled in his own name as payee, it was considered that no English stamp was necessary; Crutchley v. Mann, 1 Marsh 29, (Chit. jun. 908).

If a bill be drawn in England, though dated in some foreign place, such bill cannot be enforced here without an English stamp; Jordaine v. Lashbrooke and another, 7 T. R. 601, (Chit.

jun. 606).

(s) In Rex r. Yates, Carrington's Crim. Law, 3d edit. 273, coram the twelve judges, it was decided, that a check payable to I. F. J. and not to bearer, was not within the exception in the Stamp Act in favour of checks, and ought to have been stamped as a bill, and not being so was not "a valuable security," within 7 &

8 Geo. 4, c. 29, s. 5, and that an indictment for larceny was not sustainable.

(1) It has been holden that the person on whom the check is drawn must be bond fide a banker; the words "acting as a banker" are to be taken in their popular sense; Castleman v. Ray, 2 B. & P. 383.

r. Ray, 2 B. & P. 383.

(u) Now fifteen miles, see 9 Geo. 4, c. 49, s. 15, post, 112, note (s). Where in an action upon a check the defence is that the check was drawn more than fifteen miles from the place where it was made payable, the defendant should plend that he did not make the check declared on; M. Dowall r. Lyster, 2 M. & W. 52, post, Part II. Ch. IV. Defences and Pleas; and see cases infra note (y).

(w) What not an issuing, Ex parte Bignold, 2 Mont. & Ayr. 633, post, 118.

(x) This must be strictly observed, and therefore, where a person residing in a private country house four miles from Llanelly untruly dated it as if drawn at Llanelly, it was held that the check was unavailable for want of a stamp; Walters c. Brogden, 1 Younge & Jerv. 457, (Chit. jun. 1348). See Rea v. Polley, 3 B. & P. 311

(y) A draft on a banker post-dated, and delivered before the day of the date, thought not which the same shall be issued; *and provided the same do not direct the Stamps on

payment to be made by bills or promissory notes.

All bills for the pay and allowances of his majesty's land forces, or for other Notes. expenditures liable to be charged in the public regimental or district ac- 55 G. 3, c. counts, which shall be drawn according to the forms now prescribed, or 184. hereafter to be prescribed, by his majesty's orders, by the paymasters of regiments or corps, or by the chief paymaster, or deputy paymaster, and accountant of the army depôt, or by the paymasters of recruiting districts, or by the paymasters of detachments, or by the officer or officers authorized to perform the duties of the paymastership during a vacancy, or the absence, suspension, or incapacity of any such paymaster as aforesaid; save and except such bills as shall be drawn in favour of contractors or others, who furnish bread or forage to his majesty's troops, and who by their contracts or agreements shall be liable to pay the stamp duties on the bills given in payment for the articles supplied by them.

PROMISSORY NOTE for the payment to the bearer, on demand(z), of any sum of money (a),

Stamps on Promissory Notes Re-issuable.

Not exceeding one pound one shilling	0	0	5
Exceeding 11. 1s. and not exceeding 21. 2s.	0	0	10
Exceeding 21. 2s. and not exceeding 51. 5s.	0	1	3
Exceeding 51. 5s. and not exceeding 101.	0	1	9
Exceeding 10l. and not exceeding 20l.	0	2	0
Exceeding 201. and not exceeding 301.	0.	3	0
Exceeding 301. and not exceeding 501.	0	5	0
Exceeding 501. and not exceeding 1001.	0	8	6

Which said notes may be re-issued after payment thereof, as often as shall be thought fit.

PROMISSORY NOTE(b) for the payment in any other manner *than

On other Notes not

intended to be used till that day, must be stamped, otherwise it will be void; Allen v. Keeyes, 1 East, 425; 3 Esp. Rep. 281, S. C., (Chit. jan. 638); Whitwell v. Bennett, 3 B. & P. 359, (Chit. jun. 685). And in the case of a post dated check it is not necessary that the objection to its admissibility in evidence for want of a stamp should be taken in the first instance; and where it has been read in evidence and the fact of its being post-dated is afterwards proved as part of the defendant's case, it will be struck out; Field v. Woods, 2 Nev. & P. 117; 7 Ad. & El. 114, S. C. Nor need such fact be specially pleaded, id. ib; and see Dawson v. M. Donald, 2 M. & W. 26, post, Part II. Ch.

IV. Defences and Pleas. See also supra, n.(u). (z) A promissory note for 40l, payable to W. or bearer, without the words " on demand," being in law payable on demand, requires a five ahilling stamp; Whitelock v. Underwood, 3 D. & R. 356; 2 B. & C. 157, (Chit. jun. 1193). But a note payable to A. B. on demand, or to A. B. generally, is not a note payable to bearer on demand within this class, but falls within the second class as a note payable otherwise than to bearer on demand; Dixon v. Chambers, 1 C., M. & R. 845; S. C. 5 Tyr. 502; 1 Gale, 14; Chectham v. Butler, 5 B. & Ad. 837; 2 N. & M. 453, S. C. overruling Keates Re-issuv. Whieldon, 8 B. & C. 7; S. C. 2 M. & R. 8, able. (Chit. jun. 1379); and see Armitage v. Berry, [*108] 5 Bing. 501; S. C. 3 Moore & P. 211, (Chit. jun. 1439). See post, 116.

(a) Abbott, C. J. commenting upon these words, "I am quite satisfied that the words 'sum of money' mean the principal sum mentioned in the note, and not a sum compounded of principal and interest. A contrary decision would be most mischievous, and have the effect of avoiding many securities; for it has been the constant practice under similar provisions, applicable to bonds in this and former Stamp Acts, to measure the stamp duty by the principal sum secured, although interest is always payable from the date of the bond;" Pruessing r. Ing, 4 B. & Ald. 204, (Chit. jun. 1101); Pencock v. Mornell, 2 Stark. 558, (Chit. jun. 1077); Dearden v. Binns, 1 M. & R. 130.

(b) A promissory note payable to the plaintiff or order, and originally expressed to be for value received generally, being altered the next day upon the suggestion of one of the partners, by the addition of the words "for the goodwill of the lease and trade," requires a new stamp, such words being material, and not having been originally intended to be inserted, nor omitted

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Stamps on Bills and Notes.	
TAOCCA.	

55 G. 3, c. 184.

to the bearer(c) on demand, but not exceeding two months			
after date, or sixty days after sight, of any sum of money (d) ,			
Amounting to 40s. and not exceeding 5l. 5s.	0	1	0
Exceeding 51. 58. and not exceeding 201.	0	1	6
Exceeding 201. and not exceeding 301.	0	2	0
Exceeding 301. and not exceeding 501.	0	2	6
Exceeding 50l. and not exceeding 100l.	0	3	6

These notes are not to be re-issued after being once paid(e).

PROMISSOY NOTE for the payment, either to the bearer on demand, or in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money (d),

Exceeding 100l. and not exceeding 200l.	0	4	6
Exceeding 2001. and not exceeding 3001.	0	5	0
Exceeding 3001. and not exceeding 5001.	0	6	0
Exceeding 500l. and not exceeding 1000l.	0	8	6
Exceeding 1000l. and not exceeding 2000l.	0	12	0
Exceeding 2000l. and not exceeding 3000l.	0	15	0
Exceeding 3000l.	1	5	0

These notes are not to be re-issued after being once paid.

PROMISSORY NOTE for the payment to the bearer or otherwise, at any time exceeding two months after date, or sixty days after sight, of any sum of money (f).

itor organi, or any owns or money () /			
Amounting to 40s. and not exceeding 51. 5s.	0	1	6
Exceeding 51. 5s. and not exceeding 201.	0	2	0
Exceeding 201. and not exceeding 301.	0	2	6
Exceeding 30l. and not exceeding 50l.	0	3	6
Exceeding 50l. and not exceeding 100l.	0	4	6
Exceeding 1001. and not exceeding 2001.	0	5	0
Exceeding 2001. and not exceeding 3001.	0	6	O
Exceeding 300l. and not exceeding 500l.	0	\mathbf{s}	6
Exceeding 500l. and not exceeding 1000l.	0	12	6
Exceeding 1000l. and not exceeding 2000l.	0	15	0

by mistake; Knill r. Williams, 10 East, 34, (Chit. jun. 761). See also Cardwell r. Martin, 6 Enst, 312; 9 East, 190, 357; 1 Camp. 79, (Chit. jun. 744). As to material alterations, see Chitty's Stamp Act, 25 to 34; and post, next Chapter.

So a promissory note signed by A. and subsequently by B. whilst in the hands of the payce as surety for A., unless such signature by B is in virtue of an agreement subsisting at the time of making the note, will be void without an additional stamp; Clark r. Blackstock, 1 Holt, C. N. P. 474. As to an I. O. U. see post, Ch. XII. s. iv. Form, &c., of Promissory Notes.

(c) See ante, 107, note (2). (d) See Chitty's Stamp Act, 208, note (v). And as to the date, see ibid. 138.

(c) See section 19. Where, therefore a note payable on demand has been indersed for the accommodation of the maker, in order to be de-

posited with his creditor to secure the debt due, if the maker of the note pays the debt, and the bill is redelivered to him, it is no longer negotiable; nor can a bona fide holder, to whom such note is afterwards indorsed, recover thereon; Bartrum v. Caddy, 1 Perry & Dav 207. So if a promissory note not made negotiable be nevertheless negotiated, the holder cannot sue his immediate indorser as a new maker unless there be a second stamp; Plimley r. Westley, 2 Scott, 423; S. C. 2 Bing. N. C. 249; 1 Hodges, 324.

(f) A note payable two months after sight requires a stamp appropriated to a note payable more than sixty days after sight, or two months after date, as the two months begin to run, not from the day of the date, but on the presentment for sight; Sturdy r. Henderson, 4 B. & Ald. 592, (Chit. jun. 1110), post.

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Exceeding 2000l. and not exceeding 3000l. Exceeding 30001.

0 Stamps on 5 O Bills and 1 10 Notes.

These notes are not to be re-isued after being once paid.

55 G. 3, c.

*Promissory Note for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times, so that the whole of the money to be paid shall be definite and certain.

The same duty as on a promissory note, payable in less than two months after date, for a sum equal to the whole amount of the money to be paid.

And the following instruments shall be deemed and taken to be pro- What to missory notes, within the true intent and meaning of this schedule; be deemed

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer, or to order, and if the same shall be definite and certain, and not amount in the whole to twenty pound. And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain an agreement or memorandum, importing that interest shall be paid for the money so deposited (g).

Exemptions from the duties on Promissory Notes.

All notes promising the payment of any sum or sums of money out of any Exempparticular fund, which may or may not be available; or upon any conditions. tion or contingency, which may or may not be performed or happen; where the same shall not be made payable to the bearer or to order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to twenty pounds or be indefinite.

And all other instruments, bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes.

But such of the notes and instruments here exempted from the duty on promissory notes shall nevertheless be liable to the duty which may attach thereon as agreements or otherwise (h).

Exemptions from the preceding and all other Stamp Duties.

All promissory notes for the payment of money issued by the Governor and Company of the Bank of England.

RECEIPT or Discharge given for or upon the Payment of Money (i). Receipts. £ 8. d. Amounting to 2l. and not amounting to 5l.(k). 0 0 Amounting to 51. and not amounting to 101. 0

(g) Such a receipt when given by a private individual does not amount to a promissory note but to a special agreement within the second of the following exemptions, and is therefore admissible in evidence under a common agreement stamp; Horn v. Redfearn, 6 Scott, 260; 4 Bing. N. C. 483, post, next Chapter.

- (h) See Horn r. Redfearn, 6 Scott, 260; supra note (g).
- (i) See the notes to this part of the act, Chit. Stat. 1008, 1009.
- (k) This is repealed by the 3 & 4 Will. 4, c. 23, s. 1, and no receipt stamp is now necessary where the sum is under 51.

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Stamps on Bills and Notes. 55 G. 3, c. 184.

[*110]

Amounting to 10l. and not amounting to 20l. 0 Amounting to 201. and not amounting to 501. 0 1 0 *Amounting to 50l. and not amounting to 100l. 1 6 0 2 6 Amounting to 100l. and not amounting to 200l. 0 4 0 Amounting to 2001. and not amounting to 3001. Amounting to 300l. and not amounting to 500l. 0 7 6 Amounting to 500l. and not amounting to 1000l. Amounting to 1000l. or upwards. 10 0

And where any sum of money whatever shall be therein expressed or acknowledged to be received in full of all demands

And any note, memorandum, or writing whatsoever, given to any person for or upon the payment of money, whereby any sum of money, debt or demand, or any part of any debt or demand therein specified, and amounting to two pounds(l) or upwards, shall be expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged, or satisfied(m), or which shall import or signify any such acknowledgment, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be a receipt for a sum of money of equal amount with the same debt or demand so expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, within the intent and meaning of this schedule, and shall be charged with a duty accordingly.

And any receipt or discharge, note, memorandum, or writing whatever, given to any person for or upon the payment of money, which shall contain, import, or signify any general acknowledgment of any debt, account, claim, or demand, debts, accounts, claims, or demands, whereof the amount shall not be therein specified, having been paid, settled, balanced, or otherwise discharged or satisfied, or whereby any sum of money therein mentioned shall be acknowledged to be received in full or in discharge or satisfaction of any such debt, account, claim, or demand, debts, accounts, claims, or demands, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be a receipt for the sum of 1000l. or upwards, within the intent and meaning of this schedule, and shall be charged with the duty of ten shillings accordingly.

And all recipts, discharges, and acknowledgments of the descriptions aforesaid, which shall be given for or upon payment made by or with any bills of exchange, drafts, promissory notes, or other securities for money, shall be deemed and taken to be receipts given upon the payment of money, within the intent and meaning of this schedule(n).

(1) Now 51.; see note (k), ante, 109.

(m) These words apply to the discharge of an anlecedent debt, and not to an acknowledgment that money has been deposited to be uccounted for; and therefore, where the plaintiff having deposited money in the hands of the defendant, took from him the following memorandum,—' Mr. T. has left in my hands 2001.:' it was held in an action to recover that money, that such memorandum was admissible in evidence without a receipt stamp; Tompkins v. Ashby 6 B. & C. 541; 9 D. & R. 543, S. C.; and see Mullett v. Huchison, 7 B. & C. 639; and Langdon v. Wilson, ib. 640, infra, note (n).

(n) See the regulations in 35 Geo. 3, c. 55, Chit. Col. Stat. 941. A bill of parcels, on which is written "settled by one bill at three and another at nine months," is not admissible in evidence unless it is stamped; Smith v. Kelby, 4 Fsp. 249. And an acknowledgment of having received the acceptance of a bill of exchange in payment, requires a receipt stamp; Scholey r. Walsby, Peake R. 24; Watkins v. Hewlett, 3 Moo. 211; 1 Bro. & B. 1, S. C. But a mere acknowledgment that a party holds bills for a particular purpose, as "I have in my hands three bills, which amount to 1201. 10s. 6d., which I have to get discounted, or return on demand," does not require a stamp; Mullett

*Exemptions from the preceding Duties on Receipts. (Inter alia.)

Stamps on Bills and Notes.

55 G. 8, c.

Receipts given for money deposited in the Bank of England, or in the Bank 184. of Scotland, or Royal Bank of Scotland, or in the Bank of the British Linen Company in Scotland, or in the hands of any banker or bankers, to be accounted for on demand(o): provided the same be not expressed to be received of or by the hands of any other than the person or persons to whom the same is to be accounted for. But if with interest, see Promissory Note.

Receipts or discharges written upon promissory notes, bills of exchange, drafts, or orders, for the payment of money, duly stamped according to the laws in force at the date thereof, or upon bills of exchange drawn out

of but payable in Great Britain.

Receipts or discharges given upon bills or notes of the Governor and Company of the Bank of England.

Letters by the general post acknowledging the safe arrival of any bills of ex-

change, promissory notes, or other securities for money.

Receipts or acknowledgments of payment indorsed upon any bills, orders, remittance bills or remittance certificates drawn by commissioned officers, masters and surgeons in the navy, or by any commissioner or commissioners of the navy, under the authority of the act passed in the thirty-fifth year of his Majesty's reign, for the more expeditious payment of the wages and pay of certain officers belonging to the navy.

Receipts or acknowledgments of payment indorsed upon any bills drawn pursuant to any former act or acts of parliament, by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for managing the transport service, and taking care of sick and wounded seamen, upon and payable by the treasurer of the navy.

By this act, it will be observed, that with respect to Inland bills of ex-Observachange, whether negotiable or not, a distinction is made in the amount of the tions on stamp between bills and notes payable at a time not exceeding two months or the Act. sixty days after date, and those exceeding that time, and a penalty of 100l. is imposed on any person post-dating or issuing any bill or note so post-dated. so as to avoid the higher duty(p). It is also provided, that all drafts or orders for the payment of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any money, shall be liable to the like stamp duty as a bill or note.

A Foreign bill drawn in but payable out of Great Britain, if drawn singly and not in a set, is liable to the same duty as an inland bill of the same amount and tenor. But if a foreign bill be drawn in Great Britain in sets. each part of the set is subject to a stamp duty, progressively increasing ac-

v. Huchison, 7 B. & C. 639; 1 Man. & Ry. 522, (Chit. j. 1372.) So the following letter signed by the defendant, and addressed by him to the plaintiff, " I have this day received a bill of exchange for 300l, drawn by one Patteson upon Thomas Harrison, bearing my indorse-ment and the indorsement of Sir Paul Bagshot, which I hold as your attorney, to recover the value of from the respective parties, or to make such other arrangement for your benefit as may appear to me, in my professional capacity, ren-

sonable and proper.-15th November, 1825," was held not to require a stamp; Longdon r. Wilson, 7 B. & C. 640, note (b); and see Tornkins r. Ashby, 6 B. & C. 541; supra, note (m). See also Tornkins r. Savory, 9 B. & C. 704; 4 Man. & Ry. 538, S. C.

(o) Semble, that independently of this exemption, such a receipt would not require a stamp. See per Tenterden, C. J. in Tompkins r. Ashby, 6 B. & C. 541, 542; supra, n. m.

(p) 55 (iec. 8, c. 184, s. 12.

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Notes.

Observations on 55 G. 8, c. 184.

Stamps on cording to the amount of the snm payable (q). It is also provided, that promissory notes made out of Great Britain *shall not be negotiated or paid in Great Britain, unless the same shall have paid the duty on promissory notes of the like tenor and value in Great Britain, with an exception of notes made and payable only in Ireland(r).

> Exemptions from these stamp duties are made in favor of bills or bank post bills issued by the Bank of England, and of all bills, orders, remittance bills, and remittance certificates, drawn by commissioned officers, masters, and surgeons in the navy, or by any commissioner of the navy, and other bills drawn by or upon persons in certain public employments, and also in favor of drafts or orders for the payment of money to the bearer on demand, and drawn upon any banker or person acting as a banker, residing or transacting the business of a banker within ten (now fifteen(s)) miles of the place where such draft or order shall be issued, provided such place shall be truly specified in such draft or order, and the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes(t).

9 G. 4, c. 23.

By 9 Geo. 4, c. 23, s. 1, persons carrying on the business of bankers in England, (except in London, or within three miles thereof) having first obtained a licence and given security, may issue, on unstamped paper, notes for any sum amounting to 51. or upwards, expressed to be payable to the bearer on demand, or to order, at any period not exceeding seven days after sight, and bills of exchange, expressed to be payable to order on demand, or at any period not exceeding seven days after sight, or twenty-one days after date, provided such bills are drawn on a person carrying on the busipess of a banker in London, Westminster, or Southwark, or provided they be drawn by a banker, at a town or place where he is duly licenced to issue unstamped notes and bills under that act, upon himself or partner, payable at any other town or place where he be duly licenced to issue such bills or notes.

Section 2 authorizes the commissioners of stamps to grant licences to all persons carrying on the business of bankers (except as aforesaid) to draw and issue such bills and notes on unstamped paper, and charges such licences with a stamp duty of 30l. each (u).

Section 3 requires a separate licence for each place, but makes it unnecessary to take out more than four licences for any number of places in England, the fourth licence specifying all the places not mentioned in the other three(w).

Section 12 inflicts a penalty of 100l. on persons so licenced for post-dating bills and notes (x). And section 13 provides that nothing in that act shall exempt from the penalties of former acts persons who under any colour or

(q) Id. Schedule 1.

(r) Sect. 29, penalty 201. See poet, 319 (12).

thing in any such act or acts to the contrary notwithstanding; provided the place where such drufts or orders shall be issued shall be specified therein; and provided the same shall bear date on or before the day on which the same shall be issued; and provided the same do not direct the payment to be made by bills or promissory notes." See ante, 106, n. (u).

(1) The terms of exemption must be strictly observed; see Waters v. Brogden, 1 Y. & J. 457, (Chit. j. 1348); ante, 106, note (x).

(u) See 7 Geo. 4, c. 46, s. 16.

(w) Sec 7 Geo. 4, c. 46, s. 17.

(x) See 55 Geo. 8, c. 184, s. 12, ante, 108.

⁽s) By 9 Geo. 4, c. 49, s. 15, it is enacted, " that from and after the passing of this act, all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn in any part of Great Britain, upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker within fifteen miles of the place where such drafts or orders shall be issued, shall be and the same are hereby exempted from any stamp duty imposed by any act or acts in force immediately before the passing of this act, any

pretence whatsoever shall issue unstamped bills or notes "without being duly Stampe on licenced, or where such bills and notes shall not be drawn and issued in Bills and strict accordance with the regulations and restrictions of the act.

With respect to promissory notes, the stamp duties are arranged under five Observaseveral heads. 1st. Notes for payment to the bearer on demand, for any tions on 55 sum exceeding 1l. 1s. and not exceeding 100l. and which it is provided may 184. be re-issued after payment thereof as often as shall be thought fit. 2dly. Notes for any sum not exceeding 1001. payable in any other manner than to bearer on demand, but payable not exceeding two months after date, or sixty days after sight, and which it is provided shall not be re-issued after pay-3dly. Notes exceeding 100l. payable either to bearer on demand, or in any other manner than to bearer on demand, but not exceeding two months after date, or sixty days after sight, and which also are not to be re-issued after payment. 4thly. Notes payable to bearer or otherwise, of any sum of money at any time exceeding two months after date, or sixty days after sight, and which notes also are not to be re-issued after payment.

5thly. Notes for payment of money by instalments, or for the payment of several sums of money at different days, so that the whole of the money payable shall be definite and certain, and these latter notes are subject to the same duty as on a promissory note payable in less than two months after

date for a sum equal the whole amount of the money to be paid.

And it is enacted, that the following instruments shall be deemed promissory notes within the meaning of the schedule, viz. notes payable out of a particular fund, which may or may not be available (y); or upon any condition or contingency which may or not be performed or happen, if the same shall be made payable to the bearer or to order, and if the same shall be definite and certain, and not amount in the whole to 20l.(z).

And all receipts for money deposited in any bank, or in the hands of the banker or bankers, which shall contain any agreement or memorandum im-

porting that interest shall be paid for the money so deposited(a).

The exemptions from the duties on promissory notes are notes payable out of a particular fund, or on a condition or contingency, when not payable to bearer or order, or when for a larger sum than 201. (b), or indefinite; and all other instruments, bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereinbefore expressly directed to be deemed promissory notes. But it is provided, that such notes and instruments thereby exempted from the duty on promissory notes shall nevertheless be liable to the duty which may attach thereon as agreements or otherwise(c).

Lastly, all promissory notes for the payment of money, issued by the Governor and Company of the Bank of England, are exempted from all

stamps duties (d).

The penalty of 50l. is imposed upon any person who shall make, sign, or issue, or cause to be made, signed, or issued, or shall accept or pay, or cause or permit to be accepted or paid, any bill of exchange, *draft, or or- [* 114] der, or promissory note, for the payment of money liable to any of the du-

(y) Ante, 109. (z) Ante, 109. See observations of Lord Ellenborough in Firbank r. Bell, 1 Bar. & Ald. 36, and Jones v. Simpson, 2 Bar. & C. 321; 3 D. & R. 545, (Chit. j. 1189).

(a) Ante, 109, Horne v. Redfearn, 6 Scott, 260; 4 Bing. N. C. 488, S. C.

(b) The sum was limited to 20/. because, as

they would operate as agreements, they, when for more than 201., must have been stamped as such under the previous Stamp Acts, and which satisfied the revenue objects.

(c) Ante, 109, Horne v. Redfearn, 6 Scott,

(d) 55 Geo, 3, c. 184, schedule 1, tit. Promissory Notes.

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Stamps on ties imposed by the act, without the same being duly stamped(e). Penalties are also imposed upon persons drawing, receiving, or paying any post-Notes. dated bill, so as to avoid the higher duty, or a draft on a banker, not made conformable to the act(f). Regulations are then made relative to re-issua-Observations on 55 ble notes, and for the licences to bankers drawing and issuing such notes(g); Geo. 8, c. and it is provided, that all the powers, regulations, and penalties contained 184. in and imposed by the several acts of parliament relating to the duties thereby repealed, and the several acts of parliament relating to any prior duties of the same kind or description, shall be of full force and effect relative to the duties thereby granted (h). Hence therefore most of the decisions on the former acts are applicable to the existing stamp duties on bills and notes.

Decisions on the Statutes relative to Stamps.

With respect to Foreign bills, it is clear that the legislature did not mean to extend the stamp duties imposed by these acts to such foreign bills as are really made abroad or at sea(i), where no English stamp can be obtained, and where the use of them could not be enforced; and it may be collected from the language of the acts, that the duty is only imposed on bills drawn in Great Britain(k), or in England on Ireland, which we have seen is to be considered a foreign bill, at least as to some purposes(1). And where a bill was drawn in Ireland, for which part of the kingdom there is a distinct stamp act, and blanks left for the date, sum, time when payable, and the name of the drawee, and transmitted to England, where it was completed and negotiated, it was held, that this was to be considered as a bill of exchange from the time of signing and indorsing it in Ireland, and that an English stamp was not necessary (m). So where a bill, of which a person residing abroad, as at Antwerp, was intended to be drawer, was sketched out and accepted here, and then transmitted to such person abroad, that he might there sign his name as drawer, and he there signed the same accordingly, such bill was considered foreign and drawn abroad, where it was signed by the drawer, and that it did not require an English stamp(n). Again, where a bill of exchange was drawn in Jamaica upon a stamp of that island, with a blank for the payee's name, and transmitted to England, where a bond fide holder filled in his own name as payee, it was considered that no English stamp was necessary(0). But if a bill be drawn in England, though dated at some foreign place, such bill cannot be enforced here without an English stamp(p): however, such a defence must be made out by very strong proof, and not by mere suspicious circumstances and conjecture, and therefore if a bill be dated at Paris, 1st March, proof that the drawer was in London on the 3d March will not suf-[*115] fice, for it might have been *ante-dated or post-dated (q). If, however, the fact be proved, even a bon \hat{i} fide holder cannot sue or prove(r).

(e) 55 Geo. 3, c. 184, sect. 11.

(f) Id. ib. sect. 13. (g) Id. sect. 14 to sect. 28.(h) Id. sect. 8.

(i) Ximenes v. Jaques, 1 Esp Rep. 311.

(k) 55 Geo. 3, c. 184; Crutchley c. Mann, 1 Marsh 29, (Chit. j. 908); 5 Taunt. 529. (1) Ante, 10, note (u); Chaters v. Bell, 4

Esp. R. 48, (Chit. j. 636).
(m) Snaith v. Mingay, 1 Maule & S. 87,

(Chit. j. 880).

(a) Boehni v. Campbell, Gow, 56; 8 Taunt. 679; 3 Moore, 15, (Chit. j. 1045).
(c) Crutchley v. Mann, 5 Taunt. 529; 1

Marsh. 29, (Chit. j. 908).
(p) Jordaine v. Lashbrooke, 7 T. R. 601, (Chit. jun. 606); Abraham v. Dubois, 4 Campb.

269; (Chit. jun. 946). If an action is brought on a bill of exchange not having any English stamp, and purporting to be drawn in Paris, the defendant will be entitled to a verdict, if it appear from the evidence that the plaintiff must have been in England on the day on which it purports to have been drawn; Bire v. Moreau, 2 Car. & P. 376, (Chit. jun. 1306). But mere proof that the drawer was in England at or about the time of the date, will not suffice; Abraham v. Dubois, supra.

(q) Abraham v. Dubois, 4 Camp. 269, (Chit. j. 946); and see Bire v. Moreau, 2 Car. & P. 376, (Chit. j. 1306).

(r) Ex parte Manners in re Voss, 1 Rose,

We have seen that a bill drawn in London payable to the order of the Stamps on drawer in London, upon a merchant residing in Brussels, and accepted by Bills and him accepted by Rolls and Notes. him payable in London, is an inland bill, and must be stamped as such(s).

With respect to the amount of the sum payable it was made a question Decisions whether a stamp for the exact amount of 50l. was sufficient for a bill of that on the Statutes sum with all legal interest. It was contended that the stamp was insuffi-relative to cient, because the bill was to carry interest from the date, and therefore a Stamps. larger sum was payable upon it than 501.; but it is reported, that Lord Ellenborough inclined to think the stamp sufficient, as there was no interest due when the bill was drawn, and it was then a security for the sum of £50 and no more, and there is always interest to be recovered, if the bill be not paid the day it becomes due; the case afterwards came before the court, when it was decided upon another point, and no opinion was given as to the sufficiency of the stamp(t). In a subsequent case, where a promissory note for £30 and interest from the date was payable three months after date, and was impressed only with a 2s. 6d. stamp; on the trial before Holroyd, J. at the Sittings at Westminster after Michaelmas Term, 1820, it was objected, that as the £30 with the interest for three months, secured by the note, exceeded £30, and the note was payable at a time exceeding two months, or sixty days, a 3s. 6d. stamp was necessary; but the learned judge over-ruled the objection, and afterwards, on motion for a new trial, the whole court discharged the rule, saying, that the addition of interest ought not to be taken into calculation, for otherwise a bond for £1000 and interest would require a stamp for a larger sum than £1000, which would be contrary to practice and principle(u).

The word "date" in the Stamp Act is intended to denote the period of payment expressed on the face of the bill itself; where, therefore, it was postdated, so as in fact to be payable upwards of two months after the time it was actually issued, it was held that the 2s. stamp under the act was sufficient, and a bond fide holder might recover, though the party so post-dating

was liable to a penalty of £100(x).

It has been holden that a bill payable at sight is not to be considered as a bill payable on demand, so as to be exempt from duty, under the Stamp Act, 23 Geo. 3, c. 49, s. 4, in favour of bills payable on demand, three days of grace being allowed (y).

As to promissory notes, a note for £11 10s. made payable to bearer *on [*116] demand, with interest, for value received, requires a 2s. stamp, under the first class of the last Stamp Act(z); and a promissory note, whereby the maker promised to pay W. or bearer the sum of 401. value received, with interest, (without saying on demand, or at sight, or after date), is in law a

C. 673; 13 Price, 455, S. P. (y) J'Anson v. Thomas, B. R. Trin. Term, 24 Geo. 3, 3 Dong. 421; Bayl. 5th edit. 98,

(2) Keates v. Whieldon, 8 Bar. & Cress. 7; 2 Man. & Ry. 8; ante, 107, note (2).

⁽s) Amner v. Clark, 2 C., M. & R. 468,

ante, 10, note (x).
(t) Israel v. Benjamin, 8 Campb. 40, (Chit. j. 887).

⁽u) Pruessing v. Ing, B. & Ald. 204, (Chit. jun. 1101); ante, 107, note (a).

⁽x) Upstone v. Marchant, 2 Barn. & Cres. 10; 3 Dow. & Ry. 198, S. C., (Chit. jun. 1182). Peacock v. Murrell, 2 Stark. C. N. P. 558, (Chit. jun. 1077.) See also Johnson v. Garnett; 2 Chit. Rep. 122, (Chit. jun. 928), &c.; and see Doe d. Kettle v. Lewis, 10 B. &t

⁽Chit. jun. 426). In an action on an inland bill, the question was, whether it was included under an exception in the Stamp Act of 28 Geo. 3, c. 49, s. 4, in favour of bills payable on demand, and the court held it was not; and Buller, J. mentioned a case before Willes, C. J. in London, in which a jury of merchants was of opinion that the usual days of grace were to be allowed, on bills payable at sight. See also Dehers v. Harriott, 1 Show. 164, (Chit. jun. 485); Dixon v. Nuttall, 1 C. M. & R. 307; 6 C. & P. 320, S. C.; post, Ch. IX. s. i. Time of Presentment.

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Notes.

Decisions on the Statutes relative to Stampe.

Stamps on note payable on demand, and requires a 5s. stamp, as falling under the first division of the above provisions; and the court held, that upon all notes payable to bearer on demand for sums not exceeding 100l. the stamps specified in the first class of the schedule must be used without any distinction between notes intended to be re-issued and notes not so intended(a). It has been held that a bill or note payable at sight is not to be considered as payable on demand, because the party is entitled to days of grace(b).

As to the second class, in one case it was decided that a promissory note, by which the maker "promised to pay to J. Keates, the sum of £11 11s. on demand, with lawful interest for the same," and on which was affixed a stamp of 1s. 6d. only, was improperly stamped, because, although it contained no words of negotiability, yet it was to be deemed as a promissory note, under the first division, viz. payable to bearer on demand, within the meaning of the first part of the division of the schedule, 55 Geo. 3, c. 184, and ought to have had a 2s. stamp, and that it did not fall within the second division, which, the court said, applied only to notes not exceeding two months after date, or sixty days after sight; and though it was contended that as this note was payable only to the payee, it could not be deemed payable to bearer, or re-issuable; yet Bayley, J. observed, "we cannot say that this was not a note which might be re-issued, for by the Stamp Act other persons than bankers may take out a licence and re-issue notes (c). But the Court of Common Pleas determined otherwise (d). And in a subsequent case in the King's Bench(e), Mr. Justice J. Parke said, "As to Keates v. Whieldon, I am not by any means sure that if it were re-considered the court would come to the same conclusion; and that case has since been over-ruled in Cheetham v. Butler(f), where a promissory note payable to A. B. generally was held not to be a note payable to bearer on demand, and re-issuable, within the first class of notes described in 55 Geo. 3, s. 184, schedule, part 1, but a note payable otherwise than to bearer on demand (not re-issuable) within class 2, and that therefore such a note for 100l. required a stamp of 3s. 6d. only. So a promissory note whereby A. promised to pay B. on demand 201. with lawful interest until payment, for value received, has been held not to be a note payable to bearer on demand, but a note payable otherwise than to bearer within two months after date(g). In Moyser v. Whitaker(h) all the Judges held that a promissory note payable to A. B. or order on demand was within the second class or division of notes mentioned in the schedule, [*117] being in the language of that class a *note payable in another manner than to bearer on demand, and also not exceeding two months after date, though it was argued that it might or might not be payable more than two months after date: and Mr. Justice Bayley said, as it is payable on demand, how can it be said to be payable at exceeding two months? The fair construction of the second class is, to hold that it includes all notes not necessarily exceeding

(a) Anie, 107, note (z), Whitlock r. Underwood, 2 Bar. & C. 157; 3 Dowl. & R. 356, S. C., (Chit. jun. 1188).

(b) J'Anson v. Thomas, B. R. Trin. Term. 24 Geo. 3, 3 Dougl, 421, ante, 115, note (y); Bayl. 5th edit 98, (Chit jun. 426).

(c) Keates v. Whieldon, 8 Bur. & Cres. 7; 2 M. & Ry. 8, (Chit. jun. 1879); but see Armitage v. Berry, 5 Bing. 561; 3 M. & P. 211, S. C., and over-ruled in Cheetham v. Butler, 5 B. & Ad. 837.

(d) Armitage v. Berry, 5 Bing. 501; 3 M. & P. 211, S. C., (Chit. j. 1489).

(e) Moyser v. Whitaker, 9 Bar. & Cres. 411; Dans. & Lloyd, 216, (Chit. jun. 1431); and see Armitage v. Berry, 5 Bing. 501; 3 Moore & P. 211, (Chit. jun. 1439.)

(f) 5 Bar. & Adol. 837; 2 Nev. & M. 453, S. C.; and see Dixon v. Chambers, 1 C., M. & R. 845, infra.

(g) Dixon v. Chambers, 1 Cro., M. & R. 845; 5 Tyrw. 502; 1 Gale, 14; see Cheetham r. Butler, 5 B. & Ad. 887, supra, overruling Keates r. Whieldon, 8 B. & C. 7; 2 M. & R. 8, S. C.

(h) 9 B. & C. 411, supra, note (e).

two months(i). So a banker's deposit note, " £--- payable with interest Stamps on at the rate of three per cent. to the day of acceptance," is a note payable Bills and inmediately upon demand, and need not be left with the maker for acceptance (k). So an instrument in these words, "On demand, we jointly and Decisions severally promise to pay J. G. or order, 100l. with lawful interest for the Statutes same from the date hereof," was holden to require only a promissory note relative to stamp of 3s. 6d., as it is distinguishable from a note payable to bearer on de-Stamps. mand, which may be re-issued after payment (l).

A note, dated 7th July, 1818, payable two months after sight, requires a stamp appropriated to a note under the fourth division, i. e. on a note payable at a time exceeding two months after date, and also more than sixty days after sight, as the two months begin to run, not from the day of the date, but from the day of presentment for sight, and there being more than thirty days (viz. thirty-one days) in July and August, it follows, that even if the bill had been presented for sight on the 28th July, the two months would, even without the days of grace, exceed sixty days(m)

With respect to the clause requiring a stamp on bills, drafts, or orders, for the payment of money out of a particular fund, which may or may not be available, the object of the legislature in framing this provision was to subject such instruments to a stamp, because although they did not, in strictness, fall under the legal denomination of a bill or note, (which must be payable at all events, and not contingent); yet such instruments, in fraud of the revenue, passed current, and were commonly paid without objection (n). In a case under this clause, where C. was requested by a letter from B. to pay out of the proceeds of his goods then unsold in his C.'s hands a certain named sum of money to D., which C. consented to do by letter to D. (which letter was stamped with an agreement stamp), and these letters being given in evidence, to prove that the money was paid by order of B., it was holden, that the order itself for payment from B. to C. should have been stamped, as being an order for the payment of money out of a fund which might or might not be available(o). And in another case, the following letter from F. and Co. to their correspondents, S. and Co., "Gentlemen,-We request you will pay to Messrs. H. C. and Son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your hands, 6001. and charge the same to our account," was held an order for the payment of money within this clause, and liable to be stamped as such, and not with an agreement stamp, although the letter formed part of a correspondence between the three houses, being followed by a letter to H. C. and Son from S. and Co. promising to pay as directed, provided they should be in funds for the purpose, and by other letters between the houses of *F. and Co. and S. and Co. relating to and confirmatory of the same [*118] order(p). But in a case where A. having consigned goods to B. sent him the following order:-" Pay to G. H. the proceeds of a shipment of goods, value about 20001., consigned by me to you," and C. B., by writing, consented to pay over the full amount of the net proceeds of the goods, it was held that neither of these instruments required such a stamp as the Stamp

hurst, 4 Moore, 471, (Chit. jun. 1082).

(o) Firbank v. Bell, 1 Bar. & Ald. 36.

(p) Butts v. Swann, 2 Brod. & Bing. 78;
4 Moore, 484, (Chit. j. 1084).

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⁽i) And see Dixon v. Chambers, 1 C., M. & R. S45; ante, 116, note (g).
(k) Sutton v. Toomer, 7 Bar. & C. 416; 1 M. & R. 125, (Chit. jun. 1352).

⁽¹⁾ Armitage v. Berry, 3 Moore & P. 211;

⁵ Bing. 501, (Chit. jun. 1439.)
(m) Sturdy v. Henderson, coram Abbott, C. J. Sittings at Guildhall after Easter Term, 1821, and 4 B. & Al. 592, (Chit. jun. 1110).

⁽n) See Lord Ellenborough's observations in Firbank v Bell, 1 Bar. & Ald. 39; and see Jones v Simpson, 2 Barn. & C. 318; 8 D. & R. 545, (Chit. jun. 1189); Barlow v. Broad-.

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Stamps on Act imposed on drafts, bills, or orders for the payment of money, because

no particular sum of money was named (q).

Decisions on the `Statutes relative to Stamps.

As to checks on bankers, it has been held upon the exempting clause in favour thereof, that the person on whom the check is drawn must be bona fide a banker(r); but a person acting as a banker is considered as such, though he do not keep open shop(s). So it must be payable to bearer(t). A draft on a banker post-dated, and delivered before the day of the date, though not intended to be used till that day, must be stamped, or will be void(u); and the place where the check was actually drawn must be truly stated, and therefore where a person residing in a private country-house, called Trimsaran, four miles from Llanelly, untruly dated his check as if drawn at Llanelly, it was held that the check was unavailing for want of a stamp, although the banker resided at Llanelly (x). And where the holder of a check, which he knew was post-dated, and who also knew the drawer was insolvent, obtained payment from the banker, he was compelled to re-A check, however, is not issued until it is in the hands of a third party entitled to demand cash for it; and, therefore, where a person having credit with a bank received money from the agent of the bank, and every week gave him an unstamped check on the bank for the amount advanced during the week, which the agent sent to the bank as a voucher for himself, and this check was drawn more than the limited distance from the bank and post-dated, it was held not to be within the 13th section of 55 Geo. 3, c. And in order to subject a banker to the penalty imposed by this section for paying a check issued more than the limited distance from the bank where payable, it must be proved that the banker paid the check with a full knowledge of the fact of its having been so issued(a). ances does not prevent the operation of the act(b).

3. Time of Impressing Stamp, and Power of Re-Stamping.

3. Time of

Upon the statute 31 Geo. 3, c. 25, it has been held, that if the commis-Impressing sioners exceed their authority, and do stamp the bill or note after it has the Stamp sioners exceed their authority, and do stamp the bin of note after it has [*119] been made, and the time of stamping does not appear on the *face of it, no defence can be established on that ground to an action by an indorsee founded on the bill or note, because it would be injurious to paper credit if it were necessary for an indorsee to ascertain before he takes a bill whether

> (q) Jones v. Simpson, 2 B. & C. 318; 3 D. & R. 545, (Chit. j. 1082, 1189); and see Barlow v. Broadhurst, 4 Moore, 471.

> (r) Castleman r. Ray, 2 Bos. & Pul. 383. Action for money had and received; defendant pleaded a set-off as to part, and produced the following paper unstamped in evidence to support his plea:-

> Mr. Castleman, Please to pay the bearer £---, his receipt will be your discharge from

T. M. Standgate, 8 Sept. 1790. Mr. Castleman, Bricklayer Camberwell.

Paid by R. Ray, for C. Castleman. The plaintiff objected to this paper being received in evidence as not falling within section 4 of 28 Geo. 8, c. 49, Castleman not being a banker; and Chambre, J. before whom the

cause was tried, being of that opinion, a verdict was found for the plaintiff, and the court upon motion refused a rule for a new trial; see also Ruff v. Webb, 1 Esp. Rep 129, (Chit. j. 524).
(s) Ex parte Wilson, 1 Atk. 218.

(t) Rex v. Yates, Carrington's Crim. Law, 8d ed. 273; ante, 106.

(u) Allen v. Keeves, 1 East, 435; 3 Esp. R. 281, (Chit. j. 638); Whitwell v. Burnet, 3 B. & Pul. 559, (Chit. j. 635); Martin v. Morgan,

3 Moore, 635, (Chit. j. 1065).
(x) Waters v. Brogden, 1 Younge & J. 457, (Chit. j. 1348); and see ante, 106.

(y) Martin v. Morgan, Gow, 123; 3 Moore, 635, (Chit. j. 1065)

(2) Ex parte Bignold, 2 Mont. & Ayr. 633; 1 Dea. 712, S. C.

(a) Id. ib. (b) Id. ib.

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or not it was stamped previously to its having been made(c). But accord-Stamps on ing to subsequent decisions, it should seem that at least if the instrument be Bills and in the hands of the party in whose favour it was originally made, a subsequent stamping, apparent on the face of it, would not render it available 3. Time of against such positive enactment (d). And in a more recent case it was con-impressing sidered that an inquiry as to the time when the stamp was put on is admissible; and where upon the face of the bill or note it appears that it was restamped improperly after it was issued, an indorsee receiving it cannot recover thereon(e).

It being found that the above statute frequently defeated the claims of the holders of bills, the legislature passed a temporary act(f), whereby the commissioners of his Majesty's stamp duties on proof by the holder that no fraud on the revenue was intended were authorised to stamp bills, &c. after they were drawn on payment of a certain penalty; but as the power of the commissioners under this act has long since expired(g), and as bills and notes are excepted in the 43 Geo. 3, c. 127, s. 5, and 44 Geo. 3, c. 98, No existing s. 24, the holder of a bill has no civil remedy thereon if it be either unstamp-impressed or beara stamp of an inferior value to that required by the acts, or be of proper a different denomination(h). And the commissioners cannot on payment Stamp if of a penalty impose the proper stamp, and if they should do so, the time of inferior stamping may be proved to prevent the instrument from being available(i). Value, &c. But as an instrument which in itself amounts to a promissory note is not the less a promissory note from its containing a memorandum importing that certain title-deeds have been deposited as a collateral security, it is sufficient if the instrument be declared upon as a promissory note, that it be stamped as such at the time of the making, and a mortgage stamp may afterwards be affixed; for, as observed by Littledale, J. (k) " the restriction which prohibits stamping a promissory note after it is made applies only to the promissory note stamp; the fact that an instrument which, in the character of a mortgage, may be stamped after it is made, contains also a promissory note, amounts to nothing. The meaning of the legislature was merely that parties should not take their chance on a promissory note by delaying the stamping till they wanted to produce it in evidence as a promissory note; but that does not prevent a mortgage, *which happens also to be a promissory [*120] note, from having a mortgage stamp put on it after it is made."

An authority however was given to the commissioners by the 37 G. 3, c.

(c) Wright r. Riley, Peake's Rep. 173, (Chit. j. 498).

(d) Roderick v. Hovil, 3 Camp. 103; Rapp v. Allnut, id. 106, in notis.

(e) Green v. Davies, 4 Barn. & Cres. 235, 241; 6 D. & R. 306, S. C., (Chit. j. 1251); and see Butts r. Swann, 2 Brod. & Bing. 78; 4 Moore, 484, (Chit. j. 1084). (f) 34 Geo. 3, c. 32.

(3) Bayl. 26, in notes; Phil. Evid. 3d ed.

(h) In criminal prosecutions the want of a proper stamp is not in general an available objection; see the cases, I Chit. Crim. Law, 2d ed. 582, &c.; Chitty's Stamp Acts; Phillips on Evid. 3d ed. 454 to 459; Stark. on Evid. part iv. 1381, 1382. And as to the instances in which an unstamped bill or note may be given. in evidence, see Rex v. Poolley, 3 Bos. & P. 316; Peake's Rep. 75; 15 East, 449, 455; Phillips' Law of Evid. 3d ed. 403, 454. In

Gregory v. Frazer, 3 Camp. 454, it was held, be imthat although a promissory note without a stamp pressed. cannot be received in evidence as a security, or to prove the loan of money, it may be looked at with a view to ascertain a collateral fact; and therefore in this case, the action being for money lent, and the defence being that the defendant had been made drunk by the plaintiff, and induced to sign the note without any consideration, Lord Ellenborough held that the note might be looked at by the jury as a cotemporary writing to prove or disprove the fraud imputed to the plaintiff, (Chit. j. 899); see Coppock v. Bower, 4 M. & W. 361, and cases there cited.

(i) Green r. Daviez, 4 Barn. & Cres. 335, (Chit. j. 1251); 6 D. & R. 306, S. C.; Butta r. Swann, 2 Brod. & Ping. 84, 88; 4 Moore, 494, (Chit. j. 1084).

(k) Per Littledale, J. in Wise r. Charlton, 4 Adol. & El. 786, 790; 6 Nev. & M. 464, 366; 2 Har. & W. 49, S. C.

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Notes.

the Stamp.

Stamps on 136, s. 4, to stamp bills, checks and notes with the additional stamp duty imposed by 37 Geo. 3, c. 90, at any time before the 1st November, 1797, without any penalty, and the following section (which appears to be still in 3. Time of force (l)) provides, that any bill, &c. made after the passing of the 37 Geo. impressing 3, c. 136, and liable to any stamp duty under 31 Geo. 3, c. 25, and which shall be stamped with a stamp of a different denomination from that required by that act, may, if the stamp be of equal value or superior value to the stamp required, be stamped with the proper stamp on payment of the proper duty, and 40s. if the bill be not due, or 10l. if due; and the commissioners are thereupon to give a receipt for the duty and penalty so paid on the back of the bill, and such bill will be valid in any court. Previously to this act a bill stamped with an improper stamp was valid, provided it was a stamp required under 31 Geo. 3, c. 25, and it was of the same or greater value than the proper one (m); but where in an action on a note by an indorsee the stamp appeared to be a 7s. deed stamp, Lord Kenyon said the note could not be received in evidence, and the plaintiff was accordingly non-suited (n).

Previously to the enactment in the 43 Geo. 3, c. 127, it was held that a promissory note for 251. 5s. written upon a 9d. stamp (being the stamp imposed by 31 Geo. 3, c. 25, on notes not exceeding 501., but which at the time of the making of the note had ceased to be the proper stamp on any note whatever) instead of an 8d. stamp (being that required by 37 Geo. 3, c. 90, on notes not exceeding 301.) was void(o); but it was afterwards held that a promissory note for 451. which by law required a stamp of 1s. 6d. composed of three different sums applicable to three different funds under three acts of parliament being written on a 2s. stamp, composed of three different sums applicable to the same funds, though in larger proportions to each that was required, such note is good(p). To obviate the objection on account of a larger stamp being imposed than was necessary, it was enacted by the 43 Geo. 3, c. 127, s. 6, that every instrument, matter or thing stamped with a stamp of greater value than required by law shall be valid, provided such stamp shall be of the denomination required by law for such instrument, &c.; and by the recent act 55 Geo. 3, c. 184, s. 10, it is provided, that all instruments upon which any stamp shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with the proper stamp shall be valid, except where the stamp used on such instrument shall have been specially appropriated to any other instrument by having its name on the face (q). And it has *been observed, that where a bill or note is upon a stamp so specially appropriated, it may perhaps be stamped under 37 Geo. 3, c. 136, s. 5, on payment of the duty and 40s. penalty before it has become payable, or on payment of the duty and 10l. afterwards, and it should seem this is clearly so(r).

Under the former acts, qualifying the right to re-issue bills after pay-

(m) 31 Geo. 3, c. 25, s. 19; Chamberlain v.

(r) Ante, 120.

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⁽¹⁾ Chamberlain v. Porter, 1 New Rep. 30, (Chit. j. 692).

Porter, 1 New Rep. 84, (Chit. j. 692).
(n) Manning v. Livie, cor. Lord Kenyon, Sittings after Mich. Term, 1796, Chitty's Stamp Acts.

⁽o) Farr v. Price, 1 East, 55, (Chit. j. 631). (p) Taylor v. Hague, 2 Enst, 414, (Chit. j.

⁽q) Quere if this clause has a retrospetive operation; see Green v. Davies, 4 Bar. & C. 236, 240; 6 D. & R. 306, (Chit. j. 1251). In Haward v. Smith, 6 Scott, 438; 4 Bing. N. C.

^{684,} S. C. a plea to an action on a bill of exchange that the bill was not duly stamped, was held bad on special demurrer, as not showing whether the bill was altogether unstamped, or stamped with a stamp of a higher or lower value than required by law. Note, this plea was stated to have been pleaded before the case of Dawson v. M'Donald, 2 M. & W. 26, which decided that the want of a proper stamp was admissible as a defence under the plea of nonacceptance; see ante, 106, note (y), and post, Part II. Ch. IV. Defences and Pleas.

ment(s), it has been determined, that after a bill has been returned to and Stamps on paid by the drawer, he may without a fresh stamp indorse the bill over to a Bills and new party, who may in his own name sue the acceptor, because the prohibition against re-issuing after payment means only a payment by the acceptor, 3. Time of and where the instrument has been satisfied (t) (1).

impressing the Stamp.

If a bill or note be made in any part of our King's dominions, as in Jamaica, where by the local revenue law of such place a stamp is required, such instrument cannot be recovered upon in any court here, unless properly stamped according to the law of the place where the same was made(u); but the party objecting to the want of a stamp, in such case must prove that by the law of that part of our dominions a stamp was necessary, and for this purpose should produce an authenticated copy of the law(x). Our courts do not regard the **Revenue** Laws of a foreign independent state (y)(2).

- (s) The power to re-issue promissory notes by bankers will be considered in the chapter relating to promissory notes, post, Ch. XII. 53 Geo. 8, c. 184; 7 Geo. 4, c. 48; 9 Geo. 4,
- (1) Callow v. Lawrence, 3 Mau. & S. 95,
- (Chit. j. 11).
 (u) Alves v. Hodgson, 7 T. R. 241; 1 Esp. Rep. 528, S. C., (Chit. jan. 584); Clegg v. Levy, 3 Camp. 166.
- (x) See cases Chitty's Stamp Acts, 11. (y) Roach v. Edie, 6 T. R. 425; Boucher v. Lawrence, Rep. Temp. Hardw. 198; Hol man v. Johnson, Cowp. 343; Clugas v. Penaluna, 4 T. R. 467; Rex v. Picton, 30 How. St. Tr. 514; Park on Ins. 7th edit. 390; Marsh. on Ins. 1st ed. 51, 55. Per Grose, J. in Ogden v. Folliott, 3 T. R. 733; and 1 Hen. Bla. 135, in which this point was discussed. In Holman v. Johnson, Lord Mansfield said, "no country ever takes notice of the revenue laws of another.'

James v. Catherwood, 3 Dow & Ry. 190, assumpsit for money lent in France, and unstamped receipts were produced in proof of the loan; evidence to show that by the law of France such receipts required stamps to render them valid was rejected Chitty, for defendant, on motion for a new trial, contended that such evidence should have been received to show that in France such receipts were not legal without a stamp, and further, that as every contract must be entered into in conformity with the lex loci, it was competent to defendant to show that this contract had not been so entered into. Abbott, C. J. said, " In the time of Lord Mansfield it became a maxim that the courts of this country will not take notice of the revenue laws of a foreign state. There is no reciprocity between nations in this respect. Foreign states do not take any notice of our stamp laws, and why should we be so courteous to them when they do not give affect to

ours? It would be productive of prodigious inconvenience, if in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid.'

In Alves v. Hodgson, 7 T. R. 241, 2 Esp. Rep. 529, (Chit. jun, 584); upon its being objected that a note was not stamped according to the law of Jamaica, Lord Kenyon said, "I think we must resort to the laws of the country in which the note was made, and unless it be good there, it is not obligatory in a court of law here." So in Clegg v. Levy, 8 Camp. 167, Lord Ellenborough said, without qualification, "I should clearly hold, that if a stamp was necessary to render the agreement valid in Surinam, it cannot be received in evidence without that stamp here. A contract must be available by the law of the place where it is entered into, or it is void all the world over." But it will be observed, that in Alves v. Hodgson, Jamaica was then part of our king's dominions.

It has been observed, that in matters of penalty, it is certainly true that our courts will not recognize foreign revenue laws, as appears from Folliott r. Ogden, 1 Hen Bla. 135; Woeff v. Oxholm, 6 Mau. & S. 99; but that it does not seem tofollow from thence that where the validity of a contract is to depend upon a revenue law, the courts of this country are not bound to recognise it; Roscoe on Bills, 383. The stamp however, is not any part of the contract itself even in this country, and which is one reason for the distinction. Upon a broad and liberal policy one state ought not to give effect to the frauds upon the revenue laws of another, any more than one neighbour ought to sanction the frauds of the servants of another neighbour; Montesq. de l'Esprit de Lois, liv. 1, c. 3; Mackintosh's Lect. and Chitty's Com. Law, vol. i. 28, 74, &c. But as other nations do not re-

⁽¹⁾ An order drawn by a debtor on a person having funds in his hands, is, after presentment to the drawee, an assignment of such funds to the extent of the order, and the drawee cannot afterwards legally part with such funds to the drawer or any other person. Peyton v. Hallet, 1 Caines' Rep. 379. And where a bill is drawn upon special funds, the authority in the drawee to pay it, is not revoked by the death of the drawer before presentment of the bill. And it seems that such a bill is to be deemed an assignment of such funds. Cutts c. Perkins, 12 Mass. Rep. 206. See Debesse v. Napier & Co, I M'Cord, 106.

⁽²⁾ It seems that the courts of one country do not take notice of the stamp acts of unother

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Stamps on Bills and Notes.

*4. Consequences of Instrument not being Stamped.

Not admissible in Evidence for any Purpose as an availament(y).

It was provided by the statute 31 Geo. 3, c. 25, s. 19, (to which 55 Geo. 3, c. 184, s. 8, refers), that unless the paper on which a bill or note be written be stamped with the proper duty, or a higher duty, it shall not be pleaded or given in evidence in any court(z) or admitted to be good, useful or available in law or in equity; and that it shall not be lawful for the commisble Instru- sioners, or their officers, to stamp any bill or note after it is made.

Under this positive enactment that a bill or other instrument not duly stamped shall not be given in evidence or admitted to be available, it has been holden, that a judge cannot even submit the unstamped instrument to a jury with a view to consider whether it was thereby intended to cancel another bill(a). And where there was a perfect and absolute note on the face of it duly stamped as a note, and the defendant offered to read an unstamped indorsement upon the note, which he contended qualified the absolute contract, and it was objected that such indorsement made part of the note, and that neither of them could be read, because taken together they required an agreement stamp, Lord Ellenborough said, "I have on one side a perfect note, and on the other that which, if stamped, might have operated as a defeazance, but at which for want of a stamp I cannot look, therefore the plaintiff is entitled to a verdict(b)." And where a promissory note for 1001, with interest on demand was not properly stamped, it was proved that the defendant on being applied to by the plaintiff for payment of interest,

spect our revenue laws, so, for want of reci-

procity, we do not regard theirs.

Strong cases have occurred upon this point, Smith r. Marconnoy, Peake Rep. Addenda, 81, where it was held, that the maker of paper knowingly made for the purpose of forging assignats upon the same, to be exported to France in order to commit frauds there on other persons, might recover damages for not accepting such paper pursuant to the contract. And see Strongitharm v. Lukyn, 1 Esp. 389, S. P. But see Vattel, L. N. Rook I. Ch. X. p. 108.

See further Wynne v. Jackson, 2 Russ. Rep. 351, and post, Ch. V. s. iii. Construction of

Bills.

(y) Not necessary to plead specially the want of proper stamp; see the cases, ante,

106, note(y).

(z) It cannot be looked at by a jury but may by the court or judge, Sweeting v. Halse, 9 B. & C. 365; 4 M. & R. 287, (Chit. j. 1423); and even by a jury to defeat a claim

on the ground of fraud, &c.

(a) Sweeting v. Halse, 9 Bar. & Cres. 365; 4 Man. & R. 287, (Chit. j. 1423). When a bill of exchange became due it was agreed between the drawer and acceptor that it should be renewed, and on the back of the bill another instrument for the same value was drawn and accepted by the same parties, but it was not stamped. At the same time the name of the acceptor was erased from the first bill. In an action on that bill the judge left it to the jury to find whether it had been cancelled with the consent of the drawer, and the unstamped instrument was submitted to the view of the jury; they having found that the bill was cancelled with the consent of the drawer, the court made a rule for a new trial absolute, on the ground that the jury ought not to have been permitted to draw a conclusion of fact from the unstamped instrument.

(b) Stone v. Metcalfe, 1 Stark. Rep. 53; 4 Camp. 217; (Chit. j. 943); and see Brill r.

Crick, 1 M. & W. 232.

country, so far as to enforce a violation of them by denying effect to written contracts made in a country, and not stamped according to its laws. Therefore where a note was executed in France by a person resident there, payable at New York to another person resident there, as agent of a third person resident in France, and by the laws of France existing at the time all notes for the payment of money were required to be stamped, without which no note could be recovered in that country, it was held that a suit could be maintained thereon in the courts of New York, not-withstanding the note was not stamped. The Court said, that they did not sit to enforce the revenue laws of other countries; nor to take notice of a violation of them; and if it were otherwise, it might be said that the parties in that case never contemplated exacting payment of that note in France. Trustees of Randall v. Van Renssellaer, 6 John. Rep. 94.

A note not duly stamped according to the act of Congress of 6th July, 1797, cannot be read in evidence in an action brought upon it since the repeal of that act, unless the holder has complied with the provisions of the repealing act of the 5th of April, 1802, by paying a stamp duty

of ten dollars. Edeck v. Ranuer, 2 Johns. Rep. 423.

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stated that he would bring her some on the following Sunday, it was held, Stamps on that although this was an admission that something was due, still as it did not Bills and appear what the nature of the principal debt was, or that it was due to the Notes. plaintiff as executrix (as she had declared) or in her own right, or that it 4. Consewas one for which assumpsit would lie, the plaintiff was not entitled to re- quences of cover even nominal damages, and therefore a nonsuit was entered (c). this doctrine under the stamp laws is so strictly adhered to, that even where Stamped. a party objecting to the want of a proper stamp on an agreement which might be stamped on payment of a penalty at any time before the trial purposely destroyed such agreement, the other party was without remedy (d). bowever supposed that a bill or note originally properly stamped, but which in consequence of a material alteration was not admissible in evidence as a billor note, might nevertheless under circumstances *be looked at and referred to by the jury so as to enable the plaintiff to recover upon an account [*123] stated; as where in an action by the payee against the maker of a promissory note, it was proved at the trial that the note had been altered, but an admission was given in evidence in which the defendant said, "is that my handwriting? I write a different hand now, but I know I owe the money;" and the note was shown to the jury to enable them to ascertain the sum to which the admission referred; and upon that admission and evidence the court decided that the plaintiff was entitled to a verdict on the account stated for the whole amount of the note(e); and there have been other decisions to the like effect (f), as where a note had been given by bankers payable with interest at 31. per cent., and it was afterwards altered at the maker's request to 2 1-2 per cent. interest, the jury were allowed to look at the note to see what was the amount of the money lent, and thereby enable the plaintiffs to recover the principal money under the count for money lent (g). But as the stamp acts declare that the instrument either unstamped or insufficiently stamped shall not be pleaded or given in evidence in any court, or admitted to be good, useful or available in law or equity, it should seem that such instrument ought not to be read by the jury for any purpose whatever, even as a single link in the chain of evidence towards establishing a demand in favour of the party producing it; and accordingly the case alluded to of Bishop v. Chambre has been recently overruled(h); and where in an action by the indorsee of a bill for 571. 10s. and upon an account stated against the acceptor, the bill being upon an insufficient stamp, the plaintiff, in order to recover upon the account stated, produced two letters written by the defendant after the dishonour of the bill, in the first of which, dated the day the bill became due, and addressed "to the gentleman who calls with the bill," the defendant expressed his regret that it was not in his power to take up the bill for 571. 10s., and in the second letter, which was in answer to one from the plaintiff's attorney, requiring payment of the defendant's acceptance in favour of Tilbury for 571. 10s., the defendant said, "if he had had the money he should not let his acceptance be dishonoured; and he proposed that Tilbury should draw upon him at a month; it was decided that these letters did not amount to an acknowledgment that the sum of 571. 10s. was due to the plaintiff, but merely that it was due to the person

And Instrument not being

(c) Green, executrix, r. Davies, 4 B. & C.

235; 6 D. & R. 306, (Chit. j. 1251).
(d) Rippiner v. Wright, 2 B. & Ald. 478. (e) Bishop v. Chambre, 1 Danson & Lloyd, 83; Moo. & M. 166; 3 Car. & P. 53, S. C.; and see statement in Jardine v. Payne, 1 B. & Adol. 667, (Chit. j. 1521); and see Sutton r. Toomor, 7 B. & C. 416, (Chit. j. 1852).

(f) Sutton v. Toomer, 7 B. & C. 416; 1 M. & R. 129, (Chit. j. 1352); and other cases,

Chitty's Stamp Laws, 46 to 56.
(g) Id. ibid. But there the original note

looked at had been duly stamped.

(h) Jardine v. Payne, 1 Barn. & Adol, 668, (Chit. j. 1521); and see Sweeting v. Halse, 9 Bar. & C. 865; 4 M. & R. 287, (Chit. j. 1428).

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Bills and Notes.

4. Consequences of Instrument not being Stamped.

Stamps on legally entitled to the bill, who was not named by the defendant; that it was therefore necessary for the plaintiff to prove an indorsement of the bill; and that the bill not being on a sufficient stamp could not be looked at by the jury for the purpose of ascertaining that fact(i). And Lord Tenterden, C. J. said, "we are of opinion that an unstamped bill, or one improperly stamped, cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues; such an instrument may be looked at by the court(k) for the purpose of seeing whether it requires a stamp or is properly stamped, that being a part of the duty of the judge, with which the jury have nothing to do, and of which they are supposed to take *no cognizance; it may be looked at by the jury also for a collateral object, as was done in the case of Gregory v. Frazer(1), where the defence was, that the maker of a note was drunk at the time the money was advanced,

and was imposed upon by the plaintiff, and the hand-writing of the note was vouched as proof of that fact. But that such an instrument cannot be read in evidence as a security is clear from the words of the statute 31 Geo. 3, c. 25, s. 19, (incorporated into the subsequent stamp acts), and which expressly provides, "that no bill liable to the duties by that act imposed shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful or available in law or equity unless duly stamped(m)." And it has recently been determined that a promissory note improperly stamped cannot be given in evidence to take a case out of the statute of limitations(n). Nor can a bill of exchange expressing the terms of an agreement between a landlord and in-coming tenant be received in evidence without an agreement stamp(o).

In an action for usury the circumstance of a discounted bill or note being improperly stamped was held not to render it inadmissible (p); and in indictments for forgery, or uttering as forged, the same rule prevails (q). though some exceptions with respect to indictments for larceny, &c. have been made, they stand on very questionable ground (r).

When a bill of exchange or promissory note is not properly stamped, it has been held, that a neglect to present it for acceptance or for payment, or to give notice of dishonour, will not discharge the drawer or indorser from liability to pay the original debt, in respect of which it was indorsed or delivered to the holder, although it be proved that but for such laches the bill [*125] would have been paid(s). One reason might be *assigned, that it is illegal,

> (i) Jardine v. Payne, 1 Bar. & Adol. 663, (Chit. j. 1521).

(k) See other instances, Chitty's Stamp Acts, 52.

(1) Gregory v. Frazer, 3 Camp. 454, (Chit. j. 899); see also Rex v. Pendleton, 15 East, 449; Rex r. Bathwick, 4 Dowl. & R. 435; Reed v. Deere, 7 Bar. & C. 261. An unstamped bill or note seems in general admissible as evidence to defeat fraud, see cases, Chitty's Stamp Acts, 50, &c. As to criminal cases, id. 53 to 56, see post, 819 (13.)

(m) Jardine v. Pnyne, 1 Barn. & Adol. 670, (Chit. j. 1521).

(n) Jones v. Ryder, 4 M. & W. 32. (o) Nicholson v. Smith, 2 Stark. Rep. 128; and see other cases, post, next chapter as to the form and requisites of bills and notes

(p) So ruled by Abbott, C. J. Guildhall Sittings after Michaelmas Term, 1922, 3 Stark. Evid. 1382; and see Chitty's Stamp Acts, 53; Coppock v. Bower, 4 M. & W. 361.

(q) Rex r. Hawkeswood, 1 Leach, 257, &c. (Chit. j. 423, 504); Chitty's Stamp Acts, 53.

(r) See the cases and observations Chitty's Stamp Acts, 53 to 56, and the reasons assigned by the majority of the judges in Reculist's case, 2 Leach, 706, 707, (Chit. j. 555); and see Rex v. Yates, 3 Car. C. 1.. 273; ante, 106.

(a) Cundy and another v. Marriott, I Bar. & Adol. 696, (Chit. jun. 1522). The vendee of goods indorsed to the vendor in payment a bill on an insufficient stamp. It was not paid by the acceptor, and the vendor did not give any notice of dishonour to the vendee, and it was held, that the instrument being of no value for want of a sufficient stamp notice of dishonour was unnecessary.

Wilson v. Vysar, 4 Taunt. 288, (Chit. jun. 860). Action for goods sold; defence, payment. A bill drawn by H. on B. and accepted by the latter, and indorsed by defendant to plaintiff, for such goods. It was not presented for payment when due, and in consequence of

and subjects the party to 501. penalty for causing an unstamped bill to he Stamps on paid(r). And if there be any such original debt between the holder and Bills and such drawer or indorser, the holder, though he cannot recover upon such instrument, may nevertheless sustain his action for such original debt(s); and 4. Conseif any banker pay any bill, draft, or order, insufficiently stamped, he is not quences of to be allowed the payment in account(t). But where there is no privity be-not being tween the plaintiff and the defendant, as in the case of a remote indorsee and Stamped. the acceptor, the former will have no remedy against the latter, if the stamp be defective and not remediable by the above provisions, and can neither sue nor prove under a commission, and a court of equity will not in general afford him relief(u). But where a party had entered into an express agreement to give a valid note, and had given one upon an improper stamp, a court of equity enforced the delivery of a valid note(x); and where a creditor holds two bill, one duly stamped, and the other not, and receives money generally on account, he may apply it in satisfaction of the unstamped bill(y), and if a defendant in an action at law pay money into court upon the whole declaration, he is precluded from objecting to the sufficiency of the stamp on which the bill was drawn(z). And if two or more persons have concurred in the fraud, they may be indicted for a conspiracy, and if goods or money has been obtained by wilfully false proof of the validity of an unstamped bill, they might be indicted.

5. ALTERATIONS.

The consequences of alterations in bills as to the stamp will be considered in the next Chapter.

the laches, payment was refused by the drawer and the defendant. To rebut this defence, the plaintiff proved that the bill was drawn on a stamp of inferior value to that required by the statute, and therefore could not be given in evidence for the defendant; it was then proved, that if it had been presented at maturity, it would have been paid; but the court held, that as the bill was not properly stamped, they could

not consider it as payment.
Ruff v. Webb, 1 Esp. Rep. 129, (Chit. jun. 524). Assumpsit for work and labour; and it was decided, that a draft in these words, "Mr. R. will much oblige Mr. W. by paying to I. R. or order, 201. on his account," was a bill of exchange, and could not be given in evidence without a stamp, and also that such draft, although taken without objection by the party at the time, was not any discharge of the subsist-

But in Swears v. Wells, 1 Esp. Rep. 317, (Chit. jun. 543), where a creditor had agreed to take part of his debt in hand, and a note for the remainder at a future day, but which note was, by mistake, given upon a wrong stamp, it was beld, that having taken the money to be paid in hand, he was compellable to wait till

the time when such security would become due, unless in the mean time the party had refused to give a note properly stamped, and see Chamberlain v. Delarive, 2 Wils. 353, (Chit. jun. 877).

(r) Ante, 103.

(s) See the cases in note (s), ante, 124, and Brown v. Watts, 1 Taunt. 358, (Chit. jun. 173); Alves v. Hodgson, 7 T. R. 243, (Chit. jun. 584); and Tyte v. Jones, cited 1 East, 58, note (u); Puckford v. Maxwell, 6 T. R. 52, (Chit. jun. 531); White v. Wilson, 2 Bos. & Pul. 118; Wilson v. Kennedy, 1 Esp. Rep. 245, (Chit. jun. 535); Wade v. Beazley, 4 Esp. 7, (Chit. jun. 635).

(t) 55 Geo. 8. c. 184, s. 13.

(u) Cannot proce, see Ex parts Manners in re Voss, 1 Rose, 68, nor can have relief in equity, Toulmin v. Price, 5 Ves. 240.

(x) Aylett v. Bennett, 1 Anst. 45; 2 Bridgm.

588, (Chit. jun. 494).

(y) Biggs v. Dwight, Man. & R. 808, (Chit. jun. 1860). See post, Ch. IX. s. xi. as to the application of payments.
(2) Israel v. Benjamin, 3 Campb. 40, (Chit.

jun. 887).

*CHAPTER V.

FORMS AND REQUISITES OF BILLS OF EXCHANGE, NOTES, &c.—CONSTRUCTION.—DELIVERY TO PAYEE, AND EFFECT THEREOF.—ALTERATIONS.—AND LIABILITY OF DRAWER.

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I. Form
and principal Requisites of
Bills,
Notes, &c.

I. FORM AND PRINCIPAL REQUISITES OF BILLS, NOTES, &c.

A BILL OF EXCHANGE being "an open letter of request by one person

to another to pay money," and a promissory note being "a written promise 1. Form to pay money," it follows that each must be in writing(a), or *whilst legible and principal requiit may be in pencil(b), and the whole of the contract must be so expressed; sites of and according to the law of Great Britain and of other countries, no part of Bills, such contract can be established or supplied by oral testimony(c). It should Notes, &c. seem, however, that the whole of the contract need not be in the body of the Must be in same instrument, and that a contemporaneous memorandum or indorsement writing on on the bill, or even on a separate detached paper, may be resorted to, ei- $\frac{\text{Bill or}}{\text{Note, or a}}$ ther by the holder, to supply or explain(d), or by the defendant, to show contempothat the instrument was qualified or payable on a contingency or renewa-raneous ble(e), though evidence of a parol similar stipulation would be clearly inad-Paper. missible (f); and where the bill with the indorsements cannot all be written on the same paper, effect is given to indorsements on an annexed paper called "un alonge(g)."

A bill of exchange and promissory note, whether considered with refer- A Bill and ence to their original utility, their negotiability, or the number of persons who most conmay in separate rights or liabilities be parties thereto, are contracts formed cise Form. in the fewest possible words to effect the objects of commerce; the simple and mere acts of drawing, indorsing, or accepting the former, or making or indorsing the latter, importing the most certain and precise contract for presumed adequate consideration, that the bill shall be accepted on presentment, and the named sum be paid at the appointed time (h).

The authentic form and requisites of a bill of exchange, however, vary Necessity in some respects in different countries by express local laws; and it is a gen- of being eral maxim, that as far as respects such contract, it must, in every country with Forwhere it is sued upon, be given effect to according to the law of the place eiga Laws where it was made, and of which every person taking a foreign bill is pre- as to Forsumed to be cognizant before he receives it(i). And therefore it is essen-&c. tial for every one, before he takes a foreign bill, to be informed of the foreign law applicable to the bill where it was made or indorsed, for otherwise he may be without remedy against all parties resident out of this kingdom, on account of defects in the bill, or the negotiation of it. Thus in France there is an express law that a bill shall be drawn at one place upon another; and it is essential that it be truly dated at the time when it was made, that it state the name of the drawee, the time and place of payment, the nature of the value received by the drawee, and be payable to order, and if there be several parts that each mentions that fact(k), and an indersement must there be dated and signed, and if either of these requisites be omitted, the bill of exchange will be void, or will at least lose many of the advantages incident

(a) Thomas r. Bishop, R. T. Hardw. 2; 2 Stra. 955, (Chit. j. 277, 278, 279); ante, 1; 1 Pardess. 844, 345.

(b) Geary v. Physic, 5 Bar. & Cres. 284; 7 D. & R. 653, (Chit. j. 1279), where it was decided that an indorsement may be in pencil. See post, Ch. VI. s. i. Transfer-Modes of.

(c) Supra, note (a). (d) Beele r. Bidgood, 1 Man. & Ry. 143; 7 Bar. & Cres. 453, Chit. j. 1355). In this case

the note was to pay 3968l. for value received, in several instalments, with interest included, as expressed and specified in agreement for the sale of his moiety, &c. Proof of the agreement, showing what the instalments were, was

admitted, but it should be observed, that the only question reserved and argued related to

(e) See cases, rost, 140, 141; Hartley r. Wilkinson, 4 Maule & S 25; 4 Campb. 127, S. C., (Chit. j. 931).

(f) See post, 142, et seq.

(g) I Pardess. 865.

(h) 1 Pardess 363, post, 128, 129. (i) Pailliet Manuel de Droits Français, 3d

edit. A. D 1818, page \$40; and see rost, section iii. Construction.

(k) 1 Pardess. 21, 22, 327, 328, 346, 479, 430; Pailliet de Droits Français, 840, 841; and where see reasons for those regulations.

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I. Form and princi-pal Requisites of Bille,

to a perfect bill(1). And even the *parties who have drawn, indorsed, or accepted such defective bills, will not be precluded from taking advantage of the omissions or of defects apparent on the face of it, and the holder who took the bill will lose the ordinary legal remedies (m), though where the de-Notes, &c. fect is not self-apparent, as where a false date or place is stated, the parties who have made or negotiated the bill will be precluded from raising the obiection when the bill is in the hands of a bona fide holder(n); and it seems that small variations from the prescribed forms, but not substantially contrary to the regulations, however improper, will not vitiate(o). So a person suing as an indorsee or bearer of a Bank of England note, on a supposed transfer in France, must, in order to recover in this country, prove that the law of France allows of and gives effect to such a transfer (p). It has, therefore, been deemed expedient throughout this work to notice the principal circumstances in which the foreign law differs from or accords with that of this country.

In general, no precise sential.

But, subject to such particular and local regulations, neither the law-merchant in general, nor the law of England in particular, requires any particu-Words es lar form or set of words in a bill or note. It is, however, advisable, in the absence of express enactment or usage applicable to the case, to frame bills of exchange and notes in the forms presently given, and the parts of which will be then considered separately and in detail.

But there are prescribed Forms of Bills and Notes in England, when under a certain Amount, or re-issuable.

In England the forms of bills and notes of small amount, or circulated by bankers and re-issuable, are in some cases prescribed and must be ob-Thus all negotiable bills or notes made in England for less than served. twenty shillings shall be void(q), and it was enacted(r), that all negotiable bills and notes made in England, (except Bank of England notes payable on demand, made and dated before the 10th of October, A. D. 1826, and notes payable to bearer on demand), stamped before the 5th of February, 1826, for the payment of twenty shillings and less than 51. should be void, unless they specify the name and place of abode of the person to whom or to whose order they are made payable, and be attested by one subscribing witness, and bear date at or before the time when they are issued, and be made payable within twenty-one days after the date, and be in the form prescribed by the act(s); and there are certain forms prescribed with respect to checks and bills, and notes issued and reissuable by bankers at certain distances, which will be more properly considered in that part of the work relating to such instruments(t).

But in other cases no pre-Form. [*129]

But in general in Great Britain and Ireland no particular form or set of words is necessary to be adopted, any more than is generally the case with respect to the language of a bond or other deed (u) (1). And *although a

(1) Pailliet de Droits, Français, 480, 841; 1 Pardess. 346.

(m) 1 Pardess. 21, 22, 478, 487.

(n) Id. ibid. (o) 1 Pardess. 21, 22.

(p) Per Lord Tenterden, in De la Chaumette v. The Bank of England, 9 B. & C. 215, (Chit. j. 1419, 1542); ante, 81, note (k), and post, tit. Transfer. (q) 48 Geo. 3, c. 88; see stat. in Appendix.

(r) 17 Geo. 3, c. 80, s. 1, made perpetual by 27 Geo. 8, c. 16, and 7 Geo. 4, c. 6.

(s) Id. ibid.

(t) Post, Ch. XII. 7 Geo. 4, c. 6; and c. 46; 9 Geo. 4, c. 23; and see the preceding Chapter relating to Stamps,

(u) Com. Dig. tit. Obligation, (B. 1, 2); Bac. Ab. tit. Obligation, (B);—r. Ormston, 10 Mod. 287; Dawkes r. Lord de Loraine, 8 Wils. 213, (Chit. j. 382, 884); Morris v. Lea,

⁽¹⁾ An instrument of writing was drawn as follows: "No --- Nashville, Dec. 13, 1827.

bill of exchange or promissory note is frequently drawn or negotiated as a 1. Form security for the payment of the debt of another person, and the statute against and principal Requi-

Lord Raym. 1397; 1 Stra. 629; 8 Mod. 864, (Chit. j 250); Chadwick v. Allen, 2 Stra. 706; Rast. Ent. 338; Ruff r. Webb, 1 Esp. Rep. 129; Colehan v. Cooke, Wills. 396; Bayl. 4.

Morris v. Lea, Lord Raym. 1396; 1 Stra. 629; 8 Mod. 862, (Chit. j. 382, 894). Plaintiff saed as indorsee of a note in these words, "I promise to account with T. S. or order for fifty pounds, value received by me;" and after verdict for plaintiff, it was insisted, in arrest of judgment, that this was not a negotiable note: sed per cur. "There are no precise words necessary to be used in a note or bill. Deliver such a sum of money makes a good hill; by receiving the value the defendant became a debtor, and when he promises to be accountable to A or order, it is the same thing as a promise to pay A., and it would be an odd construction to expound the word accountable to give on account, when there may be several indorsees." Judgment for plaintiff.

Chadwick r. Allen, 2 Strs. 706, (Chit. j. 263). A note was in these words: "I do acknowledge that Sir Andrew Chadwick has delivered me all the bonds and notes, for which

4001. were paid him on account of Colonel Bills, Synge, and that Sir Andrew delivered me Ma- Notes, &c. jor Graham's receipt and bill on me for 101. which 101. and 151. 5s. balance, due to Sir Andrew, I am still indebted, and do promise to pay;" and upon demurrer to the declaration, the court held it a note within the statute.

Casborne v. Dutton, Scace. Mich. Term, 1 Geo. 2, MS. and Sel. N. P. 381, 9th ed. S. C. where the note set forth in the declaration was, "I do acknowledge myself to be indebted to A. in £—, to be paid on demand, for value received." On demurrer to the declaration, the court, after solenin argument, held that this was a good note within the statute, the words "to be paid" amounting to a promise to pay, observing that the same words in a lease would amount to a covenant to pay rent.

Ashby v. Ashby, 8 Moore & P. 196, (Chit. j. 1438). "Received of A. B. 1501. which I promise to pay on demand with interest," is good, as a note payable to A. B. by intend-ment. And see Green v. Davies, 4 Bar. & C. 235; 6 Dow. & R. 306, (Chit. j. 1251).

Cashier of the office of discount and deposite, United States Bank at Nashville, pay N. Patteson, or bearer, One Hundred Dollars and - cents, on the 14th of January, 1828.

Held, that this was an inland bill of exchange, and as such was entitled to three days' graco. Brown v. Lusk, 4 Yerger's Rep. 210.

Debt on an instrument, which is in its form a promissory note for money, concluding "witness the hands" of the parties; but scrolls by way of seals are set to their signatures: this instrument is rightly described in the declaration as a promissory note. Pensely v. Boatwright, 2 Leigh's Rep. 195.

A acknowledged by writing, not under seal, that there was due by him to B. -- dollars value received: held, that this was merely evidence of a debt, and could not be declared on as a promissory note. Read v. Wheeler, 2 Yerger's Rep. 50.

A note payable to A or B. cannot be declared on as a promissory note within the statute. Walrad et al. v. Petrie et al., 4 Wend. Rep. 575.

If, however, it purports on its face to be for value received, the setting forth of the note, according to its terms, is a sufficient statement of consideration to entitle the plaintiff to recover as on a contract. Ib.

Such note may be given in evitlence under the money counts. Ib.

A due bill, i. e. a note in this form: " Due A. B. \$325, payable on demand," is a promissory note within the statute; the acknowledgment of indebtedness, on its face implies a promise to pay, and the payment being in money absolutely. Kimball v. Huntington, 10 Wend. Rep. 675.

An order drawn by a contractor on the Post Muster General in the words: "Sir-On the first day of January, 1836, pay to my order \$5000 for value received, and charge the same to my account, for transporting the U.S. mail," was held not to be a negotiable bill of exchange, so as to entitle the holder to sue in his own name. Reeside r Knox, 2 Whart. 233. So a bill drawn on an administrator in these words, " Please to settle eighty dollars out of my part of the estate, with N. H. and this my order shall be your receipt for the same," is not a valid bill of exchange; being payable only out of a particular fund. Mills r. Kuykendall, 2 Blackf. 47. Neither is an order by a client upon his attorney to pay money out of any collected by him. Crawford v. Cully, Wright, 453. And a receipt for wool payable in six months at a Bank, is not a promissory note nor bill of exchange. Martin v. Butler, Wright, 553. Neither is a paper in these words, "Mr. L. please let the bearer have £7 and place it to my account, and you will oblige your humble servant R. S.," a bill of exchange. Little v. Slackford, 1 Moo. & Mal. 171; S. C. 22 Eng. Com. L. 280.

Where an accommodation note is drawn for \$2500 and the payee writes a direction upon it to the cashier of the bank where it is payable, to pay \$750 upon it, such note is, in legal effect, a note for \$750, and may be declared on as a note for that sum. Douglass r. Wilkinson, 17 Wend.

A paper directed to certain persons, requesting them to pay a specified sum to a person nameed, and charge the same to the account of the drawer, and dated and signed is a hill of exchange; I. Form frauds in general requires that such an engagement shall, on the face of it, and principal Requisites of not extend to bills or notes, and the simple act of-drawing, accepting, or indoorsing, will be binding, although in reality there was no consideration(x).

Notes, &c. And indeed our courts, considering the general utility of these instruments, and how much they tend to the extension of credit, and consequent advancement of trade and commerce, have gone further in giving effect to them as instruments, than they have where a question has arisen on the language of a doed

What amounts to a Bill or Note.

Thus an order or promise "to deliver money(y)," or a promise "that I. S. shall receive money(z)," or a promise "to be accountable(a)" or "responsible(b)" for it, will be a sufficient bill or note. So "I do acknowledge myself to be indebted in 50l., to be paid on demand for value received," was holden to be a good promissory note, because the words "to be paid" amounted to a promise to pay accordingly(c). So "Received of Mr. D. Boaz 100l., which I promise to pay on demand with interest," is a valid note, although no payee was named after the word "promise," because it sufficiently appeared that Boaz was intended to be the payee(d). So where an instrument was in these words, "Mr. Nelson will much oblige Mr. Webb by paying to T. Ruff, or order, twenty guineas on his account," Lord Kenyon was of opinion, that it was a bill of exchange, being an order by one person to another to pay money to the plaintiff or his order, and that it ought to have been stamped(e). So an instrument in the following form is a promis-

[*130] sory *note, and requires a stamp:—" 14 Feb. 1836. John Mason. Borrowed of Mary Ann Mason, his sister, the sum of Fourteen Pounds in cash as per loan in promise of payment, of which I am truly thankful for, and shall never be forgotten by me. £14. John Mason, your affectionate brother (f)."

An instrument drawn by A. upon B. requiring him to pay to the order of C. a certain sum at a certain time "without acceptance," is a bill of ex-

(x) 29 Car. 2, c. 3, s. 4. See Ridout v. Bristow, 1 Tyrw. Rep. 84, (Chit. j. 1518); ante, 69, note in (k).

(y) Morris v. Lea, ante, 128, note (u).

(z) Id. ibid.

(a) Id. ibid. But not if the word promise be omitted; Horne r. Redfearn, 4 Bing. N. C. 433; 6 Scott, 260, S. C.; post, 130, note (n). (b) Id. ibid.

(c) Cashborne r. Dutton, Sel. N. P. 881,

9th edition. And see Ashby v. Ashby, 3 M. & P. 186, supra. see post, 819 (14).

(d) Green v. Davies, 4 B. & C. 235, (Chit. j. 1251); 6 D. & R. 306, S. C.; post, Poth. pl. 31; but see Pardess, Court de Droit Com. (e) Ruff v. Webb, 1 Esp. Rep. 129, (Chit. j. 524); ante, 124, note (s); but see Little v. Slackford, Mood. & M. 171, (Chit. j. 1395); post, 130, note (m).

(f) Ellis v. Mason, 3 Jurist, 406. Bail Court.

although it is neither made payable to order or bearer, nor has the words "value received," nor is made payable at a day certain; nor at any particular place. Kendall v. Galvin, 15 Maire Rep. 131. And the request may be general, to pay to the drawer's own order, and it will then be payable to himself, upon endorsement, and notice to the acceptor before it is due. Rice v. Hogan, 8 Dana, 134. But an order to pay, on account of the drawer, money which will be due him at some future day, and accepted when due, is not a bill of exchange. Rice v. Porter, I Harrison, (N. J.) Rep. 440. And quere, whether a request by a mast r to the consignee of a vessel, to pay the pilot his fees for pilotage can be considered as a bill. See Dibble v. Gaston, R. M. Charl. Rep. 444. A letter sent to the holder of a fund, directing him to make payments thereout, is not such a bill as requires a stamp. Hutchinsou v. Heyworth, 9 Ad. & El. 375. Nor is an order to a debtor, at the bottom of an account, to pay the account to A., and delivered to A. for the sole purpose of collecting the money, a bill, within the stamp act. Norris v. Solomon, 2 Moo. & Rob. 267.

See also Hitchcock r. Cloutier, 7 Verm. Rep. 22; Ring c. Foster, 6 Ham. 280; Wheatley v. Williams, 1 Mee. & Wels. 553; Richards v. Richards, 2 Barn. & Adol. 447.

change, and may be so described in an indictment for forgery(g). And al- I. Form though a simple I. O. U. does not require a stamp, yet if it add "to be paid and princion a given day," it will amount either to a promissory note or an agree-sites of ment, and must be stamped accordingly (h).

Bills and Notes, &c.

But a mere acknowledgment of a debt or of money (i) having been left in a But a mere But a mere acknowledgment of a debt of of money (*) having been less in a Acknowleavy's hands, or bills to be discounted (k), without some words from which edgment of an order or promise to pay can reasonably be inferred, is not a bill or note, a Debt is and will have no other operation than perhaps affording evidence of a debt, insufficient. and it may therefore be received in evidence, although unstamped (l); and it must be an has been considered that a mere letter requesting a third person to pay Order or money as a favour, is not to be considered as a bill; and therefore where an Promise to instrument was tendered in evidence in the following form, "Mr. L. please Payto let the bearer have seven pounds, and place it to my account, and you will oblige your humble servant, R. S." Lord Tenterden held that no stamp was necessary, the paper not purporting to be a demand made by a party having a right to call on the other to pay, and that the fair meaning was, "you will oblige me by doing it (m)." And an instrument in the following form—" I have received the sum of 201. which I borrowed of you, and I have to be accountable for the said sum with interest," was held to be an agreement and not a promissory note(n). So where A. being indebted to B., and B. to C., B. by letter requested A. to pay C. the balance due to him B., and stated that C.'s receipt should be a sufficient discharge; it was held that this was not a bill of exchange, or requiring, within the 55 Geo. 3, c. 184, a stamp as such; and A. having expressed his assent to pay C. when the amount of the balance due to B. was ascertained, it was held that it amounted to an equitable assignment of the debt due from A. to B.(0)

*Where there is a contradiction, ambiguity or uncertainty in the terms of When the instrument, it may, especially against the party making or negotiating it, Terms of Instrument be so construed as to give effect to it according to the presumed intention of ambiguous. the parties (p); and therefore where a note was in these terms, "borrowed it may be of I. S. 50l. which I promise never to pay," it was decided, that the word Bill or

(g) Reg. v. Kinnear, 2 Mood. & R. 117. (h) Brooks v. Elkins, 2 M. & W. 74. Sec post, Ch. XII. s. iv. Form, &c. of Promissory

(i) Cashborne v. Dutton, Sel. N. P. 381, 9th edition.

(k) Or "received certain bills to get discounted or return on demand," or "received a bill of exchange to recover the value for you," &c. are neither promissory notes, receipts, or agreements, but mere acknowledgments, and require no stamp; Mullett v. Hutchinson, 3 C. & P. 92, (Chit. j. 1372); and Lungdon v. Wilson, 2 Man. & R. 10.

(1) In Tomkins v. Ashby, 6 B. & C. 541; 1 M. & M. 32, S. C.; it was held that the following memorandum, "Mr. T. has left in my hands 2001." was not a promissory note or receipt, and was admissible in evidence without a stamp. So a paper with these words, "I.O. U. eight guineas," was held by Lord Kenyon to be neither a promissory note nor a receipt, and therefore admissible in evidence without a stamp; Fisher v. Leslie, 1 Esp. Rep, 426; Israel r. Israel, 1 Campb. 499; Childers v. Boulnois, Dow. & Ry. N. P. C. S; Payne v. Jen-

kins, 4 Car. & P. 335; Bayl. 5. And see fur- [*131] ther, post, Ch. XII. s. iv. Form, &c. of Promissory Note. See also as to acknowledgments and accountable receipts, Chitty on Stamp Laws, 121, 211.

(m) Little v. Slackford, Mood. & M. 171. (Chit. j. 1895). And see cases 3 Chit. Crim. Law, 1033, 1034, 2d ed. S. P. and post, Part III. Ch. I. Forgery. But on other evidence the plaintiff recovered, and see Ruff r. Webb, 1 Esp. Rep. 129, (Chit. j. 524); ante, 129, n. (e). And semble, that civility in the terms of request cannot alter the legal effect of the instrument; "il vous plaira payer" is in France the proper language of a bill; l'ailliet Man. de Droits Franc. 841.

(n) Horn r. Redfearn, 4 Bing. N. C. 483; 6 Scott, 200, S. C.; see aute, 109.

(a) Crowfoot v. Gurney, 2 Moore & S. 473; 9 Bingh 372, S. C. After the balance due to B. was ascertained, but before the amount was paid, he became bankrupt. It was held that his assignees were not entitled to recover the amount from A. but that he was justified in paying it over to C.

(p) In France, as certain parts of the form

sites of Bills.

"never" might be rejected or read as "ever," for a man shall never say "I and princian a cheat and have defrauded," and the holder recovered (q). pal Requisame ground, an instrument in the common form of a bill of exchange, except that the word "at," in very small letters, was substituted for "to" in Notes, &c. the address of the bill, before the name of the drawee, may be declared on as a bill of exchange(r). And an instrument appearing to common observation as a bill may be treated as such, although words have been introduced into it for the purpose of deception, which might in strictness make it a promissory note(s); and though in a criminal case it was doubted whether such an order was not a promissory note(t), yet it has been recently decided, that where an instrument had been made in terms so ambiguous as to make it doubtful whether it be a bill or note, the holder may, at his election (as against the maker of the instrument), treat it as either; and if he proceed on it as a promissory note against the maker, he will thereby avoid the necessity of proving notice of non-payment(u). An instrument in the following form, "on demand I promise to pay," &c. addressed to the defendant [*132] and accepted *by him, may be declared on as a promissory note(x). So if a person draw a bill on himself, it may be declared on as a promissory note. (y). But a bill made payable to the order of the drawer, and by him delivered to the plaintiff, cannot be treated as a promissory note, drawn in

> of a bill, as to date, place, &c. are prescribed by positive law in those cases, the party guilty of the omission may nevertheless object to pay

on account of the defect; Pardess. vol. i. 487.

(q) Cited per Lord Macclesfield, and by Lord Mansfield in Russell v. Langstaffe, K. B. Mich. 21 Geo. 3; 2 Doug. 514, (Chit. 415); and in Peach v. Kay, Sittings after Trinity Term, 1781; and per Lord Hardwicke, in 2 Atk. 32; Bayley, 5.

(r) Shuttleworth v Stephens, 1 Campb. 407, (Chit. j. 755); Rex v. Hunter, Russ. & Ry. C. C. 511; ante, 25.

(s) Allen v. Mawson, 4 Campb. 115; ante, 25; Edis v. Bury, 6 B. & C. 433; 2 C. & P. 559; 9 D. & R. 492, (Chit. j. 1326).

(t) Rex v. Hanter, Easter Term, 1823, Russ. & Ry. C. C. 511; ante, 25. The prisoner was indicted for forging and uttering a promissory note, and the indictment stated the note as follows; "Newport, Nov. 20. A. D. 1821.-Two months after date pay Mr. B. Hobday, or order, 281. 15s. value received. John Jones. At Messrs. Spooners' and Co bankers, London." After conviction, Holroyd, J stated a case for the consideration of the Judges, whether this was rightly called a promissory note; and, on consideration, five Judges out of seven who met doubted; and a pardon was recommended. See Reg. r. Kinnear, 2 Mood. & R. 117; ante, 130.

(u) Edis r. Bury, 6 B. & C. 433; 9 D. & R. 492; 2 Car. & P. 559, (Chit. j. 1326). The instrument declared on as a promissory note was in this form:

" London, 5th Aug. 1826. "Three months after date I promise to pay Mr. John Bury, or order, forty-four pounds Mr. John Dury, or Older, while received.

"John Bury.

" J. B. Grutherot, 35, Montague Place, Bedford Sq.''

Indorsed "John Bury." Grutherot's name was written across it. In

assumpsit for cattle sold, defendant proved that he gave this instrument to plaintiff for the price and insisted upon want of notice of dishonour. If it was only valid as a bill, then defendant was discharged by want of due notice of nonpayment; but if it was a note, then the defendant, being the party primarily liable, was not entitled to notice. The court held it to be a note, but that as against the defendant it might

be treated as either a bill or note.

Lord Tenterden, C. J. "This is an instrument at least of a very ambiguous character. In form it is a promissory note, for it contains in terms a promise to pay the sum mentioned in it; but then in the corner of it, there is the name of Grutherot, and it appears that his name is also written across the instrument. In that respect, although it does not in terms contain a request to Grutherot to pay, yet it resembles a bill of exchange. It is an instrument, therefore, of an ambiguous nature, and I think that where a party issues an instrument of an ambiguous nature, the law ought to allow the holder at his option to treat it either as a promissory note or a bill of exchange. That being so, I think it was competent to the plaintiff in this case to consider this as a promissory note, and if so, the notice of the dishonour was un-

Bayley, Holroyd, and Littledale, Js. expressed a similar opinion; the two latter thinking that as until Grutherot put his name to this instrument it was clearly, in terms, a promissory note, he could not by afterwards putting his name to it as acceptor make it a bill of exchange. And see Rex r. Hunter, Russ. & Ry. C. C. 511; ante, 131, note (t); and ante, 25.

(x) Block v. Bell, I Mond. & Rob. 149. (Chit. j. 1567).

(y) Roach v. Ostler, 1 Man. & Ry. 120, (Chit. j. 1859); ante, 25, notes (h)(i).

and principal Kequi-

favour of the plaintiff, but an indorsement must be averred as well as delive- I. Form

sites of There are however (independently of some other minor requisites) essen-Bills, tial qualities to be observed in framing a bill of exchange or promissory note Notes, &c. in Great Britain and Ireland, the absence of which have very frequently But cortain given rise to discussion, and which renders them invalid. These are, that Qualities they be for the payment of money only, and that such payment be absolute are essential. They and not contingent either as to amount, event, fund or person. The law has must be for rendered these qualities essential, on account of the necessity for certainty Payment of Money on-and precision in mercantile affairs, especially with reference to negotiable se-ly, and that curities; for it would perplex commercial transactions if paper securities of absolutely, this nature, encumbered with conditions and contingencies, were allowed to and not have effectual circulation, and if the persons to whom they were offered in contingent, either as to negotiation were obliged to inquire when these uncertain events will proba- Amount, bly be reduced to a certainty, and if the time of courts of justice were occu- Event. pied in ascertaining whether or not the event on which payment was to de-Fund or Person. pend had happened (a)(1). But although a bill or note must on the face of it be payable absolutely, yet the circumstance of extrinsic circumstances suspending the time of payment and rendering it for a time inoperative, will not vitiate; therefore, if A. and others give a bill or note to B., the wife of A., though during his life she could not sue, yet after his death she may sue the other parties, if there were adequate circumstances, and in other respects the instrument was valid (b).

First, It must be for Payment of Money only. With respect to this first Must be for

Payment of Money

j. 918).

(a) See Carlos v. Fancourt, 5 T. R. 485, (Chit. j. 515); Dawkes r. Lord de Loraine, 3 Wils. 213; 2 Bla. Rep. 782, S. C., (Chit. j.

(z) Prevot r. Abbott, 5 Taunt. 786, (Chit. 382); Roberts v. Peake, 1 Burr. 325, (Chit. j. only. 340); Ralli v. Sarell, 1 Dowl. & Ry. N. P. Č

> (b) Richards v. Richards, 2 Bar. & Adol. 447; ante, 23.

The doctrine that a bill payable out of a particular fund, is not negotiable according to the custom of merchants, has been recognized in Kentucky. Merchon v. Withers, 1 Bibb's R. 502.

A bill of exchange must not be made payable out of a particular fund, but if the fund is certain and is described only as a mean by which the drawee is to be indemnified, the bill is good. Bank of Kentucky v. Sanders, 3 Marsh, 184.

The word "note" is sometimes considered as a general term, comprehending both bills of exchange and promissory notes, and was held to embrace the former, when used in an assignment

for the benefit of creditors. Dn Costa v. Guieu, 7 Serg. & Rawle, 402.

On a draft payable out of a particular fund of money in the hands of the drawer belonging to the payee, the payee may maintain an action against the drawer, in case of the drawee refusing acceptance. Joliffe v. Higgins, 6 Munf. 3.

As to the essential requisites of a bill or note, see Cook v. Satterlee, 6 Cowen, 108. Union Turnpike Co. v. Jenkins, 1 Cain. Rep. 381. An instrument in writing, by which A. directs B. to pay C. or bearer 400 dollars, and take up A.'s note of that amount, though accepted by B., is not a bill of exchange. Id.

An obligation to pay in notes of a specific bank must be paid in the notes of that bank or their numerical value in money: their value in market cannot be substituted. Edwards v. Morris, Ohio Rep. Cond. 222.

Inserting in a bill a promise that the drawer will credit the drawee's note with the amount, does not make it a bill drawn on a particular fund. It leaves the drawee to pay as he can, and at all events. Early v. M'Cart, 2 Dana, 414.

An order on a particular fund, the payment depending on the sufficiency of the fund, is not a valid bill of exchange. But if it is payable at all events, not upon a condition or contingency, though it may refer the drawee to a particular fund for reimbursement, is to all intents a bill of exchange. Ibid. See also Wiggins v. Vaught, Cheves' Rep. 91, S. P. as to promissory notes.

⁽¹⁾ These requisites apply only to a bill or note in its original formation, for it seems that an acceptance may be to pay upon a contingency, or in bills, &c. and not in money. See p. 333, note (f).

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and principal requisite, it is established by foreign as well as English law, I. Form and principe that a bill or note must be for the payment of money only; and a bill cannot pal Require be for the delivery or navment of merchandize or other things in their name. be for the delivery or payment of merchandize, or other things in their nasites of ture susceptible of deterioration and loss and variation in quality and Bills. Notes, &c. value (c)(1); nor can it be for payment in good East India bonds (d), or for [*133] payment of money by a bill or note(e)(2). And a *signed memorandum, stating that a party has certain bills in his hands "to get discounted or return on demand," is neither a promissory note nor an agreement, but a mere acknowledgment requiring no stamp (f). But it is said, that it is not necessa-

dess. 331, 332.

(d) Anon. Bul. N. P. 272. A written promise to pay 3001. to B. or order, in three good East India bonds, was held not to be a note within the statute; Smith v. Boehm, Gilb. Ca. L. & E. 93, (Chit. j. 234).

(e) It became a common practice, especially in Lancashire, for a purchaser of goods to pay for them by drawing a check on a banker, requesting him to pay the vendor or bearer, or order, the named price of the goods, by a bill, or a good bill at --- months, and the banker

(c) This is the express law in France, 1 Par- drew a bill in London or other place according-See Bolton r. Richards, 6 T. R. 139, (Chit. j. 538); Ex parte Dixon, 6 T. R. 142; post. But the 55 Geo. 3, c. 184, Schedule, tit. Bills of Exchange, subjects such drafts, when they require the delivery of a bill or note to order or bearer, to the same stampduty as a bill of exchange; see ante, 105, 118.

(f) Mullett r. Huchison, 3 Car. & P. 92; 7 B. & C. 639; 1 Man. & Ry. 522, (Chit. j. 1372); and see Langdon v. Wilson, 2 Man. & Ry. 10, cited in Mullett r. Huchison, Chit. j. 1872, n. (a).

The holder of a note payable in specific articles is not bound to receive them at a place or on a day different from that appointed in the note. Erwin r. Cook, 2 Devereux's Rep. 183.

A note was executed payable in money, but dischargeable in salt by a given day. Held, that if the salt is not delivered by the day specified, the money is due. Stewart r. Donelly, 4 Yerger's Rep. 177.

A note payable in specific articles is admissible in evidence under the money counts. Crandal v. Bradley, 7 Wend. Rep. 311.

A promissory note payable in cash or specific articles is not negotiable. Mutthews v. Houghton, 2 Fairf. 377. And see Wyman v. Winslow, Idem, 398. Johnson v. Baird, 3 Blackf. 153. }

A note payable "to A. B. or bearer in good merchantable whiskey, at trade price" cannot be sued by an assignee or bearer in his own name. Rhodes v. Lindley, Ohio Rep. Cond. 465.

⁽¹⁾ When a note is given for the payment of a certain sum of money, within a certain time, to be paid in furniture or other specific articles, until the day of payment, the payer has an election to pay either in money, or in such specific articles; but after the day of payment is past, his right of election is gone, and the payee's right to demand the money is absolute. Church v. Feterow, 2 Penn. Rep. 301.

⁽²⁾ A note for a certain sum payable to A. or order, "in foreign bills," (meaning thereby bills of country banks) has been held not to be a good promissory note within the statute, and consequently not negotiable. Jones v. Fales, 4 Mass. Rep. 245. So, in New York, a note payable in Pennsylvania or New York paper currency, to be current in the State of Pennsylvania, or the State of New York, is not a promissory note within the statute. (1 R. S. 151, R. S. of 29, 768.) Leiber v. Goodrich, 5 Cowen, 186. { The rule is the same if it be payable in Canada money. Thompson v. Sloun, 23 Wend, 71. } So in Pennsylvania, it was held, that a promissory note payable to A. B. or order, for 500 dollars in notes of the Chartered banks in Pennsylvanis was not a negotiable note on which the indorsee can sue in his own name. M'Cormick v. Trotter, 10 Serg. & R. 94. See Cook v. Satterlee, 6 Cowen, 108. In South Carolina, it has been decided, that paper medium is not money; and that, therefore, a note payable in paper medium is not assignable within the statute of Anne and their act; and on a verdict for the assignee of such a note, judgment was arrested. Lunge v. Kohn, 1 M'Cord, 115 See M'Clarin v. Nesbit, 2 Nott & M'Cord, 519. Cons. U. S. s. 8 & 10. But it was formerly decided in New York, that a note payable to A. or bearer, in "New York State bills or specie," was held to be a negotiable note within the statute, upon the ground that the bills mentioned meant bank paper, which in conformity with general usage and understanding, are regarded as cash: and therefore, that the meaning was the same as if payable in lawful current money of the State. Keith v. Jones, 9 Johns. Rep. 120. So it was also decided, that a promissory note payable at a particular place, 'in the bank notes current in the city of New York,' was a negotiable note within the statute. Judah v. Harris, 19 Johns. Rep. 144. \{ But it has been held in Vermont, that a promissory note payable to order in current bills, is not negotiable. Collins v. Lincoln, 11 Verm. Rep. 268. So, a note payable "in the office notes of a bank," is not negotiable. Irvine v. Lowry, 14 Peters, 293. The mention on the face of a note that it is given in part payment of a tract of land, does not, however, prevent its negotiability. Maurin v. Chambers, 16 Louis. Rep.

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ry that the money should be that current in the place of payment, or where I. Form the bill is drawn; it may be in the money of any country whatever(g). and princi-When the word "sterling," or lawful money of Great Britain, or some sites of words equivalent have been used, English money and currency is in general Bills, meant(a). There was not any lawful money of Ireland, excepting copper, Notes, &c. appropriated to that country; it was merely conventional; there is neither gold nor silver coin of legal currency; there is no such thing as Irish money, it is Irish currency (i). But by a recent act(k), all distinction as to currency between England and Ireland has been determined.

The bill or note must also be for the payment of a named sum certain, and Must be the amount of the sum to be paid must not in any respect be uncertain or certain as to Amount. Therefore, where the instrument was "to pay I. E. the sum of 65l. with lawful interest for the same, three months after date, and all other sums which may be due to him," Lord Ellenborough was of opinion that the instrument was too indefinite as a promissory note, and that since the whole constituted an entire promise it could not be divided into parts(m). paper whereby the defendants promised to pay the plaintiffs, or order, the sum of 131. for value received with interest at 51. per cent. and all fines according to rule, cannot be declared on as a promissory note(n). And an instrument in the following form:—"Received and borrowed of A. B. 301. which I promise to pay with interest at the rate of 51. per cent. I also promise to pay the demands of the sick club at H. in part of interest, and the remaining stock and interest to be paid on demand to the said A. B. Witness my hand, &c. C. D." is not a promissory note(o). And where the note was to pay 400l. " first deducting thereout any interest on money 1. S. might owe to the defendant," it was held, that the instrument resting entirely on contingency, it could not be considered as a promissory note to pay a certain or definite sum at all events, though being stamped as a note, it might, between the original parties, be read as evidence of a debt under the account stated(p). But a promise to pay so many pound (instead of pounds) is valid(q). So a bill of *exchange for twenty-five seventeen shillings and three-[*134] pence, is good as a bill for twenty-five pounds, seventeen shillings and three-pence, and may be declared on as such(r). Where A. having consigned goods to B. sent him the following order, "Pay to A. B. the proceeds of a shipment of goods, value about 2000l. consigned by me to you," and C. in

(§) 1 Pardess. 381, 382.

(h) Lansdowne v. Lansdowne, 2 Bligh. 95, Kearney v. King, 2 B. & Ald. 301, (Chit j. 1046); post.

(i) 2 Bligh, 79.

(k) 6 Geo. 4, c. 79.
(l) Smith v. Nightingale, 2 Stark. Rep. 875, (Chit. j. 1080); Barlow v. Broadhurst, 4 Moore, 471, (Chit. j. 1083); and Jones v. Simpson, 2 B. & C. 318; 3 D. & R 545, (Chit. j. 1189), post. Where the sum stated in the body of a bill or note is less than the sum mentioned in figures in the margin, the holder can only recover the smaller sum; and evidence is not admissible to show that the larger sum was intended, although the stamp is sufficient to cover the latter sum; Saunderson r. Piper, 5 Bing. N. C. 425; post, Part 1I. Ch. VI. Sum recoverable.

(m) Smith v. Nightingale, 2 Stark. 375. See also Firbank v. Bell, 1 Bar. & Ald. 36, post.

(n) Ayrey r. Fearnsides, 4 Mee. & Wels.

168. The jury having found general damages on a declaration containing a count on the above instrument (as a promissory note) and a count on an account stated, the court awarded a venire de novo.

(o) Bolton v. Dugdale, 4 Bar. & Adol. 619; 1 Nev. & M. 412, S. C., (Chit. j. 1637). (p) Barlow v. Broadhurst, 4 Moore, 471,

(Chit. j. 1093).

(q) Rex v. Post, Easter T. 1806, Russ. & R. C. C. 101, S. C. Prisoner altered a note for one pound into a note for ten, by substituting "ten" for "one" before the word "pound" in the body of the note, and also in the corner. It was urged, that a note for payment of ten pound was not a money note. On a case reserved, the judges were clear that a capital convic-

tion of the prisoner for forgery was right; Bayl. 11, 12, note 23.

(x) Phipps v. Tanner, 5 Car. & P. 488, (Chit. j. 1634).

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I. Form and princi-pal Requisites of Bills,

writing consented to pay over the full amount of the net proceeds of the goods; it was held that neither of these instruments required a stamp as a draft, bill or order for the payment of money, because no particular sum was named(s).

Although for many purposes bank-notes are equivalent to money, yet a Notes, &c. promissory note payable in cash, or Bank of England notes, was holden not to be valid within the statutes 3 & 4 Anne, c. 9, and 7 Anne, c. 25, s. 3, and that therefore a person who had received them from an intermediate person was not entitled to prove them as a debt against the maker(t). Afortiori an instrument engaging to pay money and deliver up horses and a wharf on a named day (u), or to pay money or surrender I. S. to prison (x), is invalid as a bill or note.

Must be abbolutely payable, not deany Event.

Secondly, The Money must be payable at all Events, not dependent on any Contingency, either with regard to Event, or with regard to Fund out of which Payment is to be made, or the Parties by or to whom the payment is pending on to be made(1).

Contingency as to Event.—Therefore an order or promise to pay money, provided the terms mentioned in certain letters shall be complied with(y); or provided that I. S. shall not be surrendered to prison within the limited time(z); or provided I. S. shall not pay the money by a particular day(a); or provided I. S. shall leave me sufficient, or I shall otherwise be able to [*135] pay it(b); or provided D. M. shall not return *to England, or his death be

> (s) Jones v. Simpson, 2 Bar. & C. 318, (Chit. j. 1189); 3 D. & R. 545, S. C.; Chitty's Stamp Laws, 141.

(t) Ex parte Imeson, 2 Rose, 225; Ex parte Davison, Buck, 31; Rex v. Wilson, Bayl. 11, Easter Term, 1809. Indictment for forging and uttering a promissory note. The note was to "pay the bearer, on demand, one guinea in cash or Bank of England notes." Upon a case reserved, the majority of the judges held this was not a note within the statute, and the prisoner was pardoned.

(u) Martin v. Chauntry, 2 Stra. 1271; Bul. N. P. 272. On error from the Court of Common Pleas, the Court of King's Bench held. that a note to deliver up horses and a wharf, and pay money at a particular day, was not a note within the statute, and reversed the judgment in favour of the original plaintiff.

(x) Smith v. Boehm, Gilb. Cases L. & E. 98, (Chit. j. 234); cited also in Jenny v. Herle, Lord Raym. 1362, (Chit. j. 253); Morris v. Lee, Lord Raym. 1396, (Chit. j. 258); see infra, note (z)

(y) Kingston v. Long, K. B. Mich. Term, 25 Geo. 8, MS; 4 Dougl. 9, (Chit. j 427). The plaintiff brought an action as indorsee against the defendant as acceptor, upon an order importing to be payable " provided the terms mentioned in certain letters written by the drawer were complied with;" and the court held clear-ly, that the plaintiff could not recover, though the acceptance admitted a compliance with the terms; for if the order was no bill until after such compliance, and if it were not a bill when drawn, it could not afterwards become one; see Bayl. 5th edit. 16, S. C.

(z) Smith v. Boehm, Gilb. Cases L & E 93, (Chit. j 234); 3 Lord Raym. 67, cited Lord Raym. 1362, 1396; Barnesley v. Baldwin, 7 Mod. 418. Action by the plaintiff as payee of the note against the makers, upon a promise to pay the plaintiff, or order, on demand, the sum of 711. 12s. 10d or surrender the body of Samuel Boehm in an action brought against him Verdict for the plaintiff, and judgment; and on error brought in the King's Bench, the court held that this was not a note within the statute, because the money was not absolutely payable, but depended upon the contingency whether the defendant should surrender Samuel Bochm to prison, and the judgment was reversed.

(a) Appleby r. Biddulph, cited 8 Mod. 363; 4 Vin. Abr. 240, pl. 16. An action was brought on this note, "I promise to pay T. M. 50l. if my brother doth not pay it within six weeks," and after verdict for the plaintiff, the court arrested judgment, because the maker was only to pay it upon a contingency.

(b) Roberts r. Peake, 1 Burr. 823, (Chit. j. 3:10). The plaintiff, as indersee of a note, sacd one of the makers; the instrument was in these words, "We promise to pay A. B. 11tl. 11s. value received, on the death of George Henshaw, provided he leaves either of us sufficient to pay that said sum, or it we otherwise shall be able to pay it;" and upon a case reserved, the court held it was not a negotiable note, because it was payable eventually and conditionally only, and not absolutely and at all events, and a nonsuit was entered; and see Ex parte Tootle, 4 Ves. 372, (Chit. j 595).

⁽¹⁾ A plaintiff may, in this state, declare upon a note payable upon a contingency, in the same manner as upon notes strictly negotiable. Odiorne v. Odiorne, 5 New Hamp. Rep. 315.

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duly certified, before the appointed time of payment(c); will be void as a I. Form bill or note. So a bill or note to pay when my circumstances will admit, and princi-without detriment to myself or family (d); or when I. S. shall marry; or if sites of the maker shall be married within two months(e); or to pay at four years af- Bills, ter date, if I am then living, otherwise this bill to be null and void (f); or Notes, &c. to pay by instalments, the instalments to cease on the death of the plaintiff(g); or to pay a sailor his wages if he do his duty as an able seaman(h); or to pay on the sale or produce, immediately when sold, of the White Hart, and the goods, &c.(i). So, borrowed and received of I. and J. W. the sum of 2001. in three drafts, dated as under, which we promise to pay unto the said I. and J. W. with interest; Lord Ellenborough thought the 2001. was payable on the contingency of the drafts being paid, and was therefore void as a note, and only available as a special agreement on being stamped as $\operatorname{such}(k)$. So where the instrument was in these words, "I., R. E. do this day bargain and agree with my uncle W. E. to give him 51. for a cart for the use of my father; and I do hereby *promise and agree to pay him the [*136] said W. E. without fail in three weeks from the date hereof;" this was holden to be an agreement, and not a promissory note (l). And an instrument in this form, "at thirty days after the arrival of the ship Paragon at Calcutta pay," &c. was held not to be a bill of exchange, because it was contingent

(c) Morgan and another v. Jones, 1 C. & J. j. 584) 162; 1 Tyr. Rep. 29, (Chit. j. 1515). An inatrument in the following terms, "nine years after the date hereof I promise to pay to, &c. the sum of, &c. with lawful interest, provided D. M. shall not return to England, or his death be duly certified in the mean time," is not a valid promissory note, nor does it even afford evidence of money lent, either on a special or indeb itatus count

(d) Ex parte Tootle, 4 Ven 372, (Chit. j. 595.)

(e) Pearson v. Garrett, 4 Mod. 242; Comb, 227, (Chit. j 198); Colehan r. Cooke, Wilhis, 897, (Chit. j. 298); Benrdsley r. Baldwin, Stra. 1151; 7 Mod 417, (Chit j 293.) A note to pay money within so many days after the defendant should marry, was held not to be a negotiable note; and in Pearson v. Garrett, Comb. 277, and 4 Mod. 242, an action having been brought upon a note, by which the defendant promised to pay the plaintiff sixty guineas, if he (the plaintiff) should be married within two months, the court inclined against the note, because it was to pay money on a mere contingency.

(f) Broham v. Bubb, Trin. Term, 2nd Sitting, June 7th, 1826, Middlesex. Per Abbott, C. J. "I think this not like a note payable on the maker's death, which is an event that must happen, but here it is contingent whether the note will ever be payable; for if the maker should die within the four years no payment is to be made, and as to the verbal promise which has been proved, inasmuch as that refers to the note in question, it does not carry the plaintiff's case further, and he is not entitled to recover on the common counts." And see next note.

(g) Worley v. Harrison, 8 Ad. & El. 669; 8. C., 5 N. & Man. 173; 1 Har. & Woll. 426. It makes no difference that the contingency is one upon which the liability is to cease, and not to arise, ib. 674; and see last note.

· (1) Alves v. Hodgeon, 7 T. R. 242, (Chit.

(i) Hill v. Halford and another, in error, 2 Bos. & Pul. 413, (Chit. j. 687). The defendants in error sued Hill, as maker of a note, thereby promising to pay them 1904, on the sale or produce, immediately when sold, of the White Hart Inn, St. Alban's, Herts, and the goods, &c. value received. The declara-

tion averred a sule of the inn and goods before the commencement of the action. After judgment in K. B. by default, writ of inquiry executed, and general damage recovered, Hill brought a writ of error in the Exchequer Chamber, and the court held that this promise could

not be declared on as a note, and therefore re-

versed the judgment. (k) Williamson r. Bennet, 2 Campb. 418, (Chit. j. 788). The defendants were sued on the following instrument, which was stamped and declared upon as a promissory note:—
"Borrowed and received of J. and J. Williamson(the plaintiffs), the sum of 2001. in three drafts, by W. and B. Williamson, dated as under, payable to us, W. Bennet and S. M. (the defendants) on J. and J. Williamson, which we promise to pay unto the said J. and J. Williamson, with interest. As witness this 26th day

1 draft at 2 months Angust 21st. £120 1 ditto 30 1 ditto 50

£200

Signed by the defendants.

of August, 1802."

Lord Ellenborough held that this was not a promissory note; and said there can be no doubt that the money was not payable immediately, and that it was not to be paid at all unless the drafts were honoured. The plaintiffs were nonsnited.

(1) Per Richardson, J. in Ellis v. Ellis, Gow's Rep. 216.

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I. Form pal Requisites of Bills,

whether the ship would ever arrive (m). So an instrument which is intended and princh merely to operate as a set-off against some future claim will be bad as a bill or note; thus, A. having given his daughter on her marriage the stock of a public house, amounting in value to 1200l. she and her husband signed the Notes, &c. following instrument: "On demand we promise to pay to A. or his order 12001. for value received in stock, &c. this being intended to stand against me M. (the daughter) as a set-off for that sum left me in my father's will above my sister Ann's share," and it was held that this was not a promissory note payable at all events, and not intended to confer on the father a right of action, but as a memorandum of a sum having been received as a satisfaction pro tanto of an intended legacy (n). So the following instrument was held to be an agreement, and not a promissory note: "I agree to pay the plaintiff or order the sum of 6951. at four instalments, viz. the first on &c., being 2001.; the second, on &c. being 1501.; the third, on &c., being 150l.; the fourth, on &c., being 100l.; the remainder, 95l., to go as a setoff for an order of R. to J., and the remainder of his debt from C. D. to him(o)."

If Event must happen, as Death, &c. such contingency does not vitiate.

But if the event on which the instrument is to become payable must inevitably happen some time or other, it has been decided to be of no importance how long the payment may be in suspense (p). Therefore if a bill be drawn payable six weeks after the death of the drawer's father (q), or payable to an infant when he shall come of age, specifying the day when that event will happen, it will be valid and negotiable (r). So a promissory note payable, with interest, twelve months after notice, is not to be considered as payable on a contingency, and is consequently valid, and may be proved under a commission against the maker, issued before any notice had been given(s)(1).

(m) Palmer v. Pratt, 2 Bingh. Rep. 185; 9 Moore, 388, (Chit. j. 1221).

(n) Clarke v. Percival, 2 Bar. & Adol. 660.
(o) Davis v. Wilkinson, 2 Perry & Dav.
256. The declaration stated, that the plaintiff accounted with the defendant, and on the account was found indebted in £--, and in consideration thereof promised to pay by instalments according to the above agreement. At the trial the plaintiff having proved that he had lent money to the defendant, held, that the above instrument was evidence of the account-

Semble, that an instrument may be framed so as to operate both as a note and as an agree-

ment; per Patteson and Coleridge, Js. ib.
(p) Cooke r. Colehan, Willes, 896, 398;
Stra. 1217, S. C.; Goss v. Nelson, 1 Burr. 226,

(Chit. j. 339).
(q) Cooke v. Colehan, Willes, 306; Stra.
1217, (Chit. j. 298). On a writ of error from
the Common Pleas, on a note whereby defendant promised to pay A. or order 150l. six weeks after the death of his futher, the court held this

to be a negotiable note within the statute, and that the distance of time of payment was no objection, as the event on which it was payable, the death of the defendant's father, must hap-pen; and see Ex parte Mitford, 1 Bro. C. C. 898; and Ex parte Barker, 9 Ves. 110. Recognized by Abbott, C. J. in Braham v. Bubb, ante, 135, note (f). And see Roffey v. Green-well, T. T. 1839, Q. B., 2 Perry & Dav.; post, Part II. Ch. VI. Sum Recoverable—Interest.

(r) Goss v. Nelson, 1 Burr. 226, (Chit. j. 339). Action on a note payable to an infant, "when he (the infant) shall come of age, to wit, 12th June 1750," and it was objected, in arrest of judgment, that it was uncertain whether the money would ever have been payable, because the infant might have died under twenty-one, but the court held it a good note, because it was payable at all events on the 12th June, 1750, though the infant should have died

before that time; and see 2 Bls. Com. 513.
(s) Clayton v. Gosling, 5 Bar. & C. 360; 8 D. & R. 110, (Chit. j. 1297).

(1) A promissory note payable to A. or order, at a day certain, "or when he (the promisse) completes the building according to contract," is payable absolutely at a day certain, and therefore good within the statute and negotiable. Stevens v. Blunt, 7 Mass. Rep. 240.

A note promising to pay a sum to the president, directors and company of a turnpike road, for five shares of the capital stock of said company, in such manner and proportion, and at such time.

and place as the president, directors, and company should from time to time require, has been held in effect payable on demand, and therefore a cash note within the statute. President, &c-of the Goshen Turnpike v. Hurtin, 9 John. Rep. 217. But a different opinion seems to have

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*There are also decisions, that if the event on which the payment is to 1. Form depend be of public notoriety, and relating to trade, and there be a moral and princicertainty of its taking place, the bill, &c. will be valid(s). On this ground pal Requithe bills of exchange called billa nundinates were formerly always holden to Bills, be good, because though the fairs on which the payment of them depended Notes, &c. were not always holden at a certain time, yet it was certain that they would be holden(t). Thus, for example, there are at Lyons four fairs, which are called vulgarly Les parements de Lyon, which are each a month; bills of exchange payable at the times of these fairs only mention the fair, without any other precise time(u). So it has been reported to have been decided that if a bill or note be payable two months after a certain ship be paid off(x), or be payable on the receipt of the payee's wages, due to him from a

certain ship, it is valid(y); but this latter decision seems questionable(z). (s) Coleban v. Cooke, Willes, \$98, (Chit. 296); Andrews v. Franklin, 1 Stra. 24, (Chit. j. 280); Evans v. Underwood, 1 Wils. 262, (Chit. j. 826); Dawkes v. Lord de Loraine, 8 Wils. 213; 2 Bla. R. 782, S. C., (Chit. j. 384); Lewis v. Orde, Gilb. Ev. 172; Hill v. Halford, 2 Bos. & Pul. 414, 415, (Chit. j. 687); ante, 185, in notes; sed vide Kyd, 58.
(t) Per Willes, C. J. in delivering judgment

in Colchan v. Cooke, Willes, 894, (Chit. j. 298); and see 1 Pardess. Cours de Droit Commercial, 852, S. P.; and Pothier, pl. 16. (u) Pothier, pl. 16.

(x) Andrews v. Franklin, 1 Stra. 24, (Chit. j. 236). A note, payable two months after a certain ship in his majesty's service should be paid off, was objected to, as depending upon a contingency which might never happen; but per cur. the paying off the ship is a thing of a public nature; it is morally certain. Judgment for the plaintiff. Bayl. 5th edit. 24; see also Selw. N. P. 9th edit. 895, 896.

(y) Evans v. Underwood, 1 Wils. 262, (Chit. j. 826). This was an action brought by an indorsee against the maker, upon a note payable on the receipt of the maker's wages from his majesty's ship the Suffolk; the court thought this case like that of Andrews v. Franklin; and after looking into that case are said to have given judgment for the plaintiff. Upon this case there is a note in Bayley on Bills, 5th edit. 24, as follows: " Quære tamen because it was uncertain, though the wages might be paid, whether the maker would receive them." also Lewis v. Orde, 1 Gilbert on Evid. by Lofft, 178; Selw. N. P. 9th edit. 885. It is observable, that in both those cases the ships belonged to government, and were not private ships, and probably the wages had been already earned.

(z) In Selw. N. P. 9th ed. 886, there is a note upon this point, and in the conclusion is stated the case of Beardesley v. Baldwin, E. 15 Geo. 2, B. R. MS. (Chit. j. 293); in which the court said, that as to Andrews v. Franklin, if it ever was determined, which they could not find, it must have been decided on the certainty observed in the return of ships, and must be looked upon as an event in itself not contingent. Sed quære. And see Evans v. Underwood, 1 Wils. 263, (Chit. j. 826); where it was said that Andrews v. Franklin was not decided. Where the note was "I promise to pay J. S.

been asserted in the President, &c. of the Union Turnpike Road v. Jenkins, 1 Caines' Rep. 381.

Where a note was executed and put into the hands of a third person, but was not to be delivered to the payee until certain conditions were performed, it was held, that, without a performance of the conditions, no recovery could be had on the note, though a suit be brought for the benefit of the holder who has an interest in the note. Jarvis v. Baker's Admrs., 3 Verm. Rep. 226

That when one of the conditions, on which the delivery of the note depended, was, that certain suits should be instituted in the name of the payee for the benefit of the signers of the note, it was not a performance of the condition that the suits were commenced, but were ordered to be discontinued by the payee. Ib.

A promissory note given on condition to be in force on the happening of a contingency, cannot /

be sued before that contingency happens. Henry v. Coleman, 5 Verm. Rep. 402.

A. is prosecuting debt against B. the surety of C., and C.'s father agrees in writing to pay the debt with interest, if A. will dismiss his suit against B., at A.'s own cost; A. dismisses his suit, generally; In assumpsit by A. against the father upon his conditional promise to pay the debt, held, A. was bound to perform the condition strictly, in order to entitle himself to enforce the promise, and having dismissed his suit generally instead of at his own costs, he cannot recover upon the promise.

pon the promise. Couch v. Hooper, 2 Leigh's Rep 557.

And though the father subsequently approved A.'s dismission of his suit against the son's surey, generally, yet A. not having averred such subsequent ratification in his declaration on the

father's promise, that fact cannot avail him. Ib.

Notes payable on a coatingency may be declared on as ordinary notes of hand. Cong. Society v. Goddare, 7 N. Hamp. 480. See also M'Gebee v. Children, 2 Stew. 506; Chittenden v. Ensign, Wright, 721.

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Contingency if payable out of a Particular Fund.—So if by the terms and princi- of the instrument the payment is to depend upon the sufficiency of a particular fund, the bill or note will be invalid; thus an order to pay money out of the drawer's growing subsistence, (a) or out of the *fifth payment when Notes, &c. it should become due, and it should be allowed by the drawer(b), or out of money when received (c), or an order to pay the amount of a note and interest out of the purchase-inoney of the drawer's house (d), or an order cause pay- or promise to pay out of the drawer's money that should arise from his a particu- reversion, when sold, is no bill or note(e). So an order to pay a sum of lar Fund. money out of the rents or other money in the hands of the person to whom [*138] it is addressed,(1) is no bill, because he may not have rent or other money in his hands sufficient to discharge it(f). So a promise to pay on

> 111. at the payment of the ship Devonshire," it was held good, and Lord Hardwicke is reported to have said, " As to the time, this note is certainly within the statute; if it had been made payable at any precise future day, and if it be uncertain at first, but referred to a subsequent fact to make it certain, when that fact happens (as in this case it was averred that the ship Devonshire was paid), it is as much reduced to a certainty as if the day had been mentioned at first;" Lewis v. Orde, Selw. N. P. 385, 9th ed.; Cunningham's Bills of Exchange, 127, 2d ed. The reasoning of Lord Hardwicke is in opposition to the cases of Carlos v. Fancourt, 5 T. R. 492; post, 139, note (e), and Hill v. Halford, 2 B. & P. 413, (Chit. j. 637); ante, 135, n. (i). When the note was "I promise to pay G. P. or order, 81. upon the receipt of his the said G. P.'s wages from his majesty's ship the Suffolk." &c. the court, it is said, on the authority of Andrews v. Franklin, held the note good; Evans v. Underwood, 1 Wils. 262. But this decision is not to be considered as law, because it is uncertain, though the wages might be paid, whether the maker of the note would receive them.

> (a) Jocelyn v. Laserre, Fort. 281; 10 Mod. 294, 316; Willes, 397, (Chit. j. 232). Evans drew upon Jocelyn, and required him to pay Laserre 71. per month out of Evans's growing subsistence. Laserre sued Jocelyn, and had judgment, but upon a writ of error that judgment was reversed, because this draft was not a good bill of exchange, inasmuch as it would not have been payable had Evans died, or had his

subsistence been taken away.

(b) Haydock v. Liuch, Lord Raym. 1563, (Chit. j. 268); Rogers drew upon Linch, and requested him to pay Haydock 141. 3s. out of the fifth payment when it should become due, and it should be allowed by Rogers. Linch accepted the draft, and Haydock sued him, but the court, upon demurrer to the declaration, held this was no bill of exchange, and gave judgment for the defendant.

(c) Dawkes v. Lord De Loraine, 2 Bla. R. 782; 3 Wils. 207, (Chit. j. 384). A draft was in these words, "8 Jan. 1768. Seven weeks after date pay to Mrs. Dawkes 321. 17s. out of W. Steward's money, as soon as you shall

have received it, for your hamble servant, De Loraine. To Timothy Brecknock, Esq." Brecknock accepted the bill, but it not being paid, Mrs. Dawkes brought an action against Lord De Loraine, who pleaded that Brecknock, had not received W. Steward's money; and upon demurrer to his plea, insisted that this was not a bill of Exchange. The court, after argument, held the objection good, because it was payable out of a particular fund, and on an event which was future and contingent, viz. the receipt of W. Steward's money, whereas a bill ought to be subject to no event or contingency, except the failure of the general personal credit of the persons drawing or negotiating it.

(d) Yates v. Grove, 1 Ves. jun. 280, 281. (e) Carlos r. Funcourt, in error from the C. P. 5 T. R. 482, (Chit. j. 515). Assumpsit upon a promissory note, whereby Carlos, in the life-time of defendant's wife, promised to pay Fancourt's wife the sum of 101. "out of his money that should arise from his recersion of 431. when sold." The defendant suffered judgment by default, and brought a writ of error, and the court held that this note could not be declared upon as a negotiable security under the statute 3 & 4 Ann. c. 9, the object of which statute was to put promissory notes on the same footing with bills of exchange in every respect, and they must stand or fall by the same rules by which bills of exchange were governed; and unless they carried their own validity on the face of them, they were not negotiable, and on that ground bills of exchange, which were only payable on a contingency, were not negotiable, because it did not appear on the face of them whether or not they would ever be paid. The same rule that governed bills of exchange in this respect must govern promissory notes; and therefore reversed the judgment; Hill v. Halford, 2 Bos. & Pul. 413, ante, 137, note (z), and infra note (g).

(f) Jenny v. Herle, Lord Raym. 1361; 8 Mod. 265; 1 Stra. 591, (Chit. j. 253). Herle sued Jenny upon a bill drawn by him upon Pratt, and payable to Herle as follows: "Sir, you are to pay Mr. Herle 1945l, out of the money in your hands, belonging to the proprietors of the Devonshire mines, being part of the consideration-money for the purchase of the manor of

^{(1) {} Or an order by a client upon his attorney, to pay out of monies collected. See Crawford v. Cully, Wright, 458. }

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the sale or produce, immediately when sold, of the White Hart Inn, St. I. Form Alban's, and the goods, &c. is no note, although it be averred in the dec- and princilaration upon such promise, that the White Hart Inn, goods, &c. were pal Requisold before the action was commenced(g). And a promise to pay when Bills, three drafts have been paid, falls under the same objection (h). order from the owner of a ship to the freighter to pay money on account of freight, is no bill, because the quantum due on the freight may be open to litigation(i), though such an order from the freighter is, because it is an admission that so much at least is due(k).

*But the statement of a particular fund in a bill of exchange will not viti- When ate it, if it be inserted merely as a direction to the drawee how to reimburse Statement himself; and therefore a bill requesting the drawee, one month after date, to of Fund pay the plaintiff, or his order, a certain sum of money "as my quarterly vitiate. half-pay, to be due from the 24th of June to the 27th September next by advance," was decided to be a valid bill (l)(1), because it would be payable, [*139] though the half-pay might never become due; and an order from the freighter of a ship to pay money on account of freight is sufficient, because it is an admission that so much at least is due(m), though we have seen that an order from the owner of a ship to the freighter, to pay money on account of freight, is not valid (n). Nor will a bill or note be vitiated by the insertion of words pointing out the consideration: as for instance, "value received out of the premises in Rosemary-lane(o);" or "being a portion of a value as under deposited in security for payment hereof(p)," or on account of

So an Notes, &c.

West Buckland." Herle had judgment in the Common Pleas: but upon a writ of error, the court of King's Bench held that this was no bill of exchange, because it was only payable out of a particular fund, supposed to be in Pratt's hands, and the judgment was accordingly re-

(g) Hill v. Halford and another, in error, 2 Bos & Pul. 413; ante, 135, note(i).
(h) Williamson v. Bennett, 2 Camp. 418,

(Chit. j. 788); ante, 135, note(k)

(i) Banbury r. Lissett, Stra. 1211, (Chit. j. 310); Gibson drew on the defendant in favour of the plaintiff, "on account of the freight of the galley Veal, Edward Champion, and this order shall he your sufficient discharge for the same." This action was brought against the defendants as acceptors, and they contended, that it was not a bill of exchange, because it was only payable out of a particular fund; and Lee, C. J. was of that opinion.

(k) Pierson v. Dunlop, Cowp, 571, (Chit. j. 352). M'Lintot freighted a ship, of which Nicholl was captain, and Pierson owner, and being unable to pay the freight, drew upon Don-lop and Co in favour of Nicholl, on account of freight. Pierson afterwards sued Danlop and Co. as acceptors, and though other objections were taken, yet it was never insisted that this was payable out of a particular fund

(1) M'Leod v. Snce, Stra. 762; Ld. Raym. 1481; 11 Mod. 400; 1 Barnardiston, 12, (Chit. 259). Error on a judgment given against M'Leod on a bill of exchange drawn by J. S. on the 25th of May, 1724, upon M'Leod, and directed him, one month after the date, to pay

A. B. or order, 91. 10s. as his quarter's half-pay frem 24th June, 1724, to 25th September following. The court were of opinion that this was a good bill of exchange, for it was not payable out of a particular fund nor upon a contingency, and was made payable at all events, and was drawn upon the general credit of the drawer not out of the half-pay, for it is payable as soon as the quarter begun, for the half-pay mentioned in the bill, which was not to be due for three months after. Semble. This case may be sustainable on the ground that the halfpay was merely referred to in order to show the consideration, and not to render the payment contingent.

(m) Pierson r. Dunlop, Cowp. 571, (Chit. j. 392); vide ante, 138, note (k).

(n) Banbury v. Lissitt, Stra. 1112, (Chit. j. 310); vide ante, 138, note (i).

(o) Burchell, administrator, &c. v. Slocock, Lord Raym. 1545, (Chit. j. 267). Action on a promissory note, whereby the defendant promised to pay to A. B. 1017. 12s in three months after the date of the said note, " value received out of premises in Rosemary-lane, late in the pessession of G. H." The court, upon demurrer held this to be a promissory note within the statute, and gave judgment for the plaintiff.

(p) Hausoullier v. Hartsink and others, 7 T. R. 733, (Chit. j. 618). Payee against the maker of a promissory note, whereby the defendant promised to pay —, or bearer, 251. being a portion of a value as under deposited in security for the payment thereof. Upon a special case being reserved, the court said they were clearly of opinion, that though as between

^{(1) {} Early v. M'Cart, 2 Dana, 214; Wiggins v. Vaught, Cheves' Rep. 91. }

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I. Form and princiand principal Requisites of
Bills,
Notes, &c.

wine had of the drawer(q). So a note promising to pay on demand 161.

So a note promising to pay on demand 161.

So a note promising to pay on demand 161.

A note also, whereby the maker promised to pay to A. B. 81., "so much being to be due from to A. B." was on the same principle held not to be conditional(s)(1).

Contingency as to Person by or to whom payable. So a contingency or uncertainty, as by or to whom the bill or note is payable, is fatal to its validity.

In general, every contract must show in whose favour it is to be performed, or it will be void for uncertainty in an essential particular(t). So a bill or note must show to whom the payment is to be made(u). And therefore where the prisoner forged a bill upon the treasurer of the navy, payable to — or order, and signed it in the name of a navy surgeon; it was held,

the original parties to the transaction the payment of the notes was to be carried to a particular account, the defendants were liable on these notes, which were payable at all events. See also Burchell v. Slocock, Lord Raym. 1545, (Chit. j. 267).

[17] [267] Buller v. Cripps, 6 Mod. 29, (Chit. j.

222); Mod. Ent. 312.

(r) Dixon v. Nuttall, 1 C., M. & R. 307; 6 C. & P. 320, S. C.

(s) Anonymous, Select Cases, 39.
(t) Champion v. Plumer, 1 New R. 252;
Cooper v. Smith, 15 East, 103.
(u) Green v. Davies, 4 B. & C. 235; 6 D.

& R. 306, (Chit. j. 1251).

(1) So where a note was made payable to A. or order, and on the back of it an indorsement was written, that it was to be delivered to A. in consideration of a judgment against C. to be assigned to the maker, it was held a good promiseory note within the statute, and that the indorsement only operated as a notice to any purchaser of the consideration of the note. Sanders v. Bacon, S John. Rep. 495.

In Massachusetts the statute of 3 & 4 Ann. ch. 9, was never enacted; but in practice the provisions of the first section were early adopted, and the form of declaring on negotiable notes resulting from that statute was extended to notes not negotiable. It may therefore be considered as the common law of that state, that all cash notes are negotiable, and that all notes for merchandize may be sued by the promisee against the promisor, and when indorsed by the indorsee against his indorser, who may declare in the same manner as they might if the note were negotiable. Jones v. Fales, 4 Mass. Rep. 245, and Eaton v. Fallensbee, Sup. Court, Essex, June Term, 1779, MSS. Whether this doctrine applies also to notes and bills payable out of particular funds, does not seem to have been decided. But even admitting that a bill payable out of a particular fund, could not be declared on within the statute; yet if the drawee accept to pay it, when the funds come into his hands, this binds him to the payment when he receives the funds, and the payee may on his refusal recover the amount in an action for money had and received. Stevens v. Hill, 5 Espin. Rep. 247, stated post, 253, and see Scarborough v. Giegar, 1 Ray's Rep. 368. Mershon v. Withers, 1 Bibb's Rep. 503. Mowry v. Todd, 12 Mass. Rep. 281. A writing was made thus ——"good for ——— dollars on demand. A. B." In an action thereon it was holden to import no promise to the holder, without evidence to show that it was actually given to him or some subsisting connexion shown from which that fact might be inferred. Brown v. Gilman, 13 Mass. Rep. 158.

In New York, a like usage in relation to notes not within the statute, has not prevailed; consequently, a note for a sum payable in lands at a specific price per acre, cannot be declared on even between the original parties as a promissory note, but the consideration must be specially set forth and proved, as in other declarations in assumpsit. Smith v. Smith, 2 John. Rep. 226. And even the terms "value received" in a note not within the statute, have been held not of themselves to imply a consideration, but a consideration must be specially averred and proved. Lansing v. M'Killip, 3 Caines' Rep. 286. However, this doctrine has been overruled, and it is now held that these terms were prima facie evidence of a consideration in such a note, and sufficient to cast the burthen of proof of the contrary on the defendant. Jerome v. Whitney, 7 John. Rep. 321. Jackson, v. Alexander, 3 John. Rep. 484. And therefore such a note would be good evidence to support the money counts. Told. and Smith v. Smith. But if no consideration appear on the face of a note, not negotiable within the statute, and no terms implying value received, it cannot be given in evidence under the money counts. Sexten v. Johnson, 10 John. Rep. 418. And see 3 Kent's Com., new ed., 76, note d.

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that to constitute an order for the payment of money there must be a payee, I. Form and that a direction to pay to --- or order was not sufficient, and the offence and princiof forgery was not *committed(x). And in another case, the judges held a sites of similar instrument to be no bill till the blank was filled up(y), but this requisite Bills, may be supplied by necessary or natural intendment(y), as in the case before Notes, &c. noticed of a note thus expressed, "received of Mr. D. Boaz 501. which I *140] promise to pay on demand," and it was holden that it sufficiently appeared that Boaz was intended to be the payee(z); and in general, as far as respects the civil remedy, when a blank has been left for the name of the payee, the intended payee, or any bona fide holder, may insert his own name(a), and such instrument may be declared upon as if the name had been originally in-And a bill addressed not to any particular person, but merely to a particular house will be sufficiently certain; at least it will be so against the acceptor(c). A mistake in the name of the intended payee, as giving him a wrong description, if there be no doubt who was intended, will be immaterial(d).

But if it be really uncertain by or to whom the payment is to be made, that imperfection will prevent the instrument from operating as a bill or note. Thus, a note to be paid "by A. or else B." is bad(c). So a note to pay, if the maker's brother do not pay by such a time, is bad(f). So a note whereby the maker promised to pay A. B. or to plaintiffs, or his or their order, a sum of money for value received, was held not to be within the statute, for it was not payable to A. B. and the plaintiffs, but payable to either of the parties, and that only on the contingency of its not having been paid to the other (g). But where a bill or note is upon the face of it payable to a particular individual, a mere contingency as to the persons who may have a right to enforce it under particular circumstances will not vitiate; as If A.B. and C. join in a promissory note payable to D. the wife of A.; in this case, if the husband die in the life-time of his wife, then the right to sue vests in the wife; if, on the other hand, the wife die first, then the note vests in the administrator of the wife, yet this does not create such a contingency as to make the instrument void as a note (h).

(y) Rex v. Randall, Russ. & Ry. C. C. 196, (Chit. j. 838).

(y) Rex v. Randall, Russ. & Ry. C C. 196, (Chit. j. 888.)

(z) Rex v. Randall, Russ. & Ry. C. C. 196, (Chit. j. 838); Ashby v. Ashby, 3 Moore & P. 186, S. P.; Pothier, pl. 31, puts this very

(a) Crutchley v. Mann, 1 Marsh. 81; 5 Taunt. 529, (Chit. j. 908); Crutchley v. Clarence, 2 Maule & S. 90, (Chit. j. 895); Avoid v. Griffin, Ryan & Mood. 42, 425, (Chit. j. 1805).

(b) Id. ibid. Atwood v. Griffin, Ryan & Mood. 425, (Chrt. j. 1805).

(c) Gray v. Milner, 3 Moore, 90; 8 Taunt.

789, (Chit. j. 1022, 1052).
(d) Rex v. Box, 6 Taunt. 825, (Chit. j. 941). (e) Ferris v. Bond, 4 Bar. & Ald. 679, (Chit. j. 1110). The form of the note in this case was thus, "I, J. C. promise to pay to A. F. the sum of 58! with lawful interest for the same, or his

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(x) Rex v. Richards, Russ & Ry. C. C. order, at six months notice, dated, &c. J. C. or else H. B." et per curiam, "This is not a promissory note by this defendant within the statute of Anne. It operates differently as to the two parties. It is an absolute undertaking on the part of J. C. to pay, and it is conditional only on the part of the defendant, for he undertakes to pay only in the event of J. C.'s not paying." A rule for a nonsuit was made absolute. See Wilkinson v. Lutwidge, Stra. 648, (Chit. j. 263).

(f) Appleby v. Biddulph, Bul. N. P. 272. cited 8 Mod. 868; 4 Vin. Ab. 240, pl. 16. An action was brought on this note, "I promise to pay T. M. 50l. if my brother doth not pay it within six weeks," and after verdict for the plaintiff, the court arrested judgment, because the maker was only to pay it upon a contingen-

(g) Blanckenhagen v. Blundell, 2 Bar. & Ald. 417, (Chit. j. 1054).

(A) Richards v. Richards, 2 B. & Ad. 447, 455, (Chit. j. 1548); ante, 28, note (r).

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pal Requisites of Bills, Notes, &c. written dum.

The rule that a bill or note payable on contingency is invalid as such, and princi- extends also to cases where the bill or note is absolute on the face of it, but rendered contingent by a contemporaneous indorsement, or even by a written memorandum on a detached paper. As where a *note before it was signed by the makers, was indorsed "The within note is taken for security Contingent for all such balances as I. M. may happen to owe to T. L. and Co. not extending further than the within-named sum of 2001., but this note is to be in force for six months, and no money liable to be called for sooner in any Memoran- case;" and in an action by the payees against one of the makers, Lord Ellenborough was of opinion, that as between the parties the instrument was merely an agreement, and not a note, although he seemed to think that in the hands of a bona fide holder, who received it as a promissory note, it might possibly be considered valid as such(i). But an indorsement merely denoting the payee's desire, and not an order or agreement that indulgence should be given, that will not qualify the tenor of the note(k). where a note payable to Foster or order, and given for 251., being the amount of the purchase-money for a quantity of fir belonging to Mr. Hartley, had, before it was signed, the following indorsement, "This note is given on condition, that if any dispute shall arise between Mr. H. and Lady W. respecting the fir, the note to be void:" it was held not to be a note payable at all events, but contingent; and that an indorsee could not recover against the maker(l). So in the instance before mentioned, where the note was given in respect of drasts borrowed of the plaintiff, Lord Ellenborough considered that the payment of the note was to depend on the payment of the drafts, and therefore contingent(m). But where on an action coming on to be tried at the assizes, an agreement in writing was entered into that the trial should be postponed till the next assizes, on the defendant undertaking to give the plaintiff a promissory note payable on demand, by way of security in case the plaintiff should recover a verdict, and to be given up if the plaintiff, the payee, should fail in that action, and the note was accordingly given, but after it was signed a memorandum was indorsed upon it, stating that the note was given upon the condition mentioned in the agreement; it was held, that this indorsement was to be considered as merely a marking of the note for the purpose of identification, and not as an incorporating of the agreement, so as to render the note an agreement or a conditional promise(n).

By separate Memorandum.

So although the memorandum be on a separate paper, yet if it were con-

(i) Leeds r. Lancashire, 2 Campb. 205, (Chit. j. 775). But the back could not be looked at unless stamped; see next case and Sweeting v. Halse, 9 Bar. & Cres. 365; 4 Mann. & Ry. 287, (Chit. j. 1423); ante, 122, note (a).

Leeds v. Lancashire, 2 Camp. 205, (Chit. j. 775). The defendants Marriott and Ball gave a joint and several promissory note to the plaintiffs for 2001. No time for payment was mentioned in the note. On the back was written, "The within note is taken for security of all such balances as James Marriott may happen to owe to Thomas Leeds & Co. not exceeding farther than the within sum of 2001. but this note to be in force for six months, and no money liamemorandum was written before the note was signed by the defendant or Ball. It appeared, in an action upon this note, that, in the course of mercantile dealings, Marriott had become in-

debted to the plaintiffs, and that on their refusing to deal with him any longer without some guarantee, the above instrument, which the makers represented to be a note, was given. It

was impressed with a promissory note stamp.

Lord Ellenborough. "As between the original parties this instrument is only an agreement, and not a note; in the bands of a bont fide holder, who received it as a promissory note, it might possibly be considered as such. The plaintiffs were nonsuited." And see Rallie r. Sarell, 1 Dow. & Ry. N. P. C. 33.

(k) Stone v. Metcalfe, MS., and 1 Stark. 58; 4. Camp. 217, (Chit. j. 943), post, 142, u (r); and see ante, 122.

(1) Hartley v. Wilkinson, 4 M. & S. 25; 4 Campb. 127, (Chit. j. 931).

(m) Williamson v. Bennett, 2 Campb. 417,

(Chit. j. 789); ante, 135, note (k).
(n) Brill v. Crick, 1 Mee. & Wels. 232.

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temporaneous, it is admissible between the original parties and their repre- I. Form sentatives; as where there was a written stipulation to renew *on a separate and principaper, it was considered that it qualified the liability, although it did not vitisites of ate the instrument itself(o); and it should seem that an indorsee who has Bills, notice of the stipulation at the time he takes the bill, will be equally bound Notes, &c. by its terms(p).

When the party means to avail himself of a binding written engagement to Steps to be renew, he must take all the proper steps to obtain a renewal, or will loose thereupon the advantage of the stipulation, and should therefore tender a proper fresh bill or note(q).

It is also incumbent on a defendant, who relies on an indorsement on a bill or note, or on a separate paper as qualifying and rendering contingent the absolute engagement on the face of the instrument, to have the same stamped as a special agreement, for otherwise it cannot be read, and the plaintiff may succeed on the former, and the defendant be precluded from establishing his defence: as where the plaintiff proved a note absolute on the face of it, and there was on the back a memorandum attested by J. S. and it was urged by the defendant that he had a right to have such memorandum read as well as the note, without calling J. S.; but Lord Ellenborough ruled otherwise, and upon J. S. being called, the desendant urged, that though unstamped the endorsement might be read, because it made part of the note, and that neither of them could be read, because taken together they required an agreement stamp; but Lord Ellenborough said, "the plaintiff is entitled to have the note read, having proved defendant's hand-writing, but the indorsement may be an unconnected instrument. I have on one side a perfect note, and on the other that which, if stamped, might have operated as a defeasance, but at which, for want of a stamp, I cannot look (r)."

It seems now settled, that verbal evidence is not admissible to contradict Parol Evior vary an absolute engagement to pay money on the face of a bill or note, dence of a although as between the original parties evidence may be adduced to estab- Bargain, or lish a defence on the ground of total want of consideration, failure of it, or agreement And if the instrument on the face of it purport to be an abso- to renew, illegality(s). lute engagement to pay money, no evidence of a verbal agreement made at sible. the same time, qualifying the liability to pay the bill, or of a verbal agreement at the time to renew or give indulgence, will be admissible to defeat the action on the bill or note(1).

(o) Bowerbank v. Monteiro, 4 Taunt 884, (Chit. j. 889); Steel r. Pradfield, 4 Taunt. (227, (Chit. j. 855); and Gibbon v. Scott, 2 Stark. R. 286, (Chit. j. 1008).

(p) See the observations in Leeds v. Lancashire, 2 Campb. 203; ante, 141, note (i). (q) Gibbon v. Scott, 2 Stark. R. 286, (Chit.

j. 1008).

(r) Verdict for plaintiff; Stone r. Metcalfe, 1 Stark. R. 53; 4 Campb. 217, (Chit. j. 943); anle, 122; and see Brill r. Crick, 1 M. & W. 232, anic, 141, note (n).

(s) See observations in Ridout v. Bristow, 1 Tyrw. 84; 1 Cro. & J. 231, (Chit. j. 1518); ante, 69, note (k); Solly v. Hinde, 2 C. M. & Ros. 516; ante, 71, note (p); and see ante, 76, 81,

(1) Houre and others r. Graham, 3 Campb. 57, (Chit. j. 888). Indorsee against the payees of a promissory note. The defendants gave in evidence that they had indorsed the note by way of collateral security for certain advances made by the plaintiff to Messrs. Grill and Son, and the rerbal condition of the defendant's indorsement was, that the note should be renewed when it became due, to which the plaintiffs acceded, but that they afterwards demanded

payment instead of calling for a renewal.

Lord Ellenborough. "I do not think I can admit evidence of this sort; what is to become of bills of exchange and promissory notes if they may be cut down by a secret agreement that they shall not be put in suit? The parol condition is quite inconsistent with the written

⁽¹⁾ Parol evidence is not admissible to show that a note, purporting to be absolute, was to be

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I. Form and principal Requisites of Bills,

This is a general rule not confined to bills of exchange, but extends to all written contracts(u); and the same law prevails in France with respect to bills where parol evidence is not admitted to extend or qualify the terms of those instruments (x). Therefore where a promissory note, on the face Notes, &c. of it, purported to be payable on demand, it was held that parol evidence was not admissible to show that at the time of making it, it was agreed that it should not be payable till after the decease of the testator(y); or until certain estates of the maker had been sold(z), or until the payee should deliver up possession of certain premises(a), or should not be payable if the

> instrument. I will receive evidence that the that the defendant should not be called on to pay note was indorsed to the plaintiffs as a trust, but the condition for a renewal entirely contradicts the instrument which the defendants have signed; such an agreement rests in confidence and honour only, and is not an obligation of There may, after a bill is drawn, be a binding promise for a valuable consideration to renew it when due, but if the promise is contemporaneous with the drawing of the bill, the law will not enforce it. This would be incorporating with a written contract an incongruous parol condition, which is contrary to first principles." The plaintiff, therefore had a verdict. The same point was decided in Campbell v. Hodgson, I Gow, R. 74. See Bowerbank v. Monteiro, 4 Taunt. 846, (Chit. j. 889); Hogg v. Snaith, 1 Taunt. 347, (Chit. j. 751); Skin. 54; Phil. on Evid. 2d edit. 433; and see 1 Maule & S. 21; Stark. on Evid. Part II. 279.

Dakes v. Dow, Sittings after Faster Term, 1817, coram Gibbs, C. J. Payee r. Maker of a note for 131. Ss. 10d. payable nine months after date. Defence and proof that defendant, at the time of giving the note, was charged in execution for a debt, and it was agreed between plaintiff and defendant, that the latter should be discharged on giving the note, and the plaintiff verbally agreed at the time it was given that if it was not convenient to the defendant to pay the note at maturity the plaintiff would give him time, but had commenced this action contrary to such engagement Gibbs, C. J. held, that such a parol contract collateral to the instrument could not be admitted in evidence to annul the very terms of the written contract, and defeat its obligation.

Rawson and another v. Walker, 1 Stark. Rep. 801, (Chit. j. 967). Action on a promissory note for 66l., payable on demand. Ld. Ellenborough refused to admit parol evidence inconsistent with the terms of the note; as that it was agreed between the plaintiff and defendant,

till a final dividend of a bankrupt's estate should be made.

And see the observations of Bayley, J. in Ridout r. Bristow, 1 Tyrw. Rep. 84; 1 Cr. & J. 231, (Chit. j. 1518); ante, 69, note (k). The following case of Usborn v. Larkin, on first view, would seem to be a contrary decision, but it probably turned on the failure of cousideration.

Usborn v. Larkin, Guildhall, 19th October, 1829, cor. Lord Tenterden, C. J. Pollock and Wightman for plaintiff. Denman and Cress-well for defendant. Webster attorney for plaintiff. Action on a note payable two months after date. Lord Tenterden, C. J. admitted evidence of a parol agreement that the note should only be a security on a certain event which had not happened, and left it to the jury, on conflicting evidence, to say whether that was the agreement, but said that evidence of such a stipulation to cut down and defeat a written positive agreement, ought to be very strong and satisfactory. The jury found for the plaintiff. But it will be observed that the evidence was received, because it tended to show a total failure of consideration, which always between the original parties affords a defence. See post, 819, (15).

(u) Sugd. Vend. & Pur. tit. Eridence; Phil. on Evid.

(x) I Pardess. 845, 482.

(y) Woodbridge r. Spooner, S B. & Al. 228;

1 Chit. Rep, 661, (Chit. j. 1073),
(2) Free r. Hawkins, S Taunt. 92; Holt,

C. N. P. 556, (Chit. j. 1000).

(a) Moseley v. Hanford, 10 B. & C. 729, (Chit. j. 1493). In this case Alexander, C. B. before whom the cause was tried, received parol evidence of the terms upon which the note was to become payable; the plaintiff, however, had a verdict, and Denman afterwards moved for a new trial on the ground that the verdict

payable only on condition. Farnham v. Ingham et al., 5 Verm. Rep. 114. A subsequent agreement by parol that a note may be paid in a different way than is expressed in the note, if the agreement is performed, may be given in evidence in an action on the note.

Such agreement, made at the time the note was executed, is admissible in evidence. Ibid. Where the payee of a note, after it was duly made and delivered, gave it to the maker to keep, until certain acts to be done by the maker were performed, who subsequently refused to redeliver it to the payee, it was held that the circumstances under which the note came to the possession of the maker might be given in evidence in an action by the payee, to recover the amount thereof. Gasloch v. Gerotner, 7 Wend. Rep. 198.

The maker of a note may prove by parol that the payee, subsequent to the making of the note, agreed that payment might be made to a third person. Low v. Treadwell, 3 Fairf. 441.

Parol evidence that a bill of exchange, absolute in its terms, was to be payable on a contingency, is isodmissible. Cunningham v. Wardwell, Id. 466.

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maker's allowance under a commission against him should not be sufficient I. Form to pay the amount(b), or not payable till a final dividend of a bankrupt's es- and princito pay the amount(0), or not payable this a mail dividend of a bankrupt's estate should have been made(c); and if a note be payable at nine months sites of after date, parol *evidence of the holder's agreement to give the maker time, Bills, So if a Notes, &c. if, at maturity, it was not convenient to pay, is inadmissible (d). note be made payable fourteen days after date, parol evidence cannot be [*144] given to show that it was not to be paid in case a verdict was obtained by the plaintiff in an action brought against other parties(e)(1). And the same rule applies to an indorsement in blank, in which case the indorser will not be allowed to prove that he had indorsed the note by way of collateral security for certain advances made by the indorsee (the plaintiff) to third persons, and that plaintiff had agreed at the time to renew (f)(2).

was against the weight of evidence. But the court intimated a doubt whether parol evidence could be given to restrain the effect of a promissory note absolute on the face of it, and referred to Woodbridge r. Spooner, 3 B. & Al. 233, as an authority to the contrary; and Parke, J. observed, that every bill or note imported two things-value received, and an engagement to pay the amount on certain specified terms; that evidence was admissible to deny the receipt of value, but not to vary the engagement. Cur. adv. vult.

Lord Tenterden, C. J. now delivered the judgment of the court, and, after stating the facts of the case, proceeded as follows:--"When this application for a new trial was made, it occurred to the court that the evidence given on behalf of the defendant ought not to have been received, on the ground that evidence of an agreement that the note was not to be put

in suit until a given event happened was not admissible, the effect of it being to contradict by parol the note itself; and upon consideration we are of opinion, that upon principle as well as authority that evidence was not admissible." Several cases to that effect are collected in Selwyn's 9th ed. 394; Hoare v. Graham, 3 Campb. 57, (Chit. j. 838); Free v. Hawkins, 8 Taunt 92, (Chit. j. 1080). Rule for a new trial refused.

(b) Rawson v. Walker, 1 Stark. R. 361, (Chit. j. 967); and Campbell v. Hodgson, Gow, C. N. P. 74, (Chit. j. 1058). (c) Rawson v. Walker, 1 Stark. Rep. 361;

see supra.

(d) Dukes v. Dow, ante, 143, note (t).
(e) Foster v. Jolly, 1 Cro. M. & R. 703; 5 Tyrw. 239, S. C.

(f) Hoare and others v. Graham, 3 Campb. 57; ante, 142, note (1).

Parol evidence is inadmissible to contradict, vary or explain a written contract, or show it

different from what it purports to be. Bradley v. Anderson, 5 Verm. Rep. 152. If A. as payee of a promissory note, sue B. as maker of the same, B. shall not be permitted to give parol evidence of facts, which amount only to an innocent mistake in A. in writing the note, to prevent A's recovery; nor shall B. give parol evidence of such facts under the false

pretence that they show fraud in A. in writing the note. Ibid.

Where usury is alleged, it may be proved by parol; and then by the like evidence, the written instruments of the contract may be contradicted or varied. Fenwick v. Ratliff's repr's., 6

Monroe's Rep. 155.

At the bottom of a promissory note on demand, was written the memorandum, "one half payable in 12 months, the balance in 24 months." Held that it was competent to either party to the note to prove by parol evidence the time when, the person by whom, and the circumstances under which the memorandum was affixed to the note. Heywood v. Perrin, 10 Pick. Rep. 228.

Such memorandum being proved to have been affixed to the note before it was delivered to the promisee, and so constituting a part of the contract, it was held, that the contract was to be construed according to the written terms; and that parol evidence to show that the stipulation for a term of credit was provisional, namely, if the promisor should remain solvent, was inadmissible.

It was also held, that there was not such a repugnance between the memorandum and the words "on demand," as would invalidate the contract, but that the memorandum limited the generality of those words. Ib.

In an action by the payee against the maker of a negotiable note in common form, the defendant cannot give in evidence, by way of defence, a parol agreement, that upon his giving a deed of real estate to the plaintiff, the note should be given up. Spring v. Lovett, 11 Pick. 417.

(2) Evidence of a parol agreement which would vary the effect of the indorsement not ad missible. Dupuy v. Gray, 1 Minor's Alabama Rep. 357.

If A. execute to B. his promissory note, and C. indorse his name in blank on the same, parel evidence is admissible to show the understanding that C. was to be the holder only collaterally. Barrows v. Lane et al., 5 Verm. Rep. 161.

⁽¹⁾ In assumpsit upon a promissory note against one of the makers, it was held to be competent to the defendant to show, by parol evidence, that he was only a surety, and that the plaintiff, knowing the fact, had so conducted with the notes as to discharge him. Bank v. Kent, 4 New Hamp. Rep. 221.

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However, it has been decided that a verbal agreement to renew, founded

1. Form and princi- on adequate consideration, and made after a bill or note has been given or pal Requirites of Bills, to renew.

No Action thereon as a Bill or Note, and Considera-

indorsed, is admissible in evidence, and will be binding(g)(1); and it has been decided, that if the indorsee of a bill verbally agree, at the time of his Notes, &c. discounting the same, not to sue the drawer in the event of non-payment of Effect of a the acceptor, he is bound by that agreement, and cannot afterwards sue subsequent Agreement such drawer(h). Consequences of informality. If the bill or note be insufficient in its ori-

ginal formation in either of these respects, or be rendered contingent by a written memorandum, it will not become valid by any subsequent occurrence rendering the payment no longer contingent, but certain, as to the amount(i); and consequently the same cannot be effectually declared upon as a bill be proved or note even between the original parties (k); and though it may in some cases be declared upon as an agreement, yet it cannot be produced in evidence, unless stamped as a special agreement (l); and even if stamped, the consideration on which it was given must, in general, be alleged and prov-Another consequence is, that so defective a bill or note cannot be proved as such under a commission of bankruptcy (n).

der a Commission.

But although the bill cannot be sued or acted upon as such, the payee may nevertheless sue the acceptor for money had and receied. bill was, "Please to pay Messrs. Maber and Kentish or order 1951. 148. 10d. out of the produce of goods you have of mine now lying at Gibraltar, Barbary, and Leghorn, as soon as the same shall have come into your hands, after discharging the present acceptances," and which bill was accepted in these words, "I agree to conform to this order Moses Massias." De Grey, Ch. J., Gould, Blackstone, and Nares, Js. held, that the payees were entitled to sue the acceptor for money had and received to their use, and that having accepted the bill, the acceptor was not at liberty to show as a defence [*145] that he was *overdrawn(o). So a bill payable out of a particular fund, when accepted, operates as an equitable assignment, and will enable the holder, at least in bankruptcy, to claim on the acceptor (p).

(g) See the observations of Lord Ellenborough in Hoare v. Graham, 8 Campb. 57; ante, 142, note (t). See Phil. on Evid. as to effect of subsequent alteration, &c.

(h) Pike r. Sweet, Danson & Lloyd Rep.

159, (Chit. j. 1410); see post.
(i) Hill v. Halford, in error, 2 B. & P. 413; (Chit. j. 657); ante, 135, note (i); Colehan v. Cooke, Willes, 399, (Chit. j. 298); ante, 136; Kingston v. Long, ante, 134, note (y).

(k) Carlos v. Fancourt, 5 T. R. 485; ante, 138, note (e); Manwaring v. Newman, 2 B. & P. 123, (Chit. j. 623); Alves v. Hodgson, 7 T. R. 243, (Chit. j. 584).

(1) Manwaring v. Newman, 2 B. & P. 125; Firbank v. Bell, 1 B. & Al. 36; Butts v. Swan,

2 B. & B. 78; 4 Moore, 484, (Chit. j. 1094); Jones v. Simpson, 2 B. & C. 318; 3 D. & R.

545, S. C., (Chit. j. 1189); ante, 142.(m) Leeds v. Lancashire, 2 Campb. 205;

ante, 141, note (i).

(n) Ex parte Adney, Cowp. 460; Ex parte Tootel, 4 Ves. 372, (Chit. j. 595); Ex parte Minet, 14 Ves. 188; Ex parte Barker, 9 Ves. 110; In re Barrington, 2 Sch. & Lef. 112, (Chit. j. 697); Clayton v. Gosling, 5 B. & C. 360; S. D. & R. 110, S. C. (Chit. j. 1287); post, tit. Bankruptcy.

(o) Maber r. Massias, 2 Bla. Rep. 1072. (p) Ex parte Kirk, 1 Atk. 108; see Crawfoot v. Gurney, 2 Moore, 473; 9 Bing. 372, S.

C.; ante, 180, note (o).

Parol testimony is admissible to prove the sale and transfer of a note payable to order, without indorsement or written transfer. Hughes v. Harrison et. al., 2 Miller's Louisiana Rep 90.

⁽¹⁾ After a promissory note discounted by a bank had become due, the bank, upon the maker's application for a renewal, endorsed on the wrapper of the note the words "renewed for three months" and the maker paid the interest in advance, but the note was retained by the bank and no new note given. It was held that this endorsement did not become a part of the note; and that the bank was not thereby disabled from commencing an action upon the note before the expiration of three months. Central Bank v. Willard, 17 Pick. 150. }

PARTI

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With respect to the original parties, this objection may only affect the I. Form form of the remedy as between them, but the consequences may be substan- and princitial and fatal as regards an indorsee or holder; for as so defective an instrument is not negotiable, the indorsee can neither sue(q) nor prove(r) upon it, Bills, and he has no remedy thereon, and can only proceed against his immediate Notes, &c. debtor for the recovery of the debt on account of which the transfer was Consemade.

But although the instrument referred to may be thus inoperative as a bill ity. or note, yet if for the payment of money they are nevertheless, by the terms of the Stamp Act, liable to the stamp duties as valid bills or notes are(s); and where they are for the payment of money, and yet constitute special agreements, it should seem that they must be stamped as well with a bill stamp as also with an agreement stamp, in which case they may be declared on specially as between the original parties (t); and in some cases they may be given in evidence under the count upon an account stated (u).

II. THEIR PARTS AND PARTICULAR REQUISITES.

Besides these principal qualities which bills of exchange must possess, II. Their there are certain other matters proper to be attended to in the formation of Particuthem: These are,

1. That in most cases the instrument be properly stamped.

2. That it be properly dated as to place.

3. That it be properly dated as to time of making.

4. That the sum to be paid be correctly superscribed.

5. That the time of payment be distinctly stated.

6. That the place of payment be in some cases stated in the body or at the foot.

7. That an order or request to pay be inserted.

8. That in the case of a foreign bill drawn in sets, each set contain a proviso that it shall only be payable in case the others are not paid.

9. That it clearly express to whom the bill is to be payable.

- 10. That where the instrument is intended to be negotiable there be words inserted, giving the power of transfer.
- 11. That the money to be paid be distinctly and intelligibly expressed in the body of the bill, and in certain cases that it be above a certain amount.

12. That in certain cases value received be inserted.

13. That it state to whose account the payment is to be placed.

14. That under particular circumstances a bill state whether it is to be paid with or without further advice.

15. That the drawer's name be clearly signed.

That the bill be properly addressed to the drawee.

17. That where the bill is to be paid at a certain place, that place be properly described at the foot or in the body.

(q) Ante, 144.

(r) See the cases in note (n), ante, 144. (s) See 55 Geo. 3, c. 184, Schedule, tit. Bills of Exchange, and tit. Promissory Notes, ante, 105, 109; and see Chitty on Stamps, 141, 209.

(1) Blackenhagen v. Blundell, 2 Bar. & Ald. 419, (Chit. j. 1054); Smith v. Nightin-gale, 2 Stark. 375, (Chit. j. 1080); sed quære, see Davies v. Williamson, 2 Perry & Dav. 256, ante, 186, note (o), where Coloridge, J. said,

that although there may be a case in which an instrument may operate both as a note and as an agreement, yet as it would be highly inconvenient to make two stamps necessary, the stamp should be selected according to the governing character of the document.

(u) Barlow v. Broadhurst, 4 Moore, 471, (Chit. j. 1083); Davies v. Williamson, 2 P. & D. 256, ante, 136, note (0); see the cases, post, Part II. Ch. II. tit. Declaration.

II. Their Parts and particular Requisites.

- 18. That where a third person is to be referred to by the holder on default of acceptance or payment, the usual words "au besoin chez Messes.

 ————," or equivalent words be inserted.
- 19. That where the drawer wishes the bill not to be protested in case of dishonour, "retour sans protet," or some equivalent words be subscribed.

 20. That if any words of qualification as to amount of re-exchange are

intended, they be explicitly stated; and

21. That if it is intended to have a witness there be no ambiguity in sign-

ing his name.

The better mode of considering each of these matters will be by presenting the reader with the usual forms of a Foreign and Inland Bill of Exchange, and of a Check and Promissory Note, and Country Banker's Note, and then considering the various parts of each in their natural order, and the legal effect, and with some observations for the use of mercantile students.

FORM OF A FOREIGN BILL.

Forms of No. Bills, Checks, Exchange for 10,000 Livres Tournoises. London, 1st January, 1840. Notes, and I. O. Ú. 1 At two usances (or "at -— after sight," or "at — — after date, at Versailles,") Stamp pay this my first Bill of Exchange (second and third of the same tenor and date -, or order (" or bearer") Ten Thousand Livres Tournoises, value received of them, and place the same to account, as per advice from JAMES OATLAND. payable at Versailles. " Au besoin chez Mesers. --.'' "Retour sans protét.'' " Re-exchange, interest, and expenses, not to exceed £ Witness, James Atkinson.

FORM OF AN INLAND BILL.

London, 1st January, 1840.

1 Two Months after date (or "at sight," or "on demand," or "at — days after sight,") pay Mr. ——, or order, One Hundred Pounds, for value received.

16 To Mr. ——, Merchant, 15 SAMUEL SKINNER.

FORM OF A BILL UNDER FIVE POUNDS.

As prescribed by Stat. 17 Geo. III. c. 30, Schedule No. 2.

[Here insert the place, day, month, and year, when and where made.]

Twenty-one days after date pay to A. B. of _____, or his order, the sum of _____, value received by C. D.

Witness, G. H. _____.

The Figures refer to the parts of the observations in the following pages of this Chapter.

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II. Their FORM OF A CHECK. Parts and (2) particular (8.5)(16)Requisites. London, 1st January, 1840. Messrs. Pay A. B. or bearer, Twenty Pounds. (4)(15) J. K. £20 0 0 PROMISSORY NOTE. £50 London, 1st January, 1840. 1. Two Months after date I promise to pay Mesers, -----, or order, Fifty Stamp. Pounds, for value received. A. B. COUNTRY BANKER'S NOTE. Norwich, 1st January, 1840. We promise to pay the Bearer on demand Five Pounds, here or at ---, Bankers, London. For A. B. C. and Co. A. B. FORM OF I. O. U. Mr.

(1)—With respect to the *stamp* to be impressed on a bill or note, and 1st. Stamp. the exceptions in favour of certain checks on bankers, Bank of England notes, and bankers' notes, we have already devoted a Chapter to the consideration of the subject (v).

(2)—In France there is a local law that a bill must be drawn at one place 2dly. Place upon another, the very object of bills being to carry into execution the previous contract of exchange, which is to pay money at a distant place from the residence of the drawer. And in that country the place of drawing must be correctly stated, or certain inconveniences will result(w). But in general, in Great Britain and Ireland the place of date in a stamped bill or note is not material. It is proper, however, in all cases to superscribe the name of the place where the bill is really made, and when the drawer is not a person well known in the commercial world, it is advisable for him to mention the number of his house, and the street in which he resides, in order that the holder may be the better enabled to find him out, in case his responsibility is doubted, or in case acceptance or payment should be refused by the drawee(1). Where the bill or note is described as drawn generally at a place,

I. O. U. Twenty Pounds. Dated this 1st January, 1840.

(v) See ante, Ch. IV.

(w) 1 Pardess. 332, 346, 348, 349, " De la remise d'un lieu sur un autre."

C. D.

⁽¹⁾ A note being dated at a particular place, it is not, therefore, payable at that place alone; and if the maker cannot be found at such place, the holder will be bound to enquire elsewhere. Galpin v. Hard, 8 M'Cord, 894. If the place of payment of a note be designated in a memorandum at the bottom; or if to the acceptance of a bill, a particular place of payment be added, with the assent of the holder; such memorandum or qualification becomes part of the contract.

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II. Their Parts and erticular

Place where made.

as at "Manchester(x)" or "London(y)," without a more definite description, it will suffice to direct a notice of dishonour to the drawer or maker at Requisites such place generally; though it would not be sufficient *as against the indorser(z). According to the form in the schedule contained in the 17 Geo. 3, c. 30, in certain cases where bills are under 51. it is absolutely necessary to insert the true name of the place where they are made; and if this be not [*148] observed in a check on a banker, it will not be exempt from the stamp duties imposed by the 55 Geo. 3, c. 184, and the prior acts(a). We have already seen some recent important provisions relative to banking establishments exceeding six in number, making bills and other negotiable securities upwards of sixty-five miles from London(b).

3dly. Date Drawing.

(3)—As the time when a bill is to become due is generally regulated by the or Time of time when it was made, the date of the instrument ought to be clearly expressed(c), and although it is the common practice to write the date in figures, yet, in order to prevent intentional or accidental alteration, which may invalidate the instrument, even in the hands of an innocent holder(d), it may be advisable to write the date at full length in words. It has been expressly enacted, that it shall not be lawful for any banker or other person to issue any promissory note for the payment of money to the bearer oh demand, and which are re-issuable, liable to any of the duties imposed by the act, with the date printed therein, under a penalty of 50l.(e). There is no legal objection to a bill being dated on a Sunday (f); and an indorsee may recover against the acceptor of a bill dated on a Sunday, when there is no evidence that the bill was accepted on that day, and even if it had been actually accepted on that day, it seems that it would have been binding (g). has been considered that the date of a bill or note is prima facie evidence of its having been made on the day of the date(h)(1); but that doctrine was afterwards over-ruled, as far as respects any questions between third persons(i). A date, however, is not, in general, essential to the validity of a bill, for where a bill has no date, the time, if necessary to be inquired into, will be

(x) Mann v. Moors, Ry. & Mo. 249, (Chit. J. 180, (Chit. j. 1516).

j. 1260). (y) Clarke v. Sharpe, 3 M. & W. 166; 1 Horn & Hurl. 35, S. C.

(z) Walter r. Haynes, Ry. & Mo. 149, (Chit.

j. 1227).

(a) Ante, 106, note (x).

(b) Ante, 15, 16.

(c) Beawes, pl. 3; Mar. 2d ed. 61; Pardessus, cours de Droit Commercial, 1 tom. 332, 346, 848. As to the terms "usual date," see Laing v. Barclay, 1 B. & C. 398; 2 D. & R. 580, (Chit. j. 1170), post, 162.

(d) Master v. Miller, 4 T. R. 320, (Chit. j. 482, 490); when not, see Upstone v. Marchant, 2 B. & C. 10; 8 D. & R. 198, (Chit. j. 1182).

(e) 55 Geo. 8, c. 184, s. 18. (f) Drury v. De Fontaine, 1 Taunt. 181; Begbie v. Levy, 1 Tyrw. R. 180; 1 Cromp. &

(g) Begbie v. Levy, supra.
(h) Taylor v. Kinlock, 1 Stark. 175, (Chit. j. 951). The date upon a promissory note made by a bankrupt, of a time antecedent to an act of bankruptcy, is prima facie evidence to show that the note existed before the act of bankruptcy was committed, so as to establish a petitioning creditor's debt in an action by the assignees. See also Obbard v. Beetham, Mo. & M. 486, (Chit. j. 1490); post, Part II. Ch. VIII. s. iii. Bankruptcy. But see next note.

(i) Stark. Evid. 161; and see 2 Stark. R.

594; Rose v. Rowcroft, 4 Camp. 245, (Chit. j. 949); Cowie v. Harris, Mood. & M. 141; Wright v. Lainson, 2 M. & W. 739; 6 Dowl. 146, S. C.; post, Part II Ch. VIII. s iii. Bank-

Tuckerman v. Hartwell, 8 Greenl. Rep. 147. And if only the name of the place be written at the bottom of the note or bill, the jury may determine when, by whom, and for what purpose it was placed there. Id. (1) { Anderson v. Weston, 8 Scott, 593. }

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computed from the day it was issued(k) or made(l); and if a bill of exchange II. Their be made payable two months after date, and no date be expressed, the court Parts and will *intend it to be payable two months after the day on which it was Requisites. made(m). A check, if post-dated and not stamped, we have seen is invalmade(m). A check, if post-acted and not stamped, we have seen is invalid.

id(n); and though it has been decided that a bill of exchange may be post-Time of dated(o)(1), and a bill or note be dated forward, of a day not arrived, and any Drawing. of the parties die before that day, such death will be no bar to a bona fide [*149] holder(p): yet we have seen that this cannot be done so as to postpone the payment for more than two months or sixty days from the time it is issued, unless the increased duty be paid (q). However, as the amount of the stamp is regulated by the date expressed thereon, we have seen that post-dating a bill will not invalidate it in the hands of a bona fide holder(r). By the statute 17 Geo. 3, c. 30(s), however, it is enacted, that all bills of exchange, or drafts in writing, being negotiable or transferable for the payment of twenty shillings, or any sum of money above that sum, and less than five pounds, or on which twenty shillings, or above that sum, and less than five pounds, shall remain undischarged, shall bear date before or at the time of drawing or issuing thereof, and not on any day subsequent thereto. A mere omission or mistake of date may be inserted or corrected without invalidating the instrument, as where an agent of drawer and acceptor discovered that a bill was improperly dated A. D. 1822, and altered it to A. D. 1823, and the plaintiff recovered(t). The law in France as to the date of a bill appears much to resemble that in this country (u)(2).

- (k) Armit v. Breame, 2 Ld. Raym. 1076, 1082. An award which directed the removal of some scaffolds within 58 days from the date of the award, had no date; an objection being taken upon this ground, the court said the time was to be computed from the delivery. See also De la Courtier v. Bellumy, 2 Show. 422, (Chit. j. 167); post, 149, note (m); Goddard's Case, 2 Co. 5 a; Sel. N. P. 9th ed. 316; Bac. Ab. Leases, (I 1); Com. Dig. Fait, (B 3); 4 B. & C. 908.
- (1) Giles v. Bourne, 6 Maule & S. 73; 2 Chit. Rep. 300, (Chit. j. 982). The plaintiff declared that J. T. on the 22d February, 1816, made his bill of exchange, and thereby required defendant, four months after date, to pay at Messrs. V. and Co. Lombard-street, &c. On demurrer assigning for cause that the bill was payable four months after date, but no date was assigned to the bill, it was held the declaration was good, for it shall be intended that it was dated on the day when it was made.
- (m) De la Courtier v. Bellamy, 2 Show. 422, (Chit. j. 167). Case on a foreign bill of exchange, payable at double usance from the date and it was alleged that the party beyond the sea drew the bill on a certain day, and that the same was presented to and accepted by the de-

fendant. Exception, that the date of the bill was not set forth. The court said that they would intend the date of the bill from the drawing of it. See also Hague v. French, 3 B. & P. 178, S. P. (Chit. j. 652). See post 820 (16.) (n) Ante, 119.

(a) Passmore v. North, 13 East, 517, (Chit. j. 829).

(p) Id. Ibid.

(q) Ante, 103, 104, and 55 Geo. 3, c. 184, s. 12; see Upstone v. Marchant, 2 B. & C. 110; 3 D. & R. 198, (Chit. j. 1182); Peacock v. Murrell, 2 Stark. C. N. P. 558, (Chit. j. 1077); 2 Chit. Rep. 121, 123, 123.

(r) Id. Ibid.
(s) This act is now in full force, see 7 Geo. 4, c. 6. It was made perpetual by 27 Geo. 8, c. 16. By 7 Geo. 4, c. 6, s. 9, the offender against this provision would be subject to 201. penalty. See also sec. 2, of 17 Geo. 3.

(t) Brutt v. Picard, Ry. & Mood. 38, (Chit.

j. 1205).

(u) 1 Pardess. 348, "l'indication du jour," the true date is there required, because it tends to establish whether or not, at the time of drawing, the drawer was on the point of insolvency, which allowing ante-dating might conceal.

(2) Notes made or first delivered after the time they bear date are valid only from the day of delivery, and are to be considered as drawn on that day. Dansing v. Gaine, &c. 2 John. Rep. 800.

⁽¹⁾ A note post-dated and negociated before the day of its date, is recoverable by the indorsee; its transfer before the day of its date affords no cause of suspicion so as to put the indorsee on inquiry and subject him to the equities existing between the original parties. Brewster v. McCardel, 8 Wend. Rep. 478.

And if a statute has made notes of a particular description illegal if, issued after a particular time, it is competent for the maker to prove that a note was ante-dated to brade the statute. Bayley v. Taber, 5 Mass. Rep. 286.

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II. Their Parts and particular Requisites. 4thly. Suble.

(4)—There is no absolute necessity for the superscription of the sum for which the bill is payable, provided it be mentioned in the body of the bill, but the superscription will aid an omission in the body (x); and it is the advice of Beawes(y), that the sum payable be expressed so distinctly both in words and figures, that no exception can be taken to the instrument; and it is tion of the now the usual mode to superscribe the sum payable in figures at the head of Sum Pays- the instrument, and in words in the body of it. If there be a discrepancy between the sum in the body of the *bill and the superscription, the former will prevail(z). In drawing a check on a banker, the sum is generally subscribed. We shall hereafter notice the amount of the sum(a).

5thly. Time of Payment.

(5)—By a French ordinance, it was required that bills of exchange made in that country should express the time when they were to be paid, or otherwise they would be invalid (b); and this may be, 1st, at sight (meaning in that country at the instant of presentment); 2dly at the expiration of a specified number of days, weeks, months or usances after sight, which begin to run from the time of acceptance or refusal; or, 3dly, at a fixed day of the month, or a fixed feast, civil or religious; or 4thly, at a fair, when payment is to be made the day before the last day thereof; or 5thly, at the expiration of a certain number of days, weeks, months, or usances after date, and which commence the day after the date. There is no positive regulation affecting bills in this country as to the time when they may be made payable. would be valid, although no time be mentioned in them, and would operate, as in the case of a check on a banker, as payable on demand(c)(1). advisable, in all cases, to express the time of payment as clearly and intelligibly as possible(d), and it is therefore usual to write it in words, particularly as they are less subject to alteration than figures; and where a bill is drawn in one country using one style, and payable in a country using another, it is said that the drawer sometimes makes the date both according to the old and new style(e).

With respect to the time when payment is to be made, it depends entirely on the agreement of the parties, and there is no limitation in point of law,

(x) Elliot's case, 2 East's P. C. 951, on an indictment for forging the following note:-

No. 17. 73. I promise to pay Mr. I. C. or bearer on demand, the sum of fifty

London, 20 June, 1795. For Governor and Company of the Bank of England. Thos. Thompson. Entered C. Blewart.

The forgery being proved, it was urged for the defendant, that this was not a note for fifty pounds, as the word "pounds" was not inserted, and judgment was respited for the opinion of the judges, who all agreed that the "£fifty" in the margin removed every doubt, and showed that the fifty in the body of the note was intended for pounds. But note, in this case the

sum in the margin was looked at in order to show the intention of the party in uttering the note, and not to show the meaning of the note itself. See Per Tindal, C. J., in Saunderson v. Piper, 5 Bing. N. C. 425, 431; 7 Scott, 408,

(y)] Beawes, tit. Bills of Exchange, pl. 8; Marius, 189.

(2) Benwes, pl. 193; Marius, 2d ed. 138, 139; Saunderson v. Piper, 5 Bing. N. C. 425; 7 Scott, 408, S. C. post, 160, note (7).

(a) Post, 159, Sum Payable. (b) Poth. pl. 16, 82; Pardessus, Droit Commercial, 1 tom. 346, 352.

(c) Boehin v. Sterling, 7 T. R. 427, (Chit. 593); Whitlock v. Underwood, 2 Bar. & C. 157; 3 D. & R. 356, (Chit. j. 1188).

(d) Beawes, pl. 3. (e) Kyd, 8; Mar. 91.

A note may for honest purposes be dated as of a day antecedent to that on which it was really made. Richter v. Selin, 8 Serg. & Rawle, 425.

If indorsers commit a promissory note to the maker, with a blank for the date, they thereby authorise him to fill the blank with what he pleases. Mitchell v. Culver, 7 Cowen, 336. See Mechanics' and Farmers' Bank v. Schuyler, 7 Cowen, 887, note (a). (1) { Burthe ". Donaldson, 15 Louis. Rep. 392. }

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though the payment must not be contingent (f). But by the 17th Geo. 3, II. Their c. 30, negotiable bills and drafts under 51. of the description above-mention- Parts and ed must be payable within twenty-one days after the day of the date thereof. Requisites. The operation of this act was suspended with respect to drafts, &c. payable Time of to bearer on demand, by the statute 37 Geo. 3, c. 32, and other subsequent Payment. acts, until the late act of 7 Geo. 4, c. 6, which, by repealing these, renewed such operation except upon bills and drafts, &c. under 51. stamped before the 5th September, 1826, and except upon Bank of England notes under 51. made and dated before 10th October, 1826. Now, therefore, by the 7 Geo. 4, c. 6, in conjunction with the 17 Geo. 3, no bill, draft, or other negotiable instrument, or Bank of England note under 51. can be made or negotiated if it be payable to bearer on demand, (except it be a bill, &c. stamped before the 5th February, 1826, and these only till 5th of April, 1829,) or a Bank of England note made and dated before the 10th October, 1826, and after the 5th of April, 1829, no Bank of England note under 51. can be negotiated if it be payable to bearer on demand(g). The 9 Geo. 4, c. 65, also restrains, under a penalty of 201., the negotiation in England of bills and notes, &c. under 5L or on which less than 5L shall remain undischarged, payable to bearer on demand, made and issued in Scotland or Ireland, or elsewhere out of England (h).

*Foreign bills are frequently drawn payable at usance or usances, but [*151] they, like inland bills, may be drawn payable at sight, or at days, weeks, months, or years, after sight or date, or on demand: bills, however, are very seldom drawn payable on demand; but usually, when it is intended they should be payable immediately, are drawn payable at sight. If drawn at sight, the drawer of a foreign bill should express that it is payable according to the course of exchange at the time of making it(i); for otherwise, it seems, that the drawee must pay according to the exchange of the day when he has sight of the bill.

A note payable generally is payable on demand (j)(1); and it has been recently determined that a banker's deposit note, "for £ --- payable with interest, at the rate of 31. per cent. to the day of acceptance," is a note payable at sight, and need not be left with the maker for acceptance (k).

Checks on bankers very seldom express any time when they are to be paid, and consequently, as will be seen hereafter, are demandable immediately they are delivered to the payee or bearer (l), and they are excepted out of the provisions of the 7 Geo. 4, c. 6 and 9 Geo. 4, c. 65(m).

However, with respect to the time when a bill drawn payable in either of

⁽f) See the cases, ante, 134, &c. If a bill of exchange be made payable at ever so distant a day, if it be a day that must come, it is no objection to the bill. Per Willes, C. J. in Colehan v. Cooke, Willes, 396, (Chit. j. 298).

(g) Penalty 201.; see these acts, Chit. Stat.

^{121, 122.}

⁽h) See the act Chit. & H. Stat. 77. (i) "En especes au cours de ce jour;" Poth. pl. 174.

⁽j) Whitlock v. Underwood, 2 Bar. & C. 157; 3 D. & R. 356, (Chit. j. 1183); ante,

⁽k) Sutton v. Toomer, 7 Bar. & C. 416; 1 M. & R. 125, (Chit. j. 1852); ante, 117.

⁽¹⁾ Down r. Halling, 4 Bar. & C. 233; 6 D. & R. 455; 2 C. & P. 11, (Chit. j. 1262); post, Chap. XI.

⁽m) 7 Geo. 4, c. 6, s. 9, and 9 Geo. 4, c. 65, s. 4.

⁽¹⁾ Thompson r. Ketcham, S John. Rep. 189. Bacon v. Page, 1 Conn. Rep. 404. Cran-

mar v. Harrison, 2 M'Cord's Rep. 246.

{ Gaylord v. Van Loan, 15 Wend. 308; Gordon v. Preston, Wright, 341; McLure v. Longworth, Idem, 582. A note psyable "on demand, with interest after six months," is due presoutly: the "six months" applying to the interest and not to the principal. Rice v. West, 2 Fairf. 323. And a note in a similar form, with the words " on demand" erased, but still legible, was held not to be due until after the lapse of the number of months mentioned. Hobart v. Dodge, 1 Fairf. 156.

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II. Their Parts and particular Requisites. these ways becomes due, the reader is referred to that part of the work which treats of the presentment for payment (n).

6thly. Place of Payment.

(6)—It has been laid down, that in all cases the drawer ought to name the place of payment, either in the body or subscription of the bill(o); but this is not essential, and in general the drawer merely subscribes the address to the drawee, without pointing out any place of payment, and then the bill is considered payable and to be presented at the residence of the drawee at the time the bill was made, or to him personally any where (p). But the drawer may prescribe a particular place of payment, and make the payment there part of the contract, as where he intends it to be made at a place where the drawee does not reside(q). So the drawee may fix the place in his acceptance, and which, it is said, is essential, when he is requested, in the body or address of the bill, to pay at a large town, in which case the acceptance should point out a particular house or place there (r). In France and other countries, excepting Great Britain and Ireland, the contract and place of payment may be thus qualified, by any words sufficiently indicating the intention of the parties, as by the drawer's writing in the body of the bill—"Two months after date, at Bourdeaux, pay, &c." or by subscribing after the address of the bill, "Payable at Bourdeaux," or by the drawee's accepting "payable at Monsieur — Rue — Bourdeaux(s);" and in either of these cases the law of the continent renders a presentment and payment at the prescribed place compulsory. In our country also, and | *152 | since the 1 & 2 *Geo. 4, c. 78, a presentment at the place so particularised by any words will always suffice, and it will not be necessary also to present the bill at the residence of the drawee, or to him personally, because a presentment at such place accords with the intention of the parties, and will therefore at least be sufficient(s). Before this act it was considered in this country that such specification by the drawer in the body of the bill of the place of payment, constituted an essential and qualifying part of the contract(t); and we shall presently see that such is still the law in proceedings against the drawer(u).

Enactment of 1 & 2 Geo. 4, c. 78, as to Acceptances payable at a particular Place.

But the act 1 & 2 Geo. 4, c. 78, intituled An act to regulate acceptances of bills(v), after reciting, that according to law, where a bill is accepted payable at a banker's, the acceptance is not a general but a qualified acceptance, and that a practice had very generally prevailed amongst merchants and traders so to accept bills, and the same have among such persons been very generally considered as bills generally accepted, and accepted without

(n) Post, Ch. IX. s. i.

(o) Marius, 107.

(p) 1 Pardess. 354, "Enonciation du lieu du paiement;" and see observations in Mitchell v. Baring, 10 B. & C. 4; Mood. & M. 381; 4 Car. & P 35, (Chit. j. 1454, 1581); post, Ch. 1X. s. i. Presentment.

(q) Beawes, pl. 3; 1 Pardess. 354; Gibb v. Mather, S Bing. 214; S. C., 1 Moore & S. 387; 2 C. & J. 254; post, 152, and Ch. IX. s. i. Presentment.

(r) 1 Pardess. 355. (s) 1 Pardess. 354.

(s) De Bergareche v. Pillin, 3 Bing. 476; 11 Moore, 350, (Chit. j. 1292); Sanderson v. Judge, 2 Hen. Bla. 509, (Chit. j. 545); Ambrose v. Hopwood, 2 Taunt. 61, (Chit. j. 772); Mackintosh v. Haydon, Ry. & Mood. 363,

(Chit. j. 1287); Stedman v. Gooch, 1 Esp. Rep. 4, (Chit. j. 508). It is upon this ground that the addition of a place of payment after a general acceptance, though not such as to make it a special acceptance, constitutes a material alteration, and vitiates the bill; see post, s. v. as to Alterations; and see the recent act 2 & 3 Will. 4, c. 98, relating to Protest, post, Ch. X. s. i.

(t) Hodge v. Fillis, 3 Campb. 463, (Chit. j. 900); Roche v. Campbell, 3 Campb. 247, (Chit. j 870); Rowe v. Young, 2 Brod. & B. 165; 2 Bligh's Rep. 391, (Chit. j. 1084).

(u) Infra, note. (v) See Rowe v. Young, 2 Brod. & B. 165; and 2 Bligh's Rep. 391; and Halcomb's report of that case. The conflicting opinions of the judges in that case occasioned this act.

PART I.

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qualification; and that many persons have been and may be prejudiced and II. Their misled by such practice and understanding, and that persons accepting bills Parts and may relieve themselves from all inconveniences, by giving such notice as Requisites. thereinafter mentioned of their intention to make only a qualified acceptance, then enacte, "that after 1st August, 1821, if any person shall accept a bill, Payment. payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance; but if the acceptor shall, in his acceptance, express that he accepts the bill payable at a banker's house or other place only (w), and not otherwise or elsewhere, such acceptance shall be deemed and taken to be to all intents and purposes a qualified acceptance of such bill, and the acceptor shall not be liable to pay such bill, except in default of payment, when such payment shall have been first duly(x) demanded at such banker's house or other place." This act applies only to acceptances(y); but it has been decided upon it, that although the drawer of a bill has, in the body of it, required payment to be made at a particular place, and the drawee has accepted it pavable there, yet, unless the acceptor has introduced the express terms required in the act, his acceptance is to be considered as general, and that, at least, it is not necessary in an action against him to prove any presentment at the particular place named in the bill, or in his acceptance, or indeed any presentment at all(z). Where, however, the action is against the drawer of a bill so made payable, a presentment at the particular place specified will still be necessary (a).

*Since this act, when it is intended by the drawer that the bill shall be 1 & 2 Geo. payable at a particular place, it is advisable to introduce in the body of the 4. c. 78. bill the particular expression in the statute, as thus, "Two months after [*153] date, pay to my order, at Messrs. —— in Lombard-street, London only, and not otherwise or elsewhere, to A. B. or order - pounds for value received," and to address the bill thus:-" To Messrs. -- Plymouth, payable in London only, and not otherwise or elsewhere;" and the holder should also require the drawee to accept accordingly by writing, "accepted payable at Messrs. —— in Lombard-street, London only, and not otherwise or elsewhere." It is not, however, necessary in order to constitute a special acceptance that the word "only" should be inserted; if a bill be accepted payable at a particular place "and not elsewhere," this is a special acceptance(b). Observing this form, the bill, as against all persons, must be presented at the specified place; though as to the acceptor, it will still be questionable whether, under the concluding terms of the enactment, ("and the acceptor shall not be liable, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place,") a presentment of the bill when at maturity would be essential, or whether a presentment at any time before the commencement of the action would not suffice (c). Before this statute, but after the decision in Rowe v. Young had established that an acceptance payable at a bank-

⁽w) This word unnecessary; Siggars v. Ni- s. i. Presentment; see Ambrose v. Hopwood,

eholls, post, 158, note (b).
(x) See infra; and post, 153, note (c). (y) See Gibb v. Mather, S Bing. 214, 221,

infra. (z) Selby v. Eden, 3 Bing. 611; 11 Moore, 511, (Chit. j. 1297); Fayle v. Bird, 6 Bar. & C. 531; 2 Car. & P. 303; 9 D. & R. 639,

⁽Chit. j. 1329). (a) Gibb v. Mather, 8 Bing. 214; S. C. 1 Moore & S. 887; 2 C. & J. 254; post, Ch. IX:

² Taunt. 61, (Chit. j. 772); Garnett v. Wood-cock, 1 Stark. Rep. 475, (Chit. j. 979, 981); and see Roscoe on Bills, 26. See post, 820, (17).

⁽b) Siggars v Nicholls, Bail Court, H. T. 1839, 3 Jurist, 34.

⁽c) See Roscoe on Bills, 91, referring to Rhodes v. Gent, 5 Bar. & Ald. 244, (Chit. j. 1124).

II. Their Parts and

Place of

Payment.

er's was a qualified acceptance, where a bill had been accepted payable at Messrs. P. & H., bankers, and it was not presented for payment until sev-Particular Requisites. eral days after it was due, the court, without saying what effect the proof of actual loss sustained by the acceptor, in consequence of an omission to present, would have had, held that he clearly was not exonerated in that case where no injury was proved to have arisen from what had occurred (d). In a case since the act, where the acceptance, payable at a banker's, omitted the words "only, and not otherwise or elsewhere," and the bill was not presented on the day it fell due, and the banker would have paid it had it been then presented, but failed afterwards, and before the presentment, the court held, that as under the act the acceptance was general, no presentment for payment at the banker's was essential as to the acceptor, and he continued liable, though the neglect of the holder occasioned the loss of the mo-

> It has been holden, that when the drawer, on the face of the bill, directs that it is to be paid at his own house, that very circumstance affords presumptive evidence of the bill having been drawn for his accommodation, and that he was to provide for and pay it, so as to dispense with proof of notice of the dishonour, unless he show that he really had effects in the hands of

the drawee (f).

Promissory Notes. able at a particular Place. [*154]

In the case of a promissory note (as the statute 1 & 2 Geo. 4, c. 78, does not extend to notes) if a particular place of payment be specified in the body when pay- of it, then, when any presentment for payment is essential, it must be made there(g), and the promissory note must be so described *in pleading(h). But if the place of payment be written only at the foot of the note, though proved to have been there before the signatures, it is considered only as a memorandum, and not as forming any part of the contract, so as to qualify it, and no presentment there need be averred or proved(i); and it was even held that to describe in a declaration, a note with such a memorandum at the foot, as in its terms payable at a particular place, is a variance (k); though if the declaration merely state, "that the said drawer made" the note payable at the place, without saying "thereby made," it is not a misdescription of the instrument, and may be rejected as a superfluous allegation(1). In one case it was considered, that if the direction at the foot were printed, it must be considered as part of the note, as it must have been made before or coeval with the signature. But that decision may be considered as overruled(m).

> We shall hereafter find, that if a place be stated in any part of the bill or note, with intent to qualify the contract, and having that effect, it must be so

described in pleading (n).

(d) Rhodes v. Gent, 5 B. & Ald. 244. (e) Turner v. Hayden, 4 Bar. & Cres. 1; 6 D. & R. 5; 1 R. & M. 215, (Chit. j. 1246). (f) Sharp v. Bailey, 9 Bar. & Cres. 44; 4

Man. & Ry. 4, (Chit. j. 1416).

(g) Sanderson v. Bowes, 14 East, 500, (Chit. j. 839); Dickinson v. Bowes, 16 East, 110, (Chit. j. 863); Howe v. Bowes, 16 East, 112, (Chit. j. 864); Rowe v. Young, 2 Brod. & Bing. 165; 2 Bligh, Rep. 391, (Chit. j. 1084).

(A) Roche v. Campbell, 3 Campb. 247,

(Chit. j. 870).

(i) Williams v. Waring, 10, Bar. & C. 2, (Chit. j. 1458); Wild v. Rennards, 1 Campb. 245; Callaghan v. Aylett, 2 Campb. 551, (Chit. j. 820, 822); Sanderson v. Judge, 2 Hen. Bla. 509, (Chit. j. 545); Price v. Mitchell.

4 Campb. 200, (Chit. j. 933); Richards v. Lord Milsington, Holt, C. N. P. 364.

(k) Exon v. Russell, 4 Maule & S. 505, (Chit. j. 949); Price v. Mitchell, 4 Campb. 200, (Chit j. 933).

(1) Hardy v. Woodroffe, 2 Stark. Rep 819, (Chit. j. 1020); see Sproule v. Legg, 3 Stark. Rep. 156; 1 B. & C. 16; 2 D. & R. 15, (Chit.

j 1152, 1154).

(m) Trecothick v. Edwin, 1 Stark. Rep. 468, (Chit. j. 979). Sed quare, and see Williams v. Waring, 10 Bar. & C. 2; 5 M. & R. 9, (Chit. j. 1458).
(n) Hardy v. Woodroffe, 2 Stark. Rep. 319,

(Chit. j. 1020); post, Part II. Ch. II. s. iv. Declaration.

PART L

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(7)—It is said by Beawes, in his Lex Merc. (0), that payment of a bill II. Their should be ordered and commanded; it is sufficient, however, if it be request- Parts and should be ordered and community, it is summered, it is summer be contained in the body of the bill, or even on the same side of the paper, 7thly. Rebut any deviation from the ordinary form is not recommended (q). We have quest to seen that a bill must contain an order or request to pay as a matter of right, Pay. and not of favour(r), but the word "pay" is not indispensable, for the word "deliver" would be equally operative(s).

(8)—Foreign bills, in general, consist of several parts, in order that the 8thly. Of bearer having lost one may receive his money on the other(t). If a person Parts. has engaged to deliver a foreign bill, it seems that he is bound, on request, to deliver as many parts of it as may be applied for (u); but if the drawer only give one bill, he will, if it should be lost, be obliged to give another of the same date to the loser(x). The several parts of a foreign bill are called a set(1); each part should contain a condition, that it shall be paid, provided the others remain unpaid(y); in other respects all are of the same tenor. This condition should be inserted in each part, and should in each mention every other part of the set, for if a *person, intending to make a set of three [*155] parts, should omit the condition in the first, and make the second with a condition, mentioning the first only, and in the third alone take notice of the other two, he might, perhaps, in some cases be obliged to pay each; for it would be no defence to an action by a ben? fide holder on the second, that he had paid the third, nor to an action on the first, that he had paid either of the others (y). But an omission is not, perhaps, material, which upon the face of the condition must necessarily have arisen from a mistake, as if in the enumeration of the several parts, one of the intermediate parts were to be omitted, for instance, "pay this my first of exchange, second and fourth not paid(z)." Each of the parts, when drawn in Great Britain, must be stamped(a). Where a bill consists of several parts, each ought to be delivered to the payce, unless one be forwarded to the drawee for acceptance, otherwise there may be difficulties in negotiating the bill, or obtaining payment(b). The forgery of the indorsement of the payer on one of the

(o) Pl. 3; and see anie, 180, note (m). (p) Morris v. Lea, Lord Raym. 1397, (Chit. j. 382, 384); ante, 128, note (u): Brown v. Harraden, 4 T. R. 149, (Chit. 470); Ruff v. Webb, 1 Esp. Rep. 129, (Chit. j. 524); but see ante, 130, note (m).

(q) Mar. 11; Brown v. Harraden, 4 T. R. 149, and see Gray v. Milner, 3 Moore, 90; 8 Taunt. 739, (Chit. j. 1052); Rex v. Hunter, Russ & Ry. C. C. 511; post, 16thly, Direction to Drawee.

(r) Ante, 130, note (m); Little r. Slackford v. Mood. & M. 171, (Chit. j. 1395).

(s) Morris r. Lea, Lord Raym, 1397; 8 Mod. 364, (Chit. j. 382, 384); antc, 128, note (u).

(1) Poth. pl. 3).

(u) 1 Pardess, 331. (x) Poth. pl. 39.

(y) 1 Pardess. 861, tit. " Des divers exemplaires d'une lettre de change."

(y) Davison v. Robertson, 3 Dow. 218, 228, (Chit. j. 934); Beawes, 430; Poth. pl. 111; 2 Pard. 367.

(z) Eayl. 5th ed. 28.

(a) Ante, 106.

(b) Bayl. 5th ed. 29. And see per Park, J. in Long v. Smyth, 7 Bing 284, 294; 5 M. & P. 78, S. C. that it is the duty of a person taking one of several parts of a bill to inquire after the others.

But in the case of Downes v. Church, 13 Peter's Rep. 205. It was held that the plaintiff in an action on the second set of a foreign bill of exchange which was protested for non-acceptance, with the protests thereto annexed, can recover without producing the first of the same set, or accounting for its non-production.

^{(1) {} Where the second of a set of three bills of exchange is protested for non-acceptance, and a suit is brought against the indorser, and the plaintiff declares on the first of the set, he is not intitled to recover unless he produces the second of the set, or accounts for its non-production. The defendant may require its production to guard against a subsequent claim by an acceptor su-pra protest. Wells v. Whitehead, 15 Wend. 527.

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II. Their Parts and particular Requisites.

Of several

Parts.

parts will not pass any interest even to a bond fide holder, and the real payer

may sustain an action on the other part(c).

It is laid down, that unless the drawee has accepted another part of a bill, he may safely pay any part that is presented to him, and that a payment of that part will annul the effect of the others. But that if one of the parts has been accepted, the payment of another unaccepted part will not liberate the acceptor from liability to pay the holder of the accepted part, and such acceptor may therefore refuse to pay the bearer of the unaccepted part, and may compel him, if he suggest that he has lost the accepted part, to find caution or sureties against his liability to pay the accepted part(d). It may therefore be collected that the drawee of a bill drawn in sets should only accept one

In a recent case many points were decided connected with this part of the The drawee (who was also payee) of a foreign bill drawn in three subject(e). parts, accepted and indersed one part to a creditor to remain in his hands until some other security was given for it; and afterwards accepted and indorsed another part for value to a third person. The acceptor substituted another security for the part first accepted, whereupon it was given up to him; and it was held, that under these circumstances the holder of the part secondly accepted was entitled to recover on the bill against the acceptor, and that the bill being foreign, did not require a stamp, though thus, in this country, converted into separate securities; and it was also held by Lord Tenterden, C. J., and Parke, J., that the acceptor would have been liable on the part secondly accepted, even if the first part had been indorsed and circulated unconditionally. In the same case at Nisi Prius, Sir James Scarlett referred to a case in which he had been concerned, and in which it was held that he whom any part of the set is first transferred, acquires a property in all [*156] the other parts, and may maintain trover *even against a bona fide holder, who subsequently, by transfer or otherwise, gets possession of another part of the set(f).

(9)—A bill of exchange and promissory note ought to specify to whom it whom pay- is to be paid(g), and it has been said that otherwise it will be merely waste able, and paper (h); and if a bill or note be contingent or uncertain, as if payable to A. authorizing or to B. and C. is not valid, nor can be sued upon as such by one of the Transfer. payees(i)(1). But Pothier(k) observes, that if the drawer has omitted to

> (c) Cheap v. Harley, cited in 3 T. R. 127. Upon this point, see Smith v. Mercer, 6 Taunt. 80; 1 Marsh. 453, (Chit. j. 923); Fuller v. Smith, 1 Car. & P. C. N. P. 197, (Chit. j. 1205).

(d) 1 Pardess. 433.

(e) Holsworth v. Hunter, 10 Bar. & C. 449,

(Chit. j. 1477).
(f) See Perreira v. Jopp, 15 B. & C. 450, note (a).

(g) 1 Pardess. 346, pl. 831—359, "Nom de celui a qui la lettre est payable." It should seem that in France a bill caunot be drawu payable to bearer, id. ibid. S.d vide Poth.

pl. 221, post, 157, note (u).
(h) Per Eyre, C. B. Gibson v. Minet, post, 1 Hen. Bla. 608, (Chit. j. 479). And where a

person was indicted for forging a bill of exchange, which was payable to blank or order; it was held there must be a payer, and forging an instrument payable to blank or order was not sufficient; Rex r. Randall, Russ. & Ry. C. C. 195, (Chit. j 838); and so with respect to the forging of an order for payment of money to blank or order; Rex v. Richards, Russ. & Ry. C. C. 193; Mansfield, C. J. diss. and see Lyon's case, 2 Leach, C. C. 597; 2 East, P. C. 933, S. C.; but see ante, 140.

(i) Blackenhagen v. Blundell, 2 B. & Al. 417, (Chit. j. 1054); ante, 140.

(k) Pl. 31; and see Green v. Davies, 4 B. & C. 235; 6 D. & R. 306, (Chit. j. 1251); ante. 139.

⁽¹⁾ Where a promissery note was made payable to A. B. or C. D., it was held to be evidence of a contract with A. B. and C. D. jointly, and that neither could maintain an action upon it separately. Willoughby v. Willoughby, 5 New Hamp. Rep. 244.

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mention any person to whom the bill is to be paid, declaring in the bill, II. Their however, from whom he received the value, it is but reasonable to construe Parts and the instrument to be payable to that person. In Great Britain it is now set-Requisites. tled, that if a bill be drawn and negotiated, and a blank left for the name of To whom the payee, a bon's fide holder may fill it up with his own name, and recover payable. against the drawer(l). But in an action against an acceptor, the holder must prove an authority from the drawer for inserting his name as payee, because otherwise the acceptor may not be able to charge the drawer with the value of the bill(m). Care also should be taken that the name be properly spelled, though, if there be a mistake or ambiguity, parol evidence is admissible to show who was intended (n). Where there are two persons of the same name, it is advisable to describe the payee in such a manner that no mistake can arise (o); and if there be father and son of the same names, and it be intended to be payable to the son, he must be so described, because, if the Christian and surname only be stated, it will be intended for the father until the contrary appear, though that may be shown, and the son's being in possession of the instrument, and directing the action, would suffice to prove his ownership (p). However, a misdescription of the character of the payee will not vitiate, provided it can, from the whole instrument, be collected who was the party intended (q). Bills and all other negotiable instruments under 5l. are, by the statute *17 Geo. 3, c. 30(r), to express the names and places [*157] of abode of the persons respectively to whom or to whose order the same shall be payable.

A bill may, in Great Britain, be drawn payable to bearer, and in such case it will be transferable by delivery (s)(1); and a bill or note payable to J. S.

(1) Cratchley v. Clarence, 2 Maule & S. 90, (Chit. j. 895). Action against the defendant as drawer of a bill of exchange. The bill had been drawn on one Henry Mann, and a blank left for the name of the payee; the bill had been negotiated by one Vashon, and indorsed to the plaintiff, who filled up the blank with his own name, and upon the trial a verdict was found for the plaintiff. The court afterwards refused to set aside the verdict, and observed, that as the defendant had chosen to send the bill into the world in this form, the world ought not to be deceived by his acts, and that by leaving the blank, he undertook to be answerable for it when filled up in the shape of a bill; see also Usher v. Dauncey, 4 Campb. 97, (Chit. j. 919); Powell v. Duff, 3 Campb. 182. The issuing of a bill with a blank for the payee's name was expressly prohibited in France, see post, 157, note (x); and the holder by so inserting his own name does not render a fresh stamp necessary; Attwood v. Griffin,

Ry. & Mood. 425, (Chit. j. 1305); Penny v. Innes, 1 C. M. & R. 439; 5 Tyr. 107, S. C.; ante, 103, note (m). And see ante, 139, 140.

(m) Crutchley v. Mann, 1 Marsh. 31; 5 Taunt. 529, (Chit. j. 908). And see Attwood v. Griffin, Ryan & Mood. 425, S. P., (Chit. j. 1305); ante, 140.

(n) Beawes, pl. 8; Willis v. Barrett, 2 Stark Rep. 29, (Chit. j. 989); Mead v. Young, 4 T. R. 29.

(o) Mead v. Young, 4 T. R. 28, (Chit. j. 467).

(p) Sweeting v. Fowler, 1 Stark. Rep. 106, (Chit. j. 946).

(q) The King v. Box, 6 Taunt. 325; Russ.

& Ry. C. C. 300, (Chit. j. 941).
(r) This act was made perpetual by the 27
Geo. 3, c. 16, and is now in full force; see 7 Geo. 4, c. 6.

(s) Grant v. Vaughan, 3 Burr. 1526, (Chit. j. 365). According to 1 Pardess. 358, bills cannot in France be so payable.

A promissory note cannot be recovered of the maker, unless there has been a delivery of it to the payee. Woodford et ux. v. Darwin, 3 Verm. Rep. 82.

But the law will presume a delivery, unless something appears which does away such prosumption. Ibid.

A note takes effect from its delivery, and not from its date. Ib. See also Camp v. Tompkins, 9 Conn. Rep. 545.

If the payer of a note negotiable by indorsement, transfer it by delivery, without indorse-

⁽¹⁾ A bill of exchange payable to the order of the drawer, and not indorsed, may be assigned, for a valuable consideration, by delivery only; and an action may be sustained against the acceptor in the name of the drawer, as on a bill payable to himself, for the benefit of the assignee. Titcomb v. Thomas, 5 Green! Rep. 292.

Parts and particular Requisites.

To whom Payable.

or "ship Fortune or bearer," is, in legal effect, payable to the bearer, and J. S. is a mere cipher(t). In France, bills of this description were at first forbidden, but by a subsequent law they were established(u). In that country, it appears that it was formerly usual to make bills payable to a person whose name was left in blank, in order that the holder of the bill, when he was desirous of not being known, might fill it up with any name be chose; but as these bills were employed as a cloak for usury and fraud, they were afterwards prohibited (x). These bills seem to have been in the nature of those payable to a fictitious payee, the validity of which has been so frequently and fully discussed of late in our courts of justice: the result of which discussion seems to be, that a bill payable to a fictitious person or his order is in effect a bill payable to bearer, and may he declared on as such, in favour of a bona fide holder ignorant of the fact, against all the parties, know-

[*158] ing that the payee was a fictitious person(y). So it *may be proved under a

(t) Grant v. Vaughan, 3 Burr. 1526, (Chit. j. 865).

(u) Poth. pl. 221; but see 1 Pardess. 358. (x) Arrets de Reglements de la Cour du 7 Juin, 1611, et du Mars, 1624; and see Pardessas Droit Commercial, 1 toin. 352, 358,

(y) Ex parte The Royal Burgh of Scotland, 19 Ves. 311, 312; 2 Rose Bank. Cas. 201, (Chit. j. 927); Hunter v. Jeffery, Peake Rep. Add. 146, (Chit. j. 587). Almost all the modern cases upon this question arose out of the bankruptcy of Livesay and Co. and Gibson and Co., who negotiated bills with fictitious names upon them to the amount of nearly a million sterling a year. See the facts, Peake Rep. Add. 146, 147.

The first case of this nature was that of Stone r. Ireland, at Nisi Prius 1769, cited 1 Hen.

Bla. 316.

The first case in banc. was Tatlock v. Harris, 2 T. R. 174, (Chit. j. 453), in which the Court of K. B. held that the boat file holder for a valuable consideration of a bill drawn payable to a fictitious person, and indorsed in that name by the drawer, might recover the amount of it in an action against the acceptor for money paid or money had and received; upon the idea that there was an appropriation of so much money to be paid to the person who should become the holder of the bill. In Vere v. Lewis, 3 T. R. 192, (Chit. j. 455), (decided the same day,) the court held there was no occasion to prove that the defendant had received any value for the bill, as the mere circumstance of his acceptance was sufficient evidence of this; and three of the judges thought the plaintiff might recover on a count which stated that the bill was drawn payable to bear-

er; Minet v. Gibson, 3 T. R. 481, (Chit j 460); put this point directly in issue, and the unanimous opinion of the court was, that where the circumstance of the payee being a fictitious person is known to the acceptor, the bill is in effect payable to bearer. Soon after, the coart of C. P. laid down the same doctrine in Collis v. Einmett, 1 Hen. Bla. 313, (Chit. j. 461); and that decision was acquiesced in, but Minet r. Gibson was carried up to the House of Lords, 1 Hen. Bla. 569. The opinions of the judges being then given, Eyre, C. B. (p. 598), and Heath, J. (p. 619), were for reversing the judgment of the court below, and Lord Thurlow, C. J. coincided with them (p. 625), but the other judges thinking otherwise, judgment was affirmed; Parl. Cas. Svo. ii. 48.

The last reported case in banc. upon this subject was Gibson v. Hunter, 2 Hen. Bla. 187, 288, (Chit. j. 618); which came before the House of Lords upon a demurrer to evidence; and in which it was held, that in an action on a bill of this sort against the acceptor, to show that he was aware of the payee being fictitious, evidence is admissible of the circumstances under which he had accepted other bills

payable to fictitious persons.

In Bennet r. Farnell, 1 Campb. N. P. 130, (Chit. j. 743), Lord Ellenborough, C. J. held that a bill of exchange unde payable to a ficti-tious person or his order, is neither in effect payable to the order of the drawar nor to bearer, but is completely roid; though if money paid by the holder of such a bill as the consideration for its being indorsed to him actually gets into the hands of the acceptor, it may be recovered back as money had and received.

But from a subsequent observation (1 Campb. 180 c.) it appears that the last case is to be tak-

ment, the party to whom the transfer is made may bring an action in the name of the payee. Myers v. James, 2 Bai. 547. So also in the case of a delivery without indorsement, or other assignment in writing, of an unnegotiable note. Horton v. Blair, Idem, 545.

In an action upon a note payable to bearer, the possession of the plaintiff is prima facts evidence of assignment and delivery by the payee. And it is unnecessary to prove consideration unless it appears that the note was lost, stolen, or otherwise forcibly or fraudulently obtained from the real owner. Jackson r. Heath, 1 Bai. 355. And the holder of such a note may see in his own name although it was delivered to him for the use of another. Ibid.

Delivery is essential to the validity of a note. Chamberlain v. Hoffs, 8 Verm. 94. }

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was tried submitted the case to the considera-

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commission against the indorser, or of the prior parties privy to the fictitious II. Their transactions(z). But if the plaintiff himself, at the time he received such a Parts and bill, knew of the payee being fictitious, and discounted the bill for the benefit Requisites.

of the drawer, he cannot recover against the acceptor, although he also ac- To whom cepted with full knowledge of the fact; and Lord Kenyon said, "though payable. now it is too well settled to be disputed, that a bonû fide holder might recover on such a bill as on a bill payable to bearer, yet a plaintiff so aware of the fact cannot recover (a)(1).

Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer, and therefore a bona fide indorsee may bring evidence to show that the signatures of the supposed drawer to the bill and to the first indorsement are in the same handwriting (b). The use of these fictitious names has been highly censured, and the person fraudulently indorsing the fictitious name on the bill, to give it currency, would be guilty of forgery(c); and as being debts not necessarily incurred, the party would not, in certain cases, be entitled to his discharge under the

Insolvent Act within five years. As it is not necessary or essential to the validity of a bill of exchange that there should be three parties to it, a bill may be drawn payable to the drawer himself(d), though in such case it is said to be more in the nature of

en with this qualification "unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." A new trial was refused in this case, because no such evidence had been offered at Nisi Prius, and Lord Ellenborough said, he conceived himself bound by Minet v. Gibson, and the other cases upon this subject, which had been carried up to the House of Lords (though by no means disposed to give them any extension), and that if it had appeared that the defendant knew the payee to be a fictitious person, he should have directed the jury to find for the plaintiff. See also Ex parte Allen, Co. B. L. 184; Ex parte Clarke, 3 Bro. C. C. 238, (Chit. j. 493); Parl. Cas. 8vo. 9th vol. 235, 255; Cullen, 98; 1 Mont. B. L. 145; Bayl. 5th ed. 31, 32, 33; Selw. 9th ed. 319; Thicknesse v.

Browilow, 2 C. & J. 425.

(z) Ex parte Clarke, 3 Bro. C. C. 233; 19 Ves. 211.

(a) Hunter v. Jeffery, Peake Rep. Add. 146, (Chit. j. 587)

(b) Cooper v. Meyer and another, 10 Bar. & C. 468, (Chit. j. 1480).
(c) The King v. Edward Taft, Leach Cro.
Law, 172: The King v. Taylor, id. 257, and note (a); Tatlock v. Harris, 3 T. R. 174, (Chit. j. 453); Vere v. Lewis, 3 T. R. 182, (Chit. j. 455), Minet r. Gibson, 3 T. R. 482,

(Chit. j. 460); Collis v. Emmett, 1 Hen. Bla. 313, (Chit. j. 461); Gibson v. Minet, 1 H. Bla. 569, (Chit. j. 479); 2 East's P. C. 957. Rex v. Edward Taft, Leach Cro. Law, 172, (Chit. j. 500). The prisoner was indicted for forging an indorsement on a bill of exchange, and found guilty, but the judge before whom he

tion of the judges upon the following statement: -The bill was drawn payable to Messrs. R. & M. and indorsed by them generally, and became the property of one W. W. from whom it had been stolen; the prisoner, for the purpose of getting it discounted, indorsed on it the name of John Williams. The judges were unanimously of opinion that this was a forgery, for although the fictitious signature was not necessary to his obtaining the money, yet it was a fraud both on the owner of the bill and the person who discounted it, and referred to Rex r. Locket, where it was holden that the forging a name, either real or fictitious, with an intent to defraud, was forgery; and see the King v. Inhabitants of Burton-upon-Trent, 3 Mau. & S. 528, where Lord Ellenborough said, if a party sign an instrument in a name assumed by him for other purposes a considerable time before, such signature will not amount to a forgery; but otherwise, if he assume a name by which he had never been known before, for the purposes of fraud. In Rex v. Bontin, Russ. & Ry. C. C. 260, it was held, that to support a charge of forgery by subscribing a fictitious name, there must be satisfactory evidence on the part of the prosecutor that it is not the party's real name, and that it was assumed for the purpose of fraud in that instance—that the assuming and using a fictitious name, though for purposes of concealment and fraud, would not amount to forgery, if it were not for that very fraud, or system of fraud, of which the forgery forms a part. And see further 3 Chit. Crim. Law, 2d.

ed. 1036, and post, Part III. c. 1, Forgery. (d) Butler v. Cripps, 1 Salk. 130; and v. Ormston, 10 Mod. 286; ante, 24, 25.

(1) $\{$ If the maker of a note make it payable to a fictitious person, and puts it in circulation with the fictitious name written on it; or if he makes it payable to a real person and forge the indorsement or procure it to be done, and then put it in circulation, he is estopped from saying that it was not genuine. Fort ads. Meacher. Rileys Law Cases, 248. See Meacher v. Fort, 3 Hills Rep. (So. Car.) 227.

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II. Their Parts and particular Requisites. 10thly.

To whom payable. [*159]

Bearer.

a promissory note. A bill payable to the drawer's order is payable to himself, if he makes no order(e). A bill may also be payable to one for the use of another, in which case it is payable to the former (f). When drawn payable to a married woman, it is payable to the *husband, and transferable in his name; or sometimes in the name of the wife (f).

(10)—As the commercial advantage to be derived from the negotiable Payable to quality of bills of exchange, was the only reason why our courts allowed in Order or to their favour an exception to the rule relative to the assignment of choses in action, it was once thought, that unless they possessed that quality, they would have no greater effect than that of being mere evidence of a contract(g). And this is still the law in France(h). But it is now well established in Great Britain, that it is not essential to the validity of a bill, as an instrument, that it be transferable from one person to another (i)(1).

v. M'Clure, 5 East, 476.

(f) Evans v. Cramlinton, Carth. 5; 2 Vent. 807; Skin. 264, (Chit. j. 174); Smith v. Kendall, 6 T. R. 123, (Chit. j. 533); Marchington v. Vernon, 1 Bos. & Pul. 101, n. (c).

(f) Ante, 25.

(g) Dawkes v. Lord de Loraine, 3 Wils. 211, (Chit. j. 382, 384).

(h) 1 Pardess 346, 358. 359. But any equivalent words will suffice, as, Pay to A B. ou à sa disposition, this bill is indorsable; 1 Pardess, 360, 361.

(i) Smith v. Kendall, 6 T. R. 123, 124, (Chit. j. 533). The King v. Box, 6 Taunt. 828; Russ. & Ry. C. C. 800, (Chit. 941); Smallwood v. Rolfe, Sel. Ca. 18; Bayl. 5th edit. 33, 34.

Smith v. Kendall, 6 T. R. 123; 1 Esp. R. 231, (Chit. j. 588). Assumpsit for money

(e) Per Holt, C. J. Anon. Comb. 401; Smith paid, &c. On the trial the following note was M'Clure, 5 East, 476. given in evidence: "Three months after date I promise to pay to Mr. Smith, currier, 401. value received, in trust for Mrs. E. Thompson, as witness my hand, L. Asken, 25th June, 1787." The defendant objected that this was not a promissory note within the statute, not being payable either to order or bearer. A verdict was taken for the defendant with leave for plaintiff to move to set it aside and enter a verdict for him. Upon motion being made and cause shown, the court held that a note payable to B. without adding " or to his order, or to bearer," was a legal note within the act of parliament; S. P. Burchell v. Slocock, Lord Raym. 1545, (Chit. j. 267); Moore v. Paine, Rep. Temp. Hardw. 288, (Chit. j 202); and see the Entries, Ewers v Benchin, 1 Lutw. 231, 232, (Chit j. 179); Manning v. Cary, id. 277, (Chit. j. 194); Clift. 916.

(1) The same principle has been recognized in the United States, Downing v. Backenstoes, 1 8 Caines' Rep. 137. Goshen Turnpike Co. v. Hurtin, 9 John. Rep. 217.

A request to pay the amount of a promissory note, written underneath the same, without words of negotiability, is operative as a bill of exchange; and the drawee is liable on his acceptance. Leonard v. Mason, 1 Wend 522.

As between indorser and indorses a note not negotiable is, in Massachusetts, treated exactly as if negotiable. Jones v. Fales, 4 Mass. Rep. 245.

In South Carolina an assignment of a chose in action not negotiable has always been considered as a letter of attorney to the assignce; and the assignce or holder of a negotiable instrument may, therefore, elect to regard himself in that character, or sue in his own name. Ware r. Key, 2 M'Cord, 873.

If the payee of a note payable to himself or bearer indorse it, he will be liable as indorser. Bush v. Adm. of Reeves, 3 John. Rep. 439.

And it has been held that the contract made by indorsement extends to all future indorsees, even where the notes are not originally negotiable; and an action lies in favor of an indersee against a remote indorser. Codwise r. Gleason, 3 Day's Rep. 12.

A bank note payable to W. Pitt, or bearer, is in effect payable to the bearer; as between any bona fide holder, and the bank, such holder is to be deemed the bearer to whom the bank is originally liable. Bullard v. Bell, 1 Mason's Rep. 252.

At common law, and by the custom of merchants, no bills are negotiable unless payable to order or to bearer. The drawer of an unnegotiable bill is not liable on the indorsement to the indorsee or assignee. Pratt v. Thomas, 2 Hill, 654.

A bill of exchange is negotiable till it is paid; and each party, who has used due diligence, may resort to all or any of the preceding parties, in case of protest. Gazzam v. Armstrong's ex'r., 3 Dana, 554.

The words " or order," or words tantamount, are necessary to make a note negotiable. Fennon v. Farmer, 1 Har. Del. Rep. 32.

An indorsement on the back of a promissory note, making its payment depend on a contigency, does not affect its negotiability. Its only effect is to give notice of the consideration to subsequent holders. Tappan v. Ely, 15 Wend. 862.

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If, however, it be intended to be negotiable, care must be taken that the II. Their operative words of transfer, commonly used in bills, or some words equiva- Parts and lent, be inserted therein(k), though if they be omitted by mistake, it seems Requisites. that if the bill was originally intended to be negotiable, the words "or order" Sum Paysmay be inserted at any time without a fresh stamp(l). In Scotland, the ble. words "or order" are not necessary in that country; and a bill or note may be effectually indorsed by the payee without them (m). The modes of making a bill transferable, are by drawing it either payable to A. B. or order, or to \hat{A} . \hat{B} or bearer, or to the drawer's own order, or to bearer generally. But any terms expressing the intent will render the bill negotiable (n). use, operation, and effect of each of these forms of words will be pointed out hereafter in that part of the work which treats of the transfer of bills and checks.

(11)—The sum for which the bill is drawn should be clearly expressed in 11thly. the body of it, and, as it has been before observed, it may be advisable to Sam Payawrite it in figures at the head, and in words at length in the body of the bill, in order the better to prevent alteration(o). Erasure may in general be de-

(k) Beawes, pl. 3; Selw. N. P. 319, 9th post. edit.; Hill v. Lewis, Salk. 183, (Chit. j. 187, 188, 189).

(m) Thompson on Bills, 101.

(n) 1 Pardess. 360, 361.

(o) Poth. pl. 35, 99; Master v. Miller, 4 T. (1) Kershaw v. Cox, 3 Esp. Rep. 246, (Chit. j. 629); Knill v. Williams, 10 East, 435, 437, R. 320, (Chit. j. 482, 490); ante, 149; 1 Par-(Chit. j. 671); Cole r. Parkin, 12 East, 471; dess. 346, 350.

A promissory note payable in cash or specific articles, is not negotiable. Matthews v. Houghton. 2 Fairf. 377.

Bills are transferable, not by force of any statute, but by the custom of merchants. A deed conveying a great number of bills, bonds, notes, &c. is not a negotiation of the bills on mercantile principles, so us to authorize the holder to sue in his own name. Hopkirk v. Page, 2 Brock. 20.

A note made and endorsed for the accommodation of the maker, to be discounted at a bank, where its discount is refused, cannot be transferred as a business note, to one having knowledge of the facts, and the amount recovered of the indorser. Stone v. Vance, 6 Ham. 249.

Where a note has been once paid, it ceases to be negotiable, except as against those by whom a new indorsement has been made, and such parties as are not prejudiced by the transfer. Cochran v. Wheeler, 7 N. Hamp. 202.

A mere order drawn by a third person on C. "to pay to the order of A. when in funds, the net amount of sales" of certain goods, is not a negotiable instrument. Jackson v. Tilghman, 1

In Ohio, by statute, notes for money made payable to any person or to bearer, are negotiable, and the title may pass by indorsement. Fallis v. Griffith, Wright, 303.

In Mandeville v. Union Bank, 9 Cranch, 11, Chief Justice Marshall said, "By making a

note negotiable at a particular bank, the maker authorizes the bank to advance, on his credit, to the owner of the note, the sum expressed on its face." Ibid.

A note payable to bearer is negotiable by delivery and this creates a property in the assignes or bearer. And the same rule obtains in regard to a check on a bank. Hutchings v. Low, 1 Green's Rep. 246.

A note for money "which may be discharged by the delivery of cotton," is not a negotiable instrument, and the indorser or assignor of such instrument is not liable upon his indorsement. Lawrence v. Doherty & Gwin, 5 Yerger's Rep. 435.

A note payable in North Carolina bank notes is negotiable, and the indorser is liable for the specie value of such notes. Deberry v. Darnel, 5 Yerger's Rep. 451.

The negotiability of a promissory note made in that form, is not restrained or in any manner altered, by the circumstance of its being paraphed ne varietur by a notary public. Abat v. Gormley et al., 3 Miller's Louisiana Rep. 239.

A note given in part payment of a contract for erecting certain buildings secured by a mortgage on the ground, is negotiable and it is no defence against it, either in the hands of the original or subsequent holder, that the buildings were not completed according to contract. Chalaron v. Vance, 7 Louisiana Rep. 571.

The paraph of the notary ne varietur on a negotiable note, does not in any manner change the

mature of its negotiability. Ibid.

Where a note is made 'payable and negotiable' at a bank, its negotiability is not restricted to the place where it is made payable. Wardell v. Hughes, 8 Wend. Rep. 418.

II. Their Parts and particular Requisites. Sum payable. [*160]

tected, but there are modes of expunging writing and figures and of inserting larger sums, so that a drawee, before he accepts or pays, must be quite certain not only that the drawer signed the bill, but also that he originally authorized the payment of the sum apparently named on the bill; and if he should accept for or pay more than the sum inserted by the drawer, he may *be without remedy(p). But even in an indictment for forgery an omission or imperfection in the body of the bill has been aided by the superscription(q). Care should be taken that the stamp be appropriated to the sum. If the sum in the superscription of the bill be different from that in the body of it, the sum mentioned in the body will be taken prima facie to be the sum paya-The sum must be fixed and certain, and not contingent(s). It may be the money of any country (t). When there has been a contract by a third person to guarantee a bill for a given sum the bill should be drawn accordingly, for if it be drawn for a larger sum the guarantee will not be liable even to the amount of the sum he engaged to secure (u). With respect to foreign bills there is no restriction as to the amount of the sum for which they may be made payable; but it is otherwise with regard to inland bills and drafts, which are forbidden to be drawn for any sum under twenty shillings by the statute 48 Geo. 3, c. 88(x), under the penalty of 51. to 201., such bill, &c. being also thereby declared absolutely void; and bills under 51. are regulated by 17 Geo. 3, c. 30, 7 Geo. 4, c. 6, and 9 Geo. 4, c. 65(y). And the amount of promissory notes is, as we shall hereafter see, also regulated. The currency and monies of Great Britain and Ireland are assimilated by 6 Geo. 4, c. 79.

the words ceived.

(12)—It appears that in France it was not only essential to the validity of a bill that it should express whether or not value had been received, but like-Value Re- wise the nature of the consideration which constituted the value (z), but in this country it is otherwise, for value received is implied in every bill and indorsement, as much as if expressed in totideum verbis(a); and though when the Coal Act, 3 Geo. 2, c. 26, s. 7 & 8, now repealed, was in force, the refusal to insert in a note the words "value received in coals," subjected the buyer to 101. penalty, yet it was held that the note was valid notwithstanding the omission (b); and though there are some old cases (c) on the question whether indebitatus assumpsit would lie on a bill of exchange, in which it

> (p) Hall v. Fuller, 6 Bar. & Cres. 750; 8 D. & R. 464, (Chit. j. 1294); Bulkley v. Butler, 2 B. & C. 434; post, 166, note(r).
> (q) Elliot's case, 2 East P. C. 951; ante,

(r) Beawes, pl. 193; Mar. 2d ed. 139, 189; Saunderson v. Piper, 5 Bing. N. C. 425; 7 Scott, 408, S. C.; ante, 149.
(s) Smith r. Nightingale, 2 Stark. 375, (Chit.

j. 1030); ante, 133, note (l).

(t) 2 Pardess. Lettres de Change, 336. (u) Phillips v. Astling, 2 Taunt. 206, (Chit.

(x) Repealing the 5 Geo. 3, c. 51. The act gives magistrates summary jurisdiction over the offender.

(y) See ante, 150. (z) Poth. pl. 8, 84; 1 Pardess. 346, 355, La Valeur fournie et la designation, of the NATURE of the value, id. ibid.

(a) Per Lord Ellenborough, in Grant v. Da Costa, 3 Maule & S. 352, (Chit. j. 920); White v. Sedgwick, B. R. Hil. 25 Geo. 3, 4 Dougl. 247; Bayl. 40, note 83. A declaration

on a bill of exchange was demurred to because it was not stated to have been given for value received, but the court said it was a settled point that it was not necessary, and gave judgment for the plaintiff; Popplewell v. Wilson, 1 Stra. 264, (Chit. j. 243); Claxton v. Swift, 2 Show. 496. (Chit. j. 467); Macleod v. Snee, Ld. Raym. 1481, (Chit. j. 259); Joeelyn v. Laserra, Fortes. 282, (Chit. j. 283); Jenny v. Hearle, 8 Mod. 267, (Chit. j. 258, 254); Everkin v. Merry, 1 Barn. 88, (Chit. j. 268); Death v. Serwonters, Lutw. 88, 89, (Chit. j. 167), acc.; Dawkes v. Lord de Loraine, 3 Wils. 212, (Chit. j. 382, 384); Banbury v. Lisset, 2 Stra. 1212, (Chit. j. 310), semble contra. In the latter case it is said that a jury of inerchants were of opinion that the words "value received" were essential to the validity of a bill of exchange; 2 Bla. Com. 468.

(b) Wigan v. Fowler and others, 1 Stark. R.

468, (Chit. j. 977).

(c) Hodges v. Steward, Skin. 846, (Chit. j. 184); Anonymous, 12 Med. 845, (Chit. j. 212). 2000

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appears there was a distinction made between a bill importing to have been II. Their given for value received, and one not containing those words, and it was Parts and holden, that in the first case the drawer was chargeable at common law, but Requisites in the latter on the custom only (d); yet it is now settled that *there is no such [*161]distinction and that a bill need not contain the above words (d).

If a bill or note contain the words "value received," an action of debt of the may be sustained by the drawer against the acceptor of the one, or the words valpayee or immediate indorsee against the maker of the other(e); though not ed. by an indorsee against the acceptor, or by a remote indorsee against the maker, by reason of the want of privity between the respective parties (f). And in a late case, Abbott, C. J. said, "I agree that when a note is expressed to be 'value received,' that raises a presumption of a legal consideration to sustain the promise, though that is only a presumption which may be rebutted" (g)(1). So when a sufficient value is expressed on the face of a bill or note it has been doubted whether the accepter or maker can give evidence that the consideration was different, unless such evidence tends to establish fraud or illegality (h).

These distinctions render it advisable in all cases to insert these words in a bill or note. It is said to have been decided, that to aid a variance, the words may be inserted at the time of the trial(i), but the utility of such amendment seems very questionable; and in a late case, where the note stated the consideration, and the declaration omitted to state such consideration, it was held no variance (k). It has been considered that when a bill is in this form, "Pay to F. G. B. or order, 315l. value received," and is subscribed by the drawer, it may be alleged in pleading to be a bill for value received by the drawer from the payee (l). But in a subsequent case, where a bill was drawn by T. S. payable to his own order, "value received," it was held that this must mean value received by the drawce, and as it had been alleged in the declaration to be "for value received by the said T. S." it was adjudged to be a fatal variance, though the plaintiff was permitted to recover on the account stated(m). So in general the words "value received," in a note, import "received from the payer(n)." But the

(d) Beawes, pl. 233; Cramlington r. Evans, 1 Show. 5, (Chit. j. 174); Vin. Ab. tit. "Bills of Exchange," G. 2.

(d) Same cases as ante, 160, note (a).
(e) Bishop v. Young, 2 Bos. & Pul. 78, 81,
(Chit. j. 621); Priddey v. Henbrey, 3 Dow. & Ry. 165; 1 B. & C. 674, (Chit. j. 1179); and see Cresswell v. Crisp, 2 C. & M. 634; 2 Dowl. 635, S. C.; Lyons v. Cohen, S Dowl. 243; post, Part II. Ch. VII. Of the action of Debt. (f) Cloves v. Williams, 3 Bing. N. C. 868; 5 Scott, 68, S. C., and the cases in last note.

(g) Holliday v. Atkinson, 5 Bar. & Cres. 508; 8 D. & R. 163, (Chit. j. 1290); ante,

74, note (x). (h) Ridout v. Bristow, 1 Tyrw. R. 88; 1 C. & J. 231, S. C.; (Chit. j. 1518), ante, 69, n.

(i) Bul. Ni. Pri. 275.

(k) Coombs v. Ingram, 4 Dow. & Ry. 211, (Chit. j. 1206); Grant v. Da Costa, 3 Maule & 8. 351; infra, note (l).

(1) Grant v. Da Costa, 3 Maule & S. 851, (Chit. j. 920). Per Lord Ellenborough, "It appears to me that 'value received' is capable

of two interpretations, but the more natural one is that the party who draws the bill should inform the drawee of a fact which he does not know than one of which he must be well aware. words, ' value received' are not at all material, they might be wholly omitted in the declaration, and there are several cases to that effect. The meaning of them here is that the drawer informs the drawce that he draws upon him in favour of the payee because he has received value of such payee. To tell him that he draws upon him because he the drawee has value in his hands is to tell him nothing, therefore the first is the more probable interpretation." And per Bayley, J. "The object of inserting the words 'value received' is to show that it is not an accommodation bill but made on a valuable consideration given for it by the payee;" and see Coombs v. Ingram, 4 Dow. &. Ry. 211, (Chit. j. 1206).

(m) Highmore v. Primrose, 5 Maule & S. 65, (Chit. j. 956). See other cases, post, tit. Declaration.

(n) Clayton v. Gosling, 5 Bar. & Cres. 360; 8 D. & R. 110, (Chit. j. 1287).

^{(1) {} Raymond r. Sellick, 10 Conn. Rep. 480. }

II. Their Parts and particular Requisites.

words "value received with interest," occurring in an instrument which is not negotiable, as a promissory note or bill of exchange not payable at all events, but on a contingency, do not of themselves import a money consideration, so as to satisfy an averment that money was lent by plaintiffs to defendant; and an instrument by which money is made payable on a contingency can-[*162] not be given in evidence as a *promissory note on the counts for money lent or on the account stated, though sued on between the original parties, and expressing value to have been received(o). So in a subsequent case it was observed that, if instead of a note a creditor take a written security, which must express a consideration, that consideration must nevertheless be proved to exist aliunde(p).

18thly. The Direction to place it to Account.

(13)—It is said by Marius that if the drawer of a bill is himself to be the debtor then he inserts in the bill these words:—" and put it to my account(o)" but if the drawee, or person to whom it is directed, be debtor to the drawer then he inserts the following words:--" and put to your account;"(p) and that sometimes where a third person is debtor to the drawee it is expressed in the bill thus:—"and put it to the account of A. B.(q)." It is, however, perfectly unnecessary to insert in a bill any of these words. In a late case, under the following special circumstances, these words were held unnecessary:—A. and B. merchants in London, being applied to on behalf of C. resident at Demarara, to give him a letter of credit for 30,000l. to enable him to purchase produce to load certain vessels for the port of London, and to accept his drafts at ninety days sight on receiving invoice, bill of lading, and order for insurance to the extent of certain fixed prices for various kinds of produce, wrote to C. stating they consented to make the advances required upon the terms prescribed, and that upon receiving the documents before mentioned and no irregularity appearing, they would accept his draft at the usual date to the extent of 30,000l. C. shipped produce to the value of 800l. on board of one vessel, and to the value of 1600l. on board another, and sent the necessary documents to A. and B., and directed that the surplus of the proceeds of the first cargo, (after repaying the advances of A. and B.) should be paid to D. in London, and that the surplus of the second cargo should be held by them to abide his future advice. C. afterwards drew a bill upon A. and B. for 500l. at six months sight, which they refused to accept, C. not specifying to the account of which cargo it was to be charged. In an action by C. for this refusal to accept, it was held C. was not bound to draw at ninety days, but might draw at any usual date, the jury not having found that six months was an unusual date; and secondly, that C. was not bound to specify to which cargo the bill was to be charged; for that in the absence of any direction by him, A. and B. might charge it to either at their election (r).

14thly. Of the Words vice (s).

(14)—The propriety of inserting the words, "as per advice," depends as per Ad- on the question whether or not the person on whom the bill is drawn is to expect further direction from the drawer. Bills are sometimes made payable "as per advice;" at other times, "without further advice(t); and generally, at least in inland bills, without any of these words. In the former

5; Thomas v. Bishop, R. T. Hardw. 1, 2, 3, (Chit. j. 277, 278, 279).
(r) Laing v. [Barclay, 1 B. & C. 392; 2 D. & R. 530; 3 Stark. 38, (Chit. j. 1170).

(s) Sec post, 166. (t) Poth. pl. 36, 169.

⁽o) Morgan v. Jones, 1 Tyrw. R. 21, (Chit. j. 1515).

⁽p) Per Bayley, J. in Ridout v. Bristow, 1 Tyrw. Rep. 88; 1 Crompt. & Jervis, 231, (Chit. j. 1518); and ante, 69, note (k). (q) Mar. 27; Com. Dig. tit. Merchant, F.

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case, the drawee may not, but in the latter he may pay before he has re- II. Their ceived advice. Every prudent drawer ought to send a distinct letter of ad- Parts and vice, as well to prevent fraud as alteration of the bill, or otherwise to let the Requisites. drawee know what provision has been made for payment of the bill(u). And no prudent drawee should *accept without previous advice, stating the sum, [*163] &c. for which the bill is drawn; and if the bill denotes that the drawee is to have advice, then, at all events, he should not accept till he has received it(v).

(15)—To give effect to the bill, &c. the drawer's name must either be 15thly. subscribed, or inserted in the body of it, but the latter will suffice (x). may be in writing or pencil(y), and it must be written either by the person purporting to be the drawer, or by some person authorised by him(z). In the case of the Bank of England, the name of their clerk may be impressed by machinery, by 1 Geo. 4, c. 92, s. 3. We have already seen how an agent should draw a bill(a). If drawn and signed by an agent, it is usual to sign it as follows:—"A. B. (the principal), per procuration, C. D." (the 'agent), and if he do not express for whom he signs, he may be personally We have also seen how a partner should draw(c). If signed by one person for himself and partners, it is usual and advisable to subscribe the name of the firm, or at least to sign it as follows:—" A. B. for A. B. and Company," or to that effect(d); but it is sufficient if it purport in any way to have been signed on behalf of the firm(e). Where there is no firm, and there are to be several persons as drawers of a bill, or makers of a note, we have seen each must separately sign (f). And a note signed "A. B.," or else "C. D.," is not binding on a party who does not sign(g). If a bill purport to be drawn in the name of a firm as consisting of several persons, in an action by the indorsee against the acceptor, the declaration may aver in the plural, that certain persons using that firm drew the bill, although, in

(u) 1 Pardem. 382, 883.

(v) 1 Pardess. 478.

(x) Beawes, pl. 3; Elliott v. Cooper, Lord Raym. 1876; 1 Stra. 609; 8 Mod. 807, (Chit. j. 255); Erskine v. Murray, Lord Raym. 1542; Taylor v. Dobbins, 1 Stra. 399.

Elliott v. Cooper, Stra. 609; Ld. Raym. 1876; 8 Mod. 807, (Chit. j. 255). It was objected on demurrer to a declaration on a note, that it alleged only that the defendant made it, but did not state that he signed it; but, by the court, "if he did not either write or sign, he did not make it, for making implies signing, and

making is alleged." Judgment for plaintiff.
Erskine v. Murray, Lord Raym. 1542, (Chit. j. 268). In an action on a bill, it was alleged that the plaintiff made his bill in writing, and thereby required the defendant to pay. It was objected on error, that it did not appear that the plaintiff signed the bill; but it was answered that the allegation that he made it, and required the defendant to pay, implied that his name was in it (otherwise he could not request) and that he or somebody wrote it for him. Judgment for the plaintiff was affirmed.

Taylor v. Dobbins, 1 Stra. 899, (Chit. j. 248). Per cur. If the defendant wrote it, his sub-scription to it was unnecessary; it is sufficient if his name appeared in any part. "I, J. S. promise to pay" is as good as "I promise to pay" subscribed "J. S." See also Saunderson v. Jackson, 2 Bos. & Pul. 238. The same

in a contract under the Statute of Frauds, Knight v. Crockford, 1 Esp. 90; Ogilvie v. Foljambe, 3 Mer. 53. So in a will, Lewarque v. Stanley, 8 Lev. 1, 86. Signature by mark suffices, Phillimore v. Baring, 1 Camp. 513, and the name of the drawer might be printed; Schneider v. Norris, 2 Mau. & Sel. 286; Saunderson v. Jackson, 2 Bos. & P. 239.

(y) Ante, 127, note (b).

(z) Ante, 27.

(a) Ante, 32.
(b) Thomas v. Bishop, Stra. 955, (Chit. j. 277); Enton v. Bell, 5 B. & Al. 34, (Chit. j. 1115); ante, 38, 34.

(c) Ante, 57.

- (d) Smith v. Jarvis, Lord Raym. 1484, (Chit. j. 265). The declaration upon a note drawn by Jarves and Bailey stated, that Jarves, for himself and partner, made his note in writing with his own hand subscribed, whereby he promised for himself and partner to pay. It was objected on demurrer, that it was not charged that Jarves had signed the note for himself and Bailey, but the Court held the statement showed that Jarvas did sign for himself and Bailey, and gave the plaintiff judgment; ante, 57, 58,
 - (e) Ante, 58, 59.

(f) Ante, 59.

(g) Ferris v. Bond, 4 Bar. & Ald. 679, (Chit. j. 1110); ante, 140, pote (e).

II. Their Parts and particular

point of fact, the bill were drawn by a single person using the name of that firm(h); and where money was deposited in the Bank of England in the Requisites. names of three assignees, it was ordered by the Chancellor to be paid to the [*164] *checks of the two(i). The clerk of the Bank of England, or of any other corporation, when he has authority in fact to sign, need not have a power under the corporate seal(k).

> It is not usual, nor indeed prudent, for the drawer of a bill or check to sign his name before it is filled up in every respect; for if a person sign his name upon blank paper, stamped with a bill stamp, and deliver it to another to draw above the signature, he will be liable, as drawer, to pay a bona fide

holder, any sum warranted by the stamp(l).

By the 17 Geo. 3, c. 30, bills and drafts or other negotiable instruments under 51., or on which less than 51. remains due, cannot be issued, unless they specify the names and places of abode of the persons respectively to whom or to whose order they be payable, and the signing of every such bill must be attested by one subscribing witness at the least(m).

16thly. Direction to the Drawee.

(16)—A bill of exchange, being in its nature an open letter of request from the maker to a third person, should regularly be properly addressed to that person by the Christian and surname, or by the full style of their firm(n). It should not be addressed to the drawer's wife, or to a fictitious person(o). And no one can be made liable as the acceptor of a bill but the person to whom it is addressed, unless he be an acceptor for honour(p). But if a bill be drawn payable to the order of the drawer at a particular place, without being addressed to any person, and a party afterwards accepts it, the want of the address of the bill to any particular party by name is cured(q). If addressed to the drawer himself, he may be sued as drawer or acceptor, or as maker of a note(r). The address of the bill, it is said, is usually made by the Italians and Dutch on the back of the bill, but the French and the English uniformly subscribe the direction in the form to which this paragraph refers; and this latter mode is reccommended as preferable to the other, because, as the paper on which a bill is usually written is but small, if the direction were on the back of it, there would be very little room left for indorsements, which frequently are very numerous; nor would there be any space on which to write the receipt for payment(s). A bill addressed to -, and Co. will, when accepted, bind all secret as well as ostensible partners, but the holder will only be bound to sue those he knew when he received the bill(t). A bill directed to A. or in his absence to B., and beginning, "pray, gentlemen, pay, &c." being accepted only by A., may be declared upon without noticing B.(u). An instrument in the form of a bill having the word "at" substituted for the word "to" before the usual place of direction at the foot of it, may be treated as a bill

(h) Bass v. Clive, 4 Campb. 78; 4 Maule & S. 18, (Chit. j. 930).

(i) Ex parte Hunter and another, 2 Rose, **868**.

(k) Rex v. Bigg, 8 P. Wms. 419, (Chit. j. 286).
(i) Collis v. Emmett, 1 Hen. Bla. 313, (Chit.

j. 461); ante, 29, note (s).

(m) Semble, a note for a sum under 5l. payable to bearer only, is not a negotiable or transferrable instrument within this act; Quarterman v. Green, 1 Carr. & Pa. C. N. P. 92. See Hill v. Lewis, 1 Salk. 132, (Chit. j. 187, 189); post, Ch. VI. s. i. Transfer.

(n) Poth. pl. 35; Beawes, pl. 8; Mar. 148; 1 Pardess. 850, 351.

(o) 1 Pardess. 350, 351, 352.

(p) Polhill v. Walter, 8 B. & Ad. 114; I Law J. K.B. 92, (Chit. j. 1572); ante, 35 n. l. (q) Gray v. Milner, 3 Moore, 90; 8 Taunt.

- 789, (Chit. j. 1022, 1052). (r) Ante, 24, note (h), 131, 132. (s) Mar. 44; Com. Dig. tit. Merchant, (F
- (t) De Mantort v. Saunders, 1 Bar. & Ad. 898, (Chit. j. 1509); ante, 44, note (1). (u) Anonymous, 12 Mod. 447, (Chr. j. 216).

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of exchange or a promissory note(x). If a bill be intended to be accepted II. Their by two or more persons, it should be addressed accordingly, for where a bill Parts and was *drawn upon one person, and was accepted by him and another, it was Requisites. decided that only the first party was liable as acceptor, for there cannot be a [*165] series of acceptors (y). But in foreign bills it is not unusual for the drawer to add, " Au besoin chez Mesers. ----," the object of which we will presently consider.

In France a bill must not be drawn upon a person residing where the drawer is domiciled, but must be drawn upon a person at another place; but they give effect to bills drawn differently in foreign countries, where the French local regulation does not prevail (z).

(17)—We have already (a) considered the points relating to the place 17thly. where the payment is to be made, and which we have seen should be fully Place of Payment. expressed in the subscription or body of the bill, and it will suffice to refer to those observations.

- (18)—When the drawer has any apprehension that the drawee will either 18thly. Au not accept or not pay the bill, he may, as a matter of precaution, to prevent besoin, &c. the expenses and inconveniences resulting from a return of the bill, require the holder in such an event to apply to a third person named in the bill for This requisition is intimated by writing in the corner of the bill, under the drawee's address, these words, "Au besoin chez Messrs. ---, at ---," or in other words, "In case of need apply to Messrs. --is desirous, in case of refusal or failure by the drawee, to become parties to the bill, in the nature of an acceptor or payer for honour; and is valid and usual on the Continent, though we have just seen that there cannot be a se-The holder is bound to apply to the party so adries of acceptors (b). dressed(c), and who may accept and pay without previous protest, in which respect he differs from an acceptor supra protest(d): and the party so paying has a right to sue the drawer for the amount(e). It should seem, however, that the introduction of these words rather imports an apprehension that the bill will not be regularly accepted or paid, and therefore tends to diminish the credit which might otherwise be attached to the bill without such desire being expressed.
- (19)—A drawer also may add a request or direction, that in case the bill 19thly. should not be honoured by the drawee, it shall be returned without protest, "Refour or without expense, by subscribing the words, "retour sans protet" ou tet," ou tet," ou tet," ou sans frais." In this case, the omission of the holder to protest, having "sans been induced by the request of the drawer, he, and perhaps the indorsers, frais." cannot resist payment on that account, and thus the expense of protest is avoided (f).
 - (20)—It should seem that the drawer of a bill may also, in order to avoid 20thly.

ante, 181.

(y) Jackson v. Hudson, 2 Campb. 447; (Chit. j. 799).

(2) 1 Pardess. 346, 480; 4 id. 210, 354.

(a) Ante, 151 to 154. (b) 1 Pardess. 351, 394, 437, 438; supra, note (y).

(c) Id. 438. But see as to these words in an indorsement, Leonard v. Wilson, 2 C. & M.

(x) Rex v. Hunter, Russ. & Ry. C. C. 511; 589; 4 Tyr. 415, S. C.; post, Ch. VI. s. i. Re-exnte, 181.

(y) Jackson v. Hudson, 2 Campb. 447; is not bound to present the bill to the referee for Expenses.

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payment till the day after dishonour by the drawee. See 6 & 7 Will. 4, c. 58, post, Ch. IX. s. i. Presentment-Time of.

(d) Id. Ibid. (e) Id. Ibid.

(f) 1 Pardess. 450.

II. Their Parts and particular

discussion and litigation respecting the amount of re-exchange and expenses, in the event of the bill being returned for non-acceptance *or non-payment, Requisites. anticipate and limit what shall be the extent of claim upon him or the in-[*166] dorser, by subscribing, "In case of non-acceptance or non-payment, re-exchange and expenses not to exceed £--," (a specified sum). And any holder taking a bill with any such words subscribed will be bound by the limit(g).

21stly. Of Subscribing Witnesses.

(21)—In general no witness is essential to the validity of a bill of exchange or promissory note(h); but in the case of bills drawn for a less sum than 51. a witness is necessary (i), and in other cases, if there be a subscribing witness, the instrument must be proved by subportaing him(k). But if he purposely keep out of the way, or diligent search has ineffectually been made with reference to his residence, his attendance will be dispensed And though his hand-writing must be proved, that of the drawer in such case need not be proved (m). In France the testimony of witnesses is not admissible to add to the terms of the written contract(n); and the same rule prevails in this country unless to establish illegality or fraud, or want of or failure in the consideration(o).

Letter of Advice.

When a bill is about to be, or has been drawn upon a person resident at a distant place, we have seen(p) that it is recommended that the drawer do, by a separate conveyance, send a letter of advice to the drawee, stating the sum to be paid, and the terms of the bill, and the funds out of which the drawee is to be re-imbursed, and that without having received some such communication, the drawee may and ought to refuse to accept(q). precaution will prevent fraudulent alterations, which have not unfrequently been affected, by discharging the sum written in the body of the bill, and introducing a larger sum before the drawee has received advice (r).

Of mistakes in Bill or Note.

In the French law there are certain rules prescribed as to the consequences of defects in bills, and who shall take advantage of them(s). But our law contains no express provisions on the subject.

If, however, by mistake a bill or note has been drawn in terms different to the intention of the parties, the error may be corrected by consent of such

parties, and this without requiring any fresh stamp(t).

Of Courts

And it should seem that a court of equity will relieve in this respect even of Equity against a surety as well as a principal, and compel all parties to give a prop-compelling Parties to er bill or note according to the original intention; as where the makers of a give the in- note intended that it should be several as well as joint, but it was drawn ontended In- ly as a joint note (u). And although in general no *relief can be obtained in [*167] equity upon a promissory note void at law for want of a stamp(x), yet where the plaintiff had received a promissory note without a stamp, the court di-

- (g) See post, Part II. Ch. VI. Sum recoverable-Re-exchange, as to the utility of such words; and see 1 Pardess. 461, &c.
- (h) Marius, 14.
 (i) Ante, 108; 17 Geo. 3, c. 30, s. 1.
 (k) Lemon v. Deane, 2 Campb. 636;
 M'Craw v. Gentry, 3 Campb. 232, (Chit. j. 361); post, Stone v. Metcalf, 1 Stark. 53, (Chit. j. 943); post, Part II. Ch. V. s. j. Evi-
- (1) Burt v. Walker, 4 Bar. & Al. 697, and cases there cited.
- (m) Page v. Newman, Mood. & M. 79; Kay v. Brookman, id. 286; post, tit. Evidence.

- (n) 1 Pardess. 345.
- (o) Ante, 127, 69.

(p) Ante, 162.

(q) 1 Pardess. 334, 335, 478, 475; post, Ch. VII. s. ii. Acceptance.

- (r) See Bulkeley v. Butler, 2 Bar. & C. 434; 3 D. & R. 625, (Chit. j. 1193); ante, 71. note (q)
 - (s) 1 Pardess. 478 to 489.
- (t) See cases as to alteration of bills, post, 80C. V.
- (u) Rawstone v. Parr, 8 Russ. 424, 529. See other cases Chitty's Eq. Dig. tit. Mistake.
 (x) Toulmin v. Price, 5 Ves. 240; ante, 125.

PART I

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rected a proper note to be made conformable to the agreement between the II. Their

On the other hand, a court of equity will, when justice requires, restrain Injunction the negotiation of a bill or note unduly obtained, and even order its cancel- in Equity lation(z).

articular Requisites. to prevent Negotiation and compel Delivery up of Bill, &c.

III. Construction of Bills and Notes, and how given EFFECT to.

Bills of exchange and promissory notes, like every other contract, are to III. How be construed in such manner as, if possible, to give effect to the intention of construed the contracting parties; and, indeed, our courts, sensible how peculiarly and given conductive the negotiability of these instruments is to the ease and increase Effect to of trade, adopt a still more liberal mode of construing them than any other instrument(b)(1).

It has been observed by a celebrated writer on moral philosophy (c), that "every contract should be construed and enforced according to the sense in which the person making it apprehended the person in whose favour it was made understood it; which mode of interpretation will exclude evasion, in cases in which the popular meaning of a phrase and the strict grammatical signification of words differ, or in general whenever the contracting party attemps to make his escape through some ambiguity in the expression which he used." These observations are applicable to the mode of construing a bill or note; thus, in a case before Lord Macclesfield, where a man, for a past consideration, gave a person a promissory note, in the beginning of which it was mentioned to be given for "twenty pounds borrowed and received," but at the latter end were the words, "which I promise never to pay;" it was decided that the payee might recover it, because the person making the note had intentionally excited expectations which he ought to satisfy (d); so if a bill be drawn payable to the order of a fictitious person, it may ut res magis valeat quam pereat be recovered upon by a bona fide holder against all the parties privy to the transaction as a bill payable to bearer, on the principle, that as they gave currency to the instrument, which they knew could never be paid to the order of the fictitious payee, the law will presume they intended that the formality of indorsement should be waived (e).

(y) Aylett v. Bennett, 1 Anstr. Rep. 45, (Chit. j. 494); Chitty's Eq. Dig. titles Agreement-Specific Performance.

(z) Ante, 98 to 101; post; Chitty's Eq. Dig. tit. Practice-Injunction.

(a) As to the construction of contracts in general, see Com. Dig. tit. Parols, (A 18); 1 Pardess. 454; 4 id. 196, 205, 209, 210, 211, 220; Chitty, jun. on Cont. 19 to 28; 3 Chit. Com. Law, 106 to 118; 3 Stark. on Evid. 915 to 1055.

(b) Per cur. Hotham v. East India Company, Dougl. 277.

(c) Paley, 126; Anderson v. Pitcher, 2 Bos. & Pul. 168.

(d) Cited in Simpson v. Vaughan, 2 Atk. 32; ante, 131.

(e) Gibson v. Minet, 1 Hen. Bla. 586, (Chit. j. 479); ante, 157, 159; Ex parte Bank of Scotland, 19 Ves. 811, 812; 2 Rose's Bank. Cas. 201, (Chit. j. 927).

⁽¹⁾ Orders for goods, in the hands of the drawee, are prima facie evidence of goods sold to the drawer delivered to the payee at his request: not so with orders for money; they are presumed to be drawn, nothing appearing to the contrary, upon funds in the hands of the drawee, and if paid, give no cause of action against the drawer, unless that presumption is rebutted by other evidence. Alvord v. Baker et al., 9 Wend. Rep. 323.

III. How Bills, &c. construed and given Effect to. strued according to law of country where made. [*168]

Effect is also to be given to the intention of the parties according to the law of the country where the contract is made, and in which it is to be performed, and not according to the law of the *country into which either or all of them may remove (f); for what is not an obligation in one place cannot Bills, &c. by the laws of another country become such in another place(g). to be con- tinction between that part of the law of the foreign country where a personal contract is made which is adopted, and that which is not adopted by our courts, is, that so much of the law as affects the rights and merits of the contract, all that relates ad decisionem litis, is adopted from the foreign country—so much of the law as affects the remedy only, all that relates ad litis ordinationem, is taken from the lex fori of that country where the action is The construction or interpretation of the contract, therefore, must be governed by the law of the country where the contract was made—lex loci contractus; the mode of suing, and time within which the action must be brought, must be governed by the law of the country where the action is brought—in ordinandis judiciis, loci consuctudo ubi agitur(h). The law of France, by which an indorsement in blank does not operate as a transfer of a bill or note, is a rule which regulates the interpretation of the contract; and, therefore, the holder of a bill or note drawn in France, and indorsed there in blank, cannot recover against the acceptor or maker in the courts of this country, at least not in his own name (i). So in an action here against the Bank of England on their promissory note, upon an indorsement in France, the Court of King's Bench said, "the plaintiff ought to have proved that by the law of France such a note was negotiable (k);" and where the defendant gave the plaintiff in a foreign country, where both were resident, a bill of exchange, drawn by the defendant upon a person in England, which bill was afterwards protested here for non-acceptance, and the defendant afterwards, while still resident abroad, became bankrupt there, and obtained a certificate of discharge by the law of that state, it was held, that such certificate was a bar to an action here, upon an implied assumpsit to pay the amount of the bill in consequence of such non-acceptance in England, because such implied contract was made abroad (l).

The time of payment is, however, in general to be calculated according to the law of the country where the bill is made payable(m); and upon a bill drawn at a place using one style, and payable at a place using the other, if the time is to be reckoned from the date, it shall be computed according to the style of the place at which it is drawn, but otherwise according to the style of the place where it is payable, and in the former case the date must be reduced or carried forward to the style of the place where the bill is payable, and the time reckoned from thence, because it must be supposed that the parties, in framing the bill, intended that it should be payable according to the law of the place where payment was to be made, and consequently

(f) Burrows v. Jemino, Stra. 733; Sel. Ca. 144, (Chit. j. 265); Potter v. Brown, 5 East, 130, (Chit. j. 694). And see argument in Wynne v. Callendar, 1 Russ. 295.

(h) Huber r. Steiner, 2 Scott, 304; 2 Bing. N. C. 202; 1 Hodges, 206, S. C.; Trimbey v. Vignier, 1 Bing. N. C. 151; post, 170, n. (b).

See further as to the remedy, post, 169.
(i) Trimbey v. Vignier, 1 Bing. N. C. 151;
4 Moore & Scott, 695; 6 Car. & P. 25, S. C. (k) De la Chaumette v. Bank of England, 9 Bar, & C. 215; Dans. & L. 319; 2 Bar. &

Ad. 385, (Chit. j. 1419, 1542).
(1) Potter v. Brown, 5 East. 124, (Chit. j.

(m) Beawes, pl. 251; Mar. 112.

⁽g) Melan v. De Fitzjames, 1 Bos. & Pul. 141; Talleyrand v. Boulanger, 3 Ves. 447; Gienar v. Meyer, 2 Hen. Bla. 603; Mostyn v. Fabrigas, Cowp. 174; Robinson v. Bland, Burr. 1077, (Chit. j. 255); Folliott v. Ogden, I Hen. Bla. 123; Alves v. Hodgson, 7 T. R. 242, (Chit. j. 584); Da Costa v. Cole, Skin. 272, (Chit. j. 778). Potter a Brown K. Fart. 180 (Chit. j. 1778). 179); Potter v. Brown, 5 East, 180, (Chit. j. 694); Johnson v. Machielyne, 3 Campb. 44.

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that was impliedly part of the contract(n). It has been observed(o), that III. How this is contrary to the reason and the nature of the thing; yet other writers Bills, ¢ertain a very different opinion; and it is said that a bill of exchange is and given considered in this respect as having been made at the place where it is payable, Effect to. according to the maxim, contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit, and that consequently the contract should be construed and regulated according to the laws and usage of that place to which the contracting parties have understood themselves subject, following the other rule, in contractibus veniunt ea quæ sunt moris et consuctudinis in regione in quâ contrahitur(p).

This doctrine was at one time extended even to the substance of the rem- But the edy, or mode of enforcing payment, and it was considered, that although the Remedy form of the remedy must depend on the laws of the country in which the according creditor proceeds, it will, in respect of the extent of it, be subject to the to the Law same regulations and restrictions as if it had been pursued in the country of the where the contract was made; and, therefore, where a man in France enter- where pured into a contract to be there performed, and the fulfilment of it could not sued. in that country be enforced by arrest, it was held, by a majority of the judges, that he could not in this country be holden to bail(q)(1). But this

(q) Melan v. De Fitzjames, 1 Bos. & Pul. 141; Pedder v. Mac Master, 3 T. R. 609; Potter v. Brown, 5 East, 124, (Chit. j. 694); but see Imlay r. Ellefsen, 2 East, 255; Tidd, 9th edit. 211.

As to the form of the action or remedy by which a contract is to be enforced, a different rule

⁽n) See Bayl. 5th edit. 249; Mar. 75, 89 to 92, 101 to 103.

⁽o) Kyd, 8.

⁽p) Poth. Pl. 155, and the notes of M. Hutteau in his edition of Pothier, p. 241. See 5 B. & C. 443.

⁽¹⁾ Many cases have occurred in the courts of the United States, which have drawn in question the operation of the lex loci contractus. The rule is well settled, that the law of a place where a contract is made, is to govern as to the nature, validity, and construction of such contract; and that being valid in such place, it is to be considered equally valid, and to be enforced every where, with the exception of cases in which the contract is immoral or unjust, or in which the enforcing it in a state would be injurious to the rights, the interest, or the convenience of such state or its cit-This doctrine is explicitly avowed in Huberus de conflictu Legum, and has become incorporated into the code of national law in all civilized countries. Pearsall v. Dwight, 2 Mass. Rep. 84. Lodge v. Phelps, 1 John. Cas. 139. Smith v. Smith, 2 John Rep. 235. Ruggles v. Keeler, 3 John. Rep. 263. Thompson v. Ketcham, 4 John. Rep. 285. 8 John. Rep. 188. Van Rough v. Van Arsdaln, 3 Caines' Rep. 154. Warder v. Arell, 2 Wash. Rep. 282, and the cases cited in Van Reimsdyk v. Kane, 1 Gallis. Rep. 371, 375.

Ticknow v. Roberts, 11 Current Law and the cases cited in Van Reimsdyk v. Kane, 1 Red 130. Ret. when it is made with reference to ry's Louis. Rep. 14; Harman v. Harman, t Bald. 130. But when it is made with reference to the performance of an act in another country, which is regulated by its laws, it must be executed with the formalities required where it is to be performed. Ibid. It seems to follow, that if a contract be void by the law of the place where it is made, it is void every where; and that a discharge of a contract in the place where it is made, shall be of equal avail in every other place. Van Schaick v. Edwards, 2 John. Cas. 355. Baker v. Wheatou, 5 Mass. Rep. 509. Thompson v. Ketcham. Smith v. Smith; and the cases cited in 1 Gallis. Rep. 371. A discharge, therefore, under the insolvent or bankrupt law of a state, (supposing it to be conditional) is a good discharge of a contract made there, in every other state where a suit may be brought to recover on such contract. James r. Allen, 1 Dall. Rep. 188. Miller v. Hall, 1 Dall. Rep. 229. But it seems to have been held that this doctrine only applies where both of the parties are citizens of, or individuals in, the state at the time when the contract was made. Harris c. Mandeville, 3 Dall. Rep. 256. Proctor v. Moore, 1 Mass. Rep. 198. Buker v. Wheaton, Smith v. Smith. But see Hicks v Brown, 12 John. Rep. 142. And such a discharge will not be valid against a suit upon a contract made or to be executed in another state, whether it be a foreign state, or the state where the suit is brought. Van Rough v. Van Arsdaln, 3 Caines' Rep. 154. Smith v. Smith, Thompson v. Ketcham, 4 John. Rep. 285. \ Woodhull v. Wagner, 1 Bald. 296, where the decisions of the U. S. Supreme Court on State insolvent laws are collected and classed. \ S. John. Rep. 189. Van Reimsdyk v. Kane, Shieffelin v. Wheaton, 1 Gallis. Rep. 441. However, in Connecticut a discharge under the insolvent laws of that state has been held a good ever, in Connecticut a discharge under the insolvent laws of that state, has been held a good discharge of a contract entered into in another state with the citizens of another state. Barber v. Mintum, 1 Bay's Rep. 186.

construed and given Effect to.

III. How latter doctrine was in a late case over-ruled, and it was decided, that, in a suit between parties resident in England, a contract made between them in a foreign country, although the contract is to be interpreted according to the foreign law, yet the remedy must be taken in all respects according to the law here, and that, therefore, one foreigner may arrest another in England for a debt which accrued in Portugal, while both resided there, though the Portuguese law does not allow of arrest for debt(r).

> (r) De la Vega v. Vianna, 1 Bar. & Adol. 284. Lord Tenterden, C. J. said, "That this was an application to discharge the defendant, who had been arrested upon mesne process, out of custody on filing common bail. The plaintiff and defendant were both foreigners; the debt was contracted in Portugal, and it appears that by the law of that country the defendant would not have been liable to arrest. It is contended on the authority of Melan and the Duke de Fitzjames, that he is entitled to the relief now sought. We are, however, of opinion that be In the case of Melan v. De Fitzjames, the distinction taken by Mr. Justice Heath, who

differed from the other judges, was, that in construing contracts, the law of the country in which they are made must govern; but that the remedy upon them must be pursued by such meaus as the law points out where the parties reside. This doctrine is said to correspond with the opinions of Huber and Voet, and we think, on consideration of the present case, that the distinction laid down by Mr. Justice Heath ought to prevail. A person suing in this country must take the law as he finds it; he cannet, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any

prevails, for the recovery must be sought, and the remedy pursued according to the lex fort, not prevails, for the recovery must be sought, and the reduced partials and the reduced partials the lex loci contractus. Dixon's Ex. r. Ramsay's Ex., 3 Cranch Rep. 324. Nash v. Tupper, 1 Caines' Rep. 402. Ruggles v. Keeler, 3 John. Rep. 268. Pearsall r. Dwight, 2 Mass. Rep. 84. Smith r. Spinola, 2 John. Rep. 198; and the cases cited 1 Gallis. Rep. 371. 376. Bird r. Caritat, 2 John. Rep. 342. Sicard v. Whale, 11 John. Rep. 194. \(\rangle\$ Woodhull r. Wagner, suppress. Bainbridge v. Wilcocks, 1 Bald. 536. \rangle\$ Therefore the statute of limitations of the state pra. Bainbridge v. Wilcocks, 1 Bald. 536. \ Therefore the statute of limitations of the state where the contract is made, has been held to be no bar to an action in another state, for it is only a modification of the remedy. Pearsall v. Dwight, Ruggles r. Keeler. But the statute of limitations of the state of limitations of limitations of the state of limitations of limit tations of the state where the suit is brought is a good bar. Nash v. Tupper, Ruggles v. Keeler, Hubbell v. Cowdrey, 5 John Rep. 132; and if a note be negotiable by the law of the place where the suit is brought, but not by that of the place where it was made, an action may be maintained by the indorsee in his own name. Lodge v. Phelps, 1 John. Cas. 139, S. C. 2 Caines' Cas. in Err. 321. And a discharge under an insolvent law of a state which simply protects the debtor from arrest or imprisonment is no bar to a suit in another state, for it is held to be limited to the person only, without discharging the debt, and local in its effects. White v. Canfield, 7 John. Rep. 117.

It has been held that a tender of payment of bills of credit, which would be good by the law of the place where the contract was made, would be a good bar in every other state, where a suit should be brought. Warder v. Arell, 2 Wash. 282. And it seems to have been thought that a stay of execution upon a foreign judgment, by the law of the place where the judgment was recovered, would be so far recognized here, as to exempt the party from arrest for the debt, and if arrested would entitle him to a discharge on common bail. Conframp c. Burel, 4 Dall. Rep. 419. and see Melan v. Fitzjames, 1 Bos. & Pul. 138. But the contrary seems asserted by Lord Ellenborough in Imlay v. Ellefsen, 2 East's Rep. 455, and see Sicard v. Whale, 11 John. Rep. 194.

And as the law of the place where the contract is made, regulates the rights and duties of the parties, if a bill be drawn and indorsed in a place, by a person resident there, he is answerable upon such indorsement only so far as the laws of that country bind him upon a bill so drawn and indorsed. Powers v. Lynch, 3 Mass. Rep. 77. See also Hicks v. Erown, 12 John. Rep. 142. And upon a bill drawn payable in a foreign country, whether payment in the current money of that country be good or not, depends upon the intention of the parties, and their reference in the contract to the lex loci. Seabright v. Galbraith, 4 Dall. Rep. 325. For where it appears that the performance of the contract in the contemplation of the parties, has relation to the laws of another country, the contract must be interpreted according to those laws Powers v. Lynch. Hicks v. Brown.

The indorsement of a bill is downed a new substantive contract; and therefore the indorser will be liable to damages on non-payment of a bill, according to the law of the place where the indorsement was made. Semb. Slacum v. Pomeroy, 6 Crunch, 221. The usage of the place on which a bill is drawn, or where payment is demanded, uniformly regulates the number of days of grace which must be allowed. Bank of Wushington v. Triplett, 1 Peters, 25, 34. See Mills v. Bank of the United States, 11 Wheat. 431. Brent's Exrs. v. Bank of the Metropolis, 1 Peters 80 ters, 89.

For other cases respecting the operation of the lex loci, see Van Schaick v. Edwards, 2 John. Cas. 355. Harrison v. Sterry, 5 Cranch, 289. Ludlow v. Van Renssellaer, 1 John. Rep. 94. Winthrop v. Pepont, 1 Bay's Rep. 468. Green v. Sarmiento, 1 Peter's Rep. 74.

PART !

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And persons trading abroad in such mode as would constitute a partner- III. How ship here, may sue here as partners for consignment sent to this country, Bills, &c. though they cannot sue at the place of trading, by reason of the particular and given law of that country(s).

Effect to.

*So with respect to the *limitation* of action, it has recently been determin-[*170] ed that the French law of prescription as to bills and notes appertains ad tempus et modum actionis instituendæ and not ad valorem contractús, and, therefore, that the payee of a promissory note made in France might sue the maker in this country at any time within six years, though by the law of France he would have been limited to five years(t).

And, on the other hand, it has been held that though by the law of the country where the contract was made the party would have forty years to proceed on it, he would only have six years in England(u). And so far has this doctrine been carried, that a holder was allowed to recover in an English Court on a bill drawn in France on a French stamp, though, in consequence of its not being in the form required by the French code, he had failed in an action which he brought on it in France(x). So we have seen that our courts do not regard the revenue laws of a foreign country, and even give effect to contracts in fraud of the foreign country, or even of the private subjects thereof(y). According, however, to the law of France, the time of limitation prescribed in the country where the contract was made would be given effect to wherever the contractor should be sued(z).

And in *England* our courts, besides giving effect to the *contract itself* ac- Foreign cording to foreign law, must also give effect to the foreign law in some other to be given collateral respects, for otherwise the greatest injustice might ensue; thus in Effect to as France, a protest for non-payment is not to be made till the day after a hill to Protests, falls due, whereas in England it is to be made on the very day. It cannot &c. be doubted that if the hill were payable in France, the English courts must give effect to the French instead of the English law(a). So in France, a protest is always necessary, while in England a protest is only necessary in the case of foreign bills (b); certain formalities are also essential in the former country to the validity of an indorsement of a bill or note, and no indorsement in blank can be made there, while in this country such mode of indorsement is not only permitted, but is the more common form; and it has lately been decided that these formalities must be complied with to enable the indorser to sue in this country in his own name (b). And in cases of

superior advantage which the law of this country may confer. He is to have the same right which all the subjects of this kingdom are entitled to." See ante, 168.

(s) Shaw v. Harvey, Mood. & M. 226 — Lord Tenterden, C. J. after referring to the articles, said, "This may be the governing law of Holland, but it will not prevent persons from suing here as partners. If they really are such, they may maintain an action for goods sold and delivered here. These are merely municipal regulations, preventing, as it seems, their suing as partners where they are in force, but not affecting the general rights of the parties." A verdict was then taken for the plaintiff, subject to a reference as to the amount.

(t) Huber v. Steiner, 2 Bing. N. C. 202; S. C. 2 Scott, 304; 1 Hodges, 206, ante, 168. Such actions, however, are not favoured. See the same case, 4 Moore & S. 328; 2 Dowl. 781. See post, Part II. Ch. IV. Defences and Pleas.

(u) The British Linen Company v. Drummond, 10 Bar. & Cress. 903. An action was brought here on a written engagement entered into in Scotland; and although by the law of this country the Statute of Limitations had attached, it was contended that the Scotch law must prevail, which would have allowed forty years for commencing the suit. But the court of King's Bench thought the case must be governed by the law of the country in which the action was brought. Cited in De La Vega v. Vianna, 1 Bar. & Adol. 234; and Huber v. Steiner, 2 Bing. N. C. 202; ante, 168.

(x) Wynne v. Jackson, 2 Russ. 351; sed guære. See Trimbey v. Vignier, 1 Bing. N.

C. 151, infra, note (b). (y) Anle, 121, note (y).

(z) 4 Pardess. 223. (a) 4 Pardess. 227.

(b) Trimbey v. Viguier, I Bing. N. C. 151;

III. How Bills, &c. construed and given Effect to. foreign marriages, in whatever country *they may have taken place, and although the parties be British subjects, yet they are legal if celebrated according to the law of the country where they took place, however different from that prescribed in England(c).

Foreign Law on this subject.

Some of the decisions referred to seem to depart from the admitted rule, that the contract itself ought to be given effect to according to the lex loci where it was made. In the French law, there is much learning on this subject, and the rule itself seems much the same as that laid down in the English courts, but they appear to be more liberal in the application of it, and give more extensive effect to foreign law than adopted in this country (d). Thus it has been there considered, that if a bill of exchange be made in a foreign country, defective according to the French law, but valid according to the foreign law, it must, nevertheless, be given effect to in the French courts, even against a French indorser, "parce que les regles sur la validité intrinseque des conventions sont derivées du droit naturel, et sont de toutes les legislations." And in the very case of limitations it is laid down, that the law of prescription prevailing in the country where the contract was made, though different from that in France, must in their courts be given effect to(e). The difficulty of ascertaining correctly the foreign law is admitted, but it is there considered that such difficulty does not constitute any sufficient ground for relieving the courts from the necessity of giving full effect to the contract according to the law of the place where it was made (f).

The Language of the Bill must be observed.

It has been observed by a celebrated writer on the law of Nations(g), that it is the first general maxim of interpretation, "that it is not allowable to interpret what has no need of interpretation;" and that when a deed is worded in clear and precise terms, when its meaning is evident, and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such a deed naturally presents; to go elsewhere in search of conjectures, in order to restrict or extend it, is but to attempt to elude it, and if this dangerous method were once admitted, every deed might be rendered useless. Les termes de la contravention doivent être consideres avant tout(h). It seems that on similar principles, our courts, notwithstanding their anxiety to give effect to the intentions of the contracting parties, have laid down as a general rule, that all latitude of construction must submit to this restriction, namely, that the words and language of the deed bear the sense which is

4 Moore & S. 695, S. C. It was proved at the trial by a French advocate called as a witness on the part of the defendant, that by the law of France a protest must always be made, and that no action could be maintained upon promissory notes and bills of exchange unless they were 'protested; and the inclorement to the plaintiff being in blank, and not according to the formalities required by the Code de Commerce, articles 136, 137, 138, was invalid, and passed no interest to the holder. And the court so held after argument in banc; but gave no opinion as to the necessity of protest. See further as to indorsement, post, Ch. VI. s. i. Transfer—Modes of.

(c) See Lacon v. Higgins, 3 Stark. R. 178; Dowl. N. P. C. 38, S. C.; infra, note (f). See also Doe d. Birtwhistle v. Vardill, 5 B. & C. 489, 452; 8 D. & R. 185, S. C.

C. 489, 462; 8 D. & R. 185, S. C. (d) See 1 Pardess. 455; 4 id. 196, 205, 209, 210, 211, 220, 223. "Des conflits de legislation relatif au commerce." "De l'application de lois estrangères relatives à la forme des actes." De l'interpretation des actes faits en pays etrangers." "De l'execution des actes faits en pays estrangers."

(e) 4 Pardesa. 223.

(f) 4 Id. 216, &c. In many cases, particularly with respect to foreign marriages, it is admitted that the lex loci must be ascertained and given effect to; see the cases collected 1 Bla. Com. by Chitty, 440, note 31, and supra. n. (c). And if English courts will take any cognizance of foreign transactions, semble that full effect should be given to them, the same as if discussed in the proper country. And see Alivon v. Furnival, 1 C. M. & R. 277; 4 Tyr. 751. S. C. see nest. 820. (18).

751, S. C. see post, 820,(18).
(g) Vattel, 244; et vide Powell on Contracts, tit. Construction.

(h) 4 Pardessus, 216, 217, &c.

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attempted to be put upon them (i). However, in the case of bills and other III. How negotiable instruments, our courts have relaxed this rule; and therefore in Bills, &c. the case just alluded to, where *an action was brought by an indorsee of a and given bill of exchange against the acceptor, and he could not prove an indorse- Effect to. ment by the payee, evidence was admitted to prove that the payee was a [*172] fictitious person, and consequently could not indorse it; and it was adjudged, that as the drawer and acceptor knew of such fact, and the holder did not, the bill should against them operate as a bill payable originally to bearer, The courts have and that the holder might recover thereon as such(k). always, in mercantile affairs, endeavoured to adapt the rules of law to the course and method of trade and commerce, in order to promote it; and when new cases have arisen on the mercantile law, they consult traders and merchants as to their usage in regard to bills (l)(1).

(i) Anderson v. Pitcher, 2 Bos. & Pul. 168; Hotham r. East India Company, Dougl. 277; Burnet v. Kensington, 7 T. R. 214.
(k) Gibson v. Minet, 1 Hen. Bla. 569, (Chit. j. 479); and see ante, 157, note (y); 167 note P. 99, in notes.

(1) Per Willes, C. J. in Stone v. Rawlinson, Willes, 561; Barnes, 164, (Chit. j. 313); and see Carvick v. Vickery, Dougl. 653, (Chit. j. 410); ante, 57, note (l); but see Holt's C. N.

(1) It may be well to collect in this place a number of cases in which a legal construction has

been put upon written contracts, which do not properly fall under any other head.

A note as follows, "Due the bearer hereof, 3l. 18s. 10d. which I promise to pay to A. T. or order, on demand," is a note payable to A. T. or order, and not to the bearer, and therefore cannot be transferred but by indorsement. Cock v. Fellows, 1 John. Rep. 143.

An instrument in writing, by which A. directed B. to pay C. or bearer 400 dollars, and take up A.'s note of that amount, though the instrument be accepted, is not a bill of exchange. Cook v. Satterslee, 6 Cowen, 108. But a request to pay the amount of a promissory note, written underacath the same, is operative as a bill of exchange, and after acceptance, the drawee is liable. Leonard v. Mason, 1 Wend. 522. And so, if the place of payment of a note is designated in a memorandum at the bottom; or if to the acceptance of a bill, a place of payment be added, with the assent of the holder, such memorandum or qualification becomes a part of the contract. Tuckerman v. Hartwell, 3 Greenl. 147.

Where a person adds at the bottom of a note of another, that he acknowledges himself to be holden as a surety for the note, he is in law deemed an original joint promissor. Hunt v. Adams, 6 Mass. Rep. 219. Leonard v. Vredenburgh, 8 John. 295.

If a person write his name on the back of a note in blank, as guarantor, and authorize another person to write a guaranty over his name, it is good and may be filled up accordingly. Ulen v. Kittredge, 7 Mass. Rep. 233. Moies v. Bird, 11 Mass. Rep. 436. If a note be made payable to A. or order, and a person who had previously intended to have

become indorser thereon, write on the back of the note, " for value received, I undertake to pay the money within mentioned to A ;" he will be held as an original promissor. White v. How-land, 9 Mass. Rep. 314. Leonard v. Vredenburgh, Bailey v. Freeman, 11 John. Rep. 221.

The payee of an accommodation note not negotiable, indersed it in blank to a creditor of the maker, intending thereby to become security for the debt of the maker to the creditor; it was held that the creditor might lawfully write over the indorsement " for value received, I undertake to pay the moncy within mentioned to A. (the creditor;") and so hold the payee as an original promissor. Joscelyn v. Ames, 3 Mass. Rep. 274.

And if a note be payable to the creditor only, and another person indorse his name in blank on the note as security for the payment, he may be treated as an original promissor. Moies v. Bird.

If a bill be drawn in England, on a firm in Boston, payable to the drawer himself or order, and be accepted by one of the firm then in England, payable in London, it is a foreign bill of exchange, and on non-payment it is to be governed by the law of Massachusetts as to damages. Grimshaw v. Bender, 6 Mass. Rep. 157.

Where a note dated the 15th of July, was payable immediately with interest from the first day of June, it was held to mean the first day of the preceding June. Whitney v. Crosby, 8 Caines' Rep. 89.

Where the payee of a note payable to himself or order, indorsed on it, "I guarantee the payment of this note within six months," and signed his name thereto, such a signature was held to operate a transfer of the note to every subsequent holder, even supposing that the guaranty should be construed a mere contract between the payee and his immediate indorsee. Upham r. Prince, 12 Mass. Rep. 14. But see Tyler v. Binney, 7 Mass. Rep. 479.

Such a guaranty by a third person, made at the time of the execution of the note is an original collateral undertaking, and is sustained by the original consideration in the note. Leonard v. Vredenburg, 8 John. Rep. 29. Bailey v. Freeman, 11 John. Rep. 221.

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IV. DELIVERY OF A BILL OR NOTE TO THE PAYEE, AND EFFECT

IV. Delivery of a Bill or Effect thereof.

A bill of exchange, &c. in general is delivered by the drawer to the payee, and where it consists of several parts, as is usual in case of foreign bills, Note to the each ought to be delivered to the person in whose favour it is made, unless one part be forwarded to the drawee for acceptance, and in that case the rest must be so delivered; were it otherwise difficulties might arise in negotiating a bill or obtaining payment of it(m), though a delivery is not essential to vest the legal interest in the payee (n)(1).

When it suspends or destroys Remedy for prior Debt.

In general one contract not under seal cannot be extinguished by another similar contract(o); and a mere gratuitous promise, without any new consideration, to give time for the payment of a pre-existing debt is not binding (p). But a person by taking a bill of exchange or promissory note in satisfaction of a former simple-contract debt, or of a simple-contract debt created at the time, suspends his remedy, and is precluded from afterwards waiving it and suing the person who gave it him for the original debt before the bill has been dishonoured; for the taking of the bill is prima facie a satisfaction of the debt and at least amounts to an agreement to give the person delivering it credit for the length of time it has to run(q)(2). And if the holder of a bill

(m) Ante, 155.

(n) Smith v. M'Clure, 5 East, 477, (Chit. j. 699). The plaintiff declared on a bill payable to his own order, and averred that he delivered it to the defendant, to whom it was addressed, and who accepted it according to the usage and custom, &c. and by reason of the premises, &c. the defendant became liable to pay. The defendant demurred specially, and assigned as cause that it was not alleged that the defendant re-delivered the bill to the plaintiff. Per curi-am, the acceptance of the bill, which was admitted by the demurrer, and must be taken to be a perfect acceptance, vested a right in the drawer to sue upon it, and if, after such an acceptance, the acceptor improperly detained the bill in his hands the drawer might nevertheless sue him on it, and give him notice to produce the bill, and on his default give parol evidence of it.

- (o) Story r. Atkins, Lord Raym. 1430, (Chit. j. 960); Scott v. Surman, Willes, 406; Taylor r. Wasteneys, 2 Stra. 1218.
- (p) De Symons v. Minchwick, 1 Esp. R. 430. (q) Kearslake v. Morgan, 5 T. R. 513, (Chit. j. 520); post, 176, note (t); Stedman r. Gooch, 1 Esp. R. 3. Assumpsit for goods sold; defence that plaintiff had taken three promissory notes of Finlay; it appeared that these notes had been returned to the defendant before they were payable, and it was insisted that the plaintiff, having taken them in discharge of her debt for goods sold, could not maintain an action on her original debt until an actual default in the payment of these notes, as the notes might be paid when they became due, nor should the plaintiff be allowed to judge of the probable or improbable ability of the party to pay at a future day.

 Lord Kenyon said that the law was clear, and

that if in payment of a debt the creditor is con-

Where the payee of a note payable to himself or order, indorsed on it upon a transfer, "I guarantee the payment of the within note in eighteen months, if it cannot be collected before that time; the guaranty was construed not to mean to give an unlimited currency to the note, and no person other than an original party to the guaranty could maintain an action thereon. Tyler v. Binney, 7 Mass. Rep. 479.

Where the promissee of a negotiable note, payable in six months, sold it, having made and signed this indorsement on it, "I guarantee the payment of the within note in six months;" this was held to be an absolute and original undertaking, by which it was the duty of the guarantor

to see that the maker paid the money within the time specified, or to take notice of his neglect and pay it himself. Cobb v. Little, 2 Greenl. 261.

Where the defendant indersed a note not negotiable, obliging himself to pay it if the maker proved insolvent, or ' to make it good,' all that can be required of the indorsee is that he should first use the ordinary means to get payment from the maker before he resorts to the indorser. The rules applicable to negotiable instruments do not apply in such case. Wilson v. Mullen, 3 McCord, 236. See further as to collateral undertakings. Prentiss v. Danielson, 5 Conn. Rep. McCord, 236. See further as to collateral undertakings. Prentiss r. Dan 175. Beckwith r. Angel, 6 Conn. Rep. 315. Smith r. Hawkins, Id. 444.

(1) But it is essential to the validity of a promissory note. Chamberlain v. Hopps, 8 Verm.

(2) Where a bill of exchange is given in payment of goods purchased, there can be no recov-

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take *from the drawer a promissory note in full satisfaction of the bill, he IV. Delivcannot afterwards sue the acceptor of such bill(r). So if a party in a cause ery of a take a promissory note from his attorney for the debt which his attorney has Bill or Note to received from the opposite party, he deprives himself of the summary relief the Payee, by application to the court to make the attorney pay over the money(s). &c. And even on behalf of the crown an extent in aid cannot be issued against a When it person from whom the principal debtor has taken a bill which is not due(t). suspends or On the same principle the acceptance by a creditor of a check in his favour Remedy drawn by the debtor operates as payment unless dishonoured (u). But for prior where the traveller of a tradesman in London called on his employer's debt- Debt. or in the country, and being unable to obtain cash consented, at the request of the debtor, to take an acceptance for the amount, and wrote the whole form of a bill except the name of the drawer, (the traveller having no authority to sign bills, but being in the habit of sending them up to London without a drawer's name to prevent risk by loss), and sent it up to his employer, telling the debtor that he did not think it would be satisfactory, and the employer kept the bill, but did not put his name to it as drawer, it was held that these facts did not amount to proof of the drawing of a bill, so as to prevent the creditor from recovering for his original demand before the instrument purporting to be a bill became due(x). And the taking of a bill is not a suspension of the right to proceed for the prior debt, unless the party delivering it performs all that he engaged to do; and therefore where an action having been brought against the acceptor of a bill of exchange, it was

tent to take a bill or note payable at a future day, he cannot legally commence an action on his original debt until such bill or note becomes payable, or default is made in the payment; but that if such bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer's in his hands and who therefore refuses it, in such case he may consider it as waste paper and resort to his original demand and sue the debtor on it.

Formerly if a writ were issued before the bill was due and the bill was dishonoured bet fore the day of which the declaration was entitled, the action was sustainable; 4 East, 75; 7 T. R. 4; 11 East, 118. But it would now be otherwise; see 2 Will. 4, c. 39; Chit. & H. Stat. 1091.

(r) Surd v. Rhodes, 1 M. & W. 153; S. C. 1 Tyrw. & G. 298; 4 Dowl. 743; 1 Gale, 376; and see Lewis v Lister, 2 C., M. & R. 704; S. C. 4 Dowl. 377; 1 Gale, 320. As to renewed bills, see post

(s) Anon. 3 Law J. 106, K. B. 28th January,1825.

(t) The King v. Dawson, Wightw. 32, (Chit. j. 799). It was pleaded to an inquisition founded on an extent in aid that the defendant had accepted a bill drawn upon him by J. C. (the original debtor) and which did not become due until after the inquisition was taken; the replication stated that the bill was dishonoured, and that the original debtor to the crown had been obliged to take it up; upon demurrer, that as the inquisition was executed before the bill became due the bill could not at that time have been taken up by the said J. C., the court held, that as on the day of taking the inquisition no action could have been maintained by J. C. against the defendant upon this bill of exchange, the interest in the bill at that time being in his indorsee, there was, in fact, at that time no right of action against any person.

(u) Pearce v. Davis, 1 Mood. & Rob. 365. The mere fact of one party drawing a check in favour of another is not evidence of a debt;

(x) Vyse v. Clarke, 5 Car. & P. 403.

ery on a count for goods sold, unless it be shown that the drawer has been legally fixed with the payment of the bill, or has promised to pay it with full knowledge that he was not liable. Jones et al. r. Savage, 6 Wend. Rep. 658.

So, a note due to a bank, which is taken up by the proceeds of a note discounted to renew it, is in general extinguished. Hill v. Bostick, 10 Yerg. 410. And in all cases of notes endorsed, where one is fairly received in renewal of another, it discharges the first, and the second is taken in the usual course of trade," and for a good consideration passing at the time. Nichol v. Bate, Idem, 429

The delivery of a bill of exchange or promissory note as payment, is prima facie, evidence of payment for the goods sold; and it is for the creditor to show that the security has been dishonoured. In general, if it be dishonoured it will not be considered payment, unless the creditor has agreed to run the risk of the bill or note which he takes in payment being bad, or unless he has, by laches, made it his own; in which case it would operate in discharge of the original cause of action. 8 Burge's Col. and For. Law 794. }

ery of a Bill or Note to When it suspends or destroys Remedy for prior Debt. [*174]

IV. Deliv- agreed between the parties that the defendant should pay the costs, renew the bill, and give a warrant of attorney to secure the debt, and the defendant gave the warrant of attorney and renewed the bill, but did not pay the costs, the Payee, it was held that the plaintiff might bring a fresh action on the first bill while the second was outstanding in the hands of an indorsee(y). So if the person delivering a bill, check, or note, knew or *had reasonable ground to expect that it was of no value, the holder, on discovering the fraud, will not be precluded from immediately suing such party on his original liability(z). We have already seen what conduct the holder may pursue when a bill or note given in payment of a debt is upon a wrong stamp(a).

Where one of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, on which bill judgment was recovered, it was held that such judgment was no bar to an action of covenant against the three, such bill, though stated to have been given for the payment and in satisfaction of the debt, not being averred to have been accepted in satisfaction, nor to have produced it in fact(b). So where the maker of a promissory note accepts a bill of exchange drawn by the payee of the note, in lieu of such note, it must, in answer to an action on the note, be distinctly averred that the bill was given as well as taken in satisfaction of the note(c). The taking of a bill or note in payment of rent does not of itself preclude the right of distraining for the rent even before the bill or note become due(d). And the taking a bill or note does not prejudice a prior specialty security so as to preclude the party taking it from recovering interest payable on the specialty (e). And the giving a bill or note for a smaller sum is not in law a satisfaction of a larger sum claimed, and the difference may be sued for (f). An express and clear agreement by the creditor to take a bill as payment at all events, and whether honoured or not, would amount to a payment of the debt(g), but in the absence of such stipulation even a partner of the debtor,

(y) Norris v. Aylett, 2 Campb. 329, (Chit. j. 781). Per Lord Ellenborough. There was to be no extinguishment of the bill until, amongst other things, the costs were paid. If they had been paid this might have brought it within the case of Kearslake v. Morgan, but the agreement remaining unperformed on the part of the defendant the plaintiff reserved to himself the power of rendering the bill available; this is like accord without satisfaction. Verdict for the plaintiff, on his delivering up the substituted bill to the defendant; and see Lumley r. Musgrave, and Lumley v. Hudson, 5 Scott, 230, 238; but see Dillon r. Rimmar, 1 Bing. 100; 7 Moore, 427, (Chit. j. 1170). See post, 820

(z) Stedman v. Gooch, 1 Esp. Rep. 5, (Chit. (2) Stedman v. Gooch, P. Esp. Rep. 5, (Chit. j. 216); hawse v. Crow, Ry. & Moo. C. N. P. 414; Puckford v. Maxwell, 6 T. R. 52, (Chit. j. 531); Owenson v. Morse, 7 T. R. 61; Bishop v. Shilleto, 2 B. & Ald. 329, note (a); Taylor v. Plumer, 3 Maule & S. 362, (Chit. j. 923); 2 B. & P. 518; Gladstone v. Hadwen, 1 Maule & S. 517, (Chit. j. 886); Noble v. Adams, 7

Taunt. 59; Earl of Bristol v. Wilsmore, 1 B. & C. 514; 2 D. & R. 755; Kilby r. Wilson, Ry. & Moo. C. N. P. 178.

(a) Ante, 124, note (s); and see Wilson v.

Vysar, 4 Taunt. 298, (Chit. j. 860).
(b) Drake v. Mitchel, 3 East, 251, (Chit. j. 665); see Sard a. Rhodes, 1 M. & W. 153; ante, 173, note (r)

(c) Crisp v. Griffith, 2 C., M. & R. 159; S. C. 3 Dowl. 752; 1 Gale, 106.

(d) Bul. N. P. 182, note (a); 3 Price, 272; Davis r. Gyde, 4 Nev. & M. 462; 2 Adol. & Ellis, 623, S. C. Quære, whether to an avowry for rent an agreement to take a promissory note as accord and satisfaction could be pleaded in bar, or an agreement to suspend the right of distress until a note taken for the rent should become due; id. ib.

(e) Curtis v. Rush, 2 Ves. & B. 416, (Chit. j. 910).

(f) Thomas v. Heathom, 2 B. & C. 477; 3 Dow. & Ry. 647, (Chit. j. 1197). See post, 820 (20).

(g) Brown v. Kewley, 2 Bos. & Pul. 518; 3 Chit. Com. Law. 131.

^{(1) \(\)} A draft or bill of exchange upon a third person, given by a debtor to a creditor, who stipulates that it shall be in full satisfaction of the debt, when paid, is prima facie evidence of payment of the original debt; and to rebut such evidence the creditor is bound to show, in an action for the recovery of the original debt, diligence in obtaining payment of the bill, and if not paid, notice of non-payment; or, he must excuse the non-presentinent and produce the bill on the trial, to be cancelled. Dayton v. Snell, 28 Wend. 345. }

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unknown until the dishonour, may be sued(h). And if the payee of a pro-IV. Demissory note payable on demand deposit it with a creditor as a security for livery of a advances, and afterwards procure from the maker of the note a bill of ex-Note to the change as in lieu of the note, representing that the creditor wished for a fresh Payee, security, and undertaking to get back and deliver up the note, but which he &c. never does; the creditor, notwithstanding he has been paid the amount of the bill, may also recover upon the note, unless there are circumstances from which a jury can infer that he knew the bill to have been given for the same debt as the note(i).

The taking a bill of exchange or note in satisfaction will in general deter- When it mine a lien. Thus, where the owner of a ship having a lien on the goods Lien. until the delivery of good and approved bills for freight took a bill of exchange in payment, and though he objected to it at the time he afterwards negotiated it, it was held that such negotiation amounted to an approval of the bill by him, and that it was a *relinquishment of his lien on the goods(k). So a [*175] vendor, who takes in payment a promissory note and negotiates it, loses his lien; and such lien is not revived upon the dishonour of the note, which is outstanding in the hands of an indorsee(1). But a vendor does not waive his lien on his estate sold by taking the promissory note or acceptance of the vendee, and receiving its amount by discount(m). And where real property was devised to trustees on trust to sell and pay the produce to the chil dren of the testator, and the children sold the property to one of the executors in consideration of a sum secured by bills payable by instalments, and as to some shares further secured by an assignment of a policy of insurance, and the executor became bankrupt without having paid the bills, it was held that the children all had a lien on the estates for the sums unpaid (n).

When an account for goods sold is settled, and the defendant gives a bill When it of exchange for the amount which remains unpaid, it has been holden that inquiry as the defendant cannot, in an action on such bill, go into evidence to impeach to amount the charges in the account which has been settled, the giving of the bill being of prior conclusive evidence of the sum due(o).

The effect also of taking a bill of exchange or promissory note on account Compels of a precedent debt, is, that when the bill is accepted or note made by a Holder to third person, the creditor cannot proceed in an action for such debt against prove due his original debtor without showing that he has used due diligence to obtain Diligence. payment from such third person(p); and also showing, if the defendant was

- (h) Robinson v. Wilkinson, 3 Price, 538.
- (i) Adams v. Bingley, 1 M. & W. 192. (k) Horncastle v. Farran, 8 B. & Ald. 497; 2 Stark. R. 590, (Chit. j. 1079).

(1) Bunney v. Poyntz, 1 Nev. & M. 229; 4 Bar. & Adol. 568, S. C.

Bar. & Adol. 568, S. C.

(m) Ex parte Loaring, 2 Rose, 79; Grant v.

Mills, 2 Ves. & B. 306, (Chit. j. 898).

(n) Ex parte Latey, 2 Mont. & Ay. 609; 1

Dea. 557, S. C.

(o) Knox v. Whalley, 1 Esp. Rep. 159,

(Chit. j. 528); (sed quære Trueman v. Hurst,

1 T. R. 40, (Chit. j. 430); Chandler v. Dorsett, Finch Rep. 431, (Chit. j. 165); Vin. Abr.

Partner, E 2). The defendant was indebted to the plaintiff 742, for clothes, & c. and gave a to the plaintiff 741. for clothes, &c. and gave a bill of exchange for 841. and received the differ-The bill being dishonoured, plaintiff

brought his action on the bill and for a further sum for clothes furnished since the bill was given. At the trial the defendant was proceeding to impeach the plaintiff's charges contained in the first bill, which was objected to by the counsel for the plaintiff. Lord Kenyon ruled, that up to the time of giving the bill of exchange all matters must be considered as closed, and that the giving the bill must to that effect be taken as conclusive evidence of the sum due at that time.

(p) Smith r. Wilson, Andr. 187, (Chit. j. 285). This was a special case for the opinion of the court. It appeared that the defendant being indebted to the plaintiff for goods sold and money paid, had, in part payment, indorsed to him a note for 1002 drawn by Jones and payable to defendant or order, and at the foot

a party thereto or delivered it to the plaintiff, that the defendant had due nolivery of a tice of the dishonour (q). And *where the buyer of goods hands over to the Note to the seller the promissory note of a third party without indorsing it, it is not ne-Payee, &c. cessary for the seller, in an action for the price of the goods, to prove pre-[*176] sentment of the promissory note to the maker(r). But if the defendant was the acceptor of the bill or the maker of the note, then it suffices merely to produce the instrument on the trial, in order to show that it is not outstanding in a third person's hands(s). It is a good plea, in an action for the original debt, that the defendant delivered a bill or note in payment or for or on account of such debt, and compels the plaintiff to reply and prove that the bill or note was dishonoured, and that due notice thereof was given to the defendant(t).

When the Bill must be producdue Notice of Dishon-

In an action for the original demand, if it appear in evidence that a negotiable(u) bill or note was given, the plaintiff cannot recover without producing the instrument, or proving it in his possession or control(v), or proving Trial, and that it was destroyed(x), or showing that it was on a wrong stamp(y).

our proved. of an account stated between the parties plaintiff wrote "received the contents when the above mentioned bill is paid." Plaintiff indorsed over the note, which became due 28th March, 1735. Jones carried on business and continued his payments till the 13th May following; one question therefore was, whether the plaintiff, by receiving this note and not applying for the money due thereon, had lost his original debt? The court held, that where a note is taken for a precedent debt, it must be intended to be taken by way of payment, upon this condition that the note is paid in a reasonable time, but if the person accepting it doth not endeavour to procure such payment, and the money is lost by his default, it is but reasonable that he should bear the loss; see Ward v. Evans, 2 Lord Raym. 928, 929, 930, (Chit. j. 216); Chamberlain v. Delarive, 2 Wils. 353, (Chit. j. 877).

Hebden v. Hartsink and another, 4 Esp. Ni. Pri. R. 46, (Chit. j. 40). Assumpsit by the plaintiff for wages as a clerk to the defendant. Pleas of non-assumpsit and a set-off. To prove payment of 1401. in part discharge of the plaintiff's demand, the defendants gave in evidence that they had given him bills of the house to that amount. It was contended for the plaintiff, that before this could be deemed a discharge to that amount, the defendants should prove the bills to have been paid. Lord Kenyon said it was not necessary; that where a party took bills in payment of a debt, he would presume the money was received, unless the contrary was shown.

(q) 4 Ann. c. 9, s. 7; Bridges v. Berry, 3 Taunt. 180, (Chit. j. 804); but see Bishop v. Rowe, 8 Maule & S. 362, (Chit. j. 921); as to the necessity of giving defendant notice of dishonour, &c. when he is no party to the bill, post, Ch. X. s. i.

(r) Goodwin r. Coates, 1 Mood. & Rob. 221.

(s) Ante, 124, note (s).

(t) Kearslake v. Morgan, 5 T. R. 513, (Chit. j. 520). Assumpsit for goods sold and delivered and for money lent. The defendant pleaded the general issue, and that as to 4l. 11s. 6d. one W. P. made his promissory note for 10l. payable to

the defendant or order at a time which elapsed before the commencement of the suit, and that the defendant, before the note became due, indorsed it to the plaintiff for and on account of the said sum of 41. 14s. 6d. and of the sum of 51. 5s. 6d. paid by the plaintiff to the defendant; and that the plaintiff accepted and received the note for and on account of those sums; to this plea there was a general demurrer, and it was urged that the plea ought to have alleged that the note was received in satisfaction of the debt; but the court on argument held the plea good, and advised the plaintiff to withdraw his demurrer and reply, which he did; see Sard v. Rhodes, 1 M. & W. 153; Crisp v. Griffith, 2

C., M. & R. 159, ante, 173, n. (r). (u) See Plimley v. Weatley, 2 Bing. N. C. 249; 2 Scott, 423, S. C.; post, Ch. X. . i.

Notice of Dishonour.
(v) Hadwen v. Mendizabel, 10 Moore, 477; 2 Car. & P. 20, (Chit. j. 1271); post, 177. In this case the plaintiff received bills for goods sold and paid them away, but afterwards got them back, and they were, at the time of the trial for the price of the goods, lying protested in the hands of plaintiff's agent sbroad; and it was held he might recover the money due without delivering up the bills, and that defendant noust seek relief in equity if plaintiff did not deliver them up.

(x) Dangerfield v. Wilby, 4 Esp. N. P. C. 159, (Chit j. 648). The declaration contained a count upon a note made by the defendant payable to the plaintiff, and the money counts. At the trial the note was stated to be lost, but no evidence of the fact was offered, nor was there any evidence of its being destroyed or not in existence. It was proved, however, that on the money being demanded, the defendant had apologized for not having paid the money on account of the note. This was the whole of the plaintiff's case, and he contended that the note was only evidence of the consideration (which was stated to have been money lent), and that he might abandon the note and go for the consideration. But Lord Ellenborough said that as the note, for anything that appeared in evidence, hit!

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But it has been recently decided, that although a party, who has, in pay- IV. Dement of a debt for goods sold, received an acceptance of his debtor in pay- livery of a ment cannot in general sue him for the amount whilst the bill is outstanding Note to the in a third person's hands, yet if the bill be dishonoured, the debt for goods Payee, sold may be sued for; and it suffices if the bill be returned to the plaintiff at &c. any time before the trial(z). And where the defendant had given the plaintiff in payment for goods certain bills of *exchange which were afterwards dis- [*177] honoured, and thereupon the latter sued him for the price of the goods, it was held that the plaintiff was not even bound to produce the bills at the trial, and that proof of the fact of their being in the possession of his agent at the time was sufficient to show that the defendant could not be called upon by a third person(a).

So it suffices for the plaintiff, when the bill was received in satisfaction from a third person, and the original defendant (the debter) was not a party to it, to prove the due presentment for acceptance or payment, and the dishonour, without showing that notice thereof was given to the drawer or to the defendant, unless the latter can prove that he sustained some actual loss for want of such notice(b); and if the defendant admit the refusal of the drawee to accept the bill, although he requested the creditor to present it again for acceptance, this will be unnecessary, and the creditor may recover his original demand without further proof of the dishonour of the bill(c). So, if a bill or note be not negotiable for want of the words "or order," the creditor may sue for the original consideration without proof of notice of dishonour(d). But in a case where the defendant, being indebted to the plaintiff, gave him a promissory note for 45l. which was dishonoured, and the latter afterwards agreed to accept 5s. in the pound, to be secured by the acceptance of a bill for 111. 5s. by the defendant's brother, which was accordingly given, but the original note remained in the plaintiff's possession, and was to revive if the acceptance was not honoured, and the bill was not paid

was in existence, it might be still in circulation, so that the defendant might be subjected twice to the payment of the same demand; without therefore proving the note destroyed, the plaintiff was not entitled to recover; sec as to lost bills, post, Ch. VI. s. iii.

(y) Ante, 124, note (s).
(z) Burden v. Halton, I Moore & P. 223;
4 Bing. 454, (Chit. j. 1374). Therefore where the defendant had given the plaintiff bills for goods, which bills had been transferred to a third person, but at the time of the trial of an action for the value of the goods, though not at the commencement of it, they were again in the plaintiff's hands over-due and unpaid by the defendant; it was held that he was liable notwithstanding he had given the hills; and per Best, C. J. "There is no evidence of these bills having been transferred to the indorsces for consideration, and they were sent back to the plaintiff without any money passing. The authorities show that if the bills had remained in the hands of third persons that would have been a defence to the action, because the defendant might have been called on to pay them; but as they were in the hands of the plaintiff and overdue at the time of the trial that could never happen."

(a) Hadwen v. Mendizabel, 10 Moore, 477; 2 Car. & P. 20, (Chit. j. 1271); ante, 176, note (v). On motion for a new trial, Best, C. J. said, "It was proved that the original bills

were in the possession of the plaintiff's agent, and I thought that he had a right to retain them until the defendant was ready to pay. In Dangerfield v. Wilby, (4 Esp. Rep. 159), (Chit. j. 649), ante, 176, note (x), the plaintiff declared on the note, which might have been in existence and in the hands of a third person, as its absence was not accounted for. The present case however is wholly different. The action was not brought on the bills. If it had been, no doubt they must have been produced. The plaintiff however relied on his original demand, and declared for goods sold and delivered, the consideration for which the bills were given, and he thereby threw the onus of setting up the bills on the defendant." Park and Burrough, Justices, concurred; et per Gaselle, J. "The defendant may pay the amount of the verdict into court and move that execution may be stayed until the bills are delivered up: but it appears to me that there is no ground to set aside the verdict."

(b) Bishop v. Rowe, 3 Maule & S. 362, (Chit. j. 921); Warrington v. Fubor, 8 East, 242, (Chit. j. 733). See this more fully, post, Ch X. s. l. Notice of Dishonour.

(c) Hickling r. Hardy, 7 Taunt. 812; 1 Moore, 61, (Chit. j. 983).

(d) See Plimley r. Westley, 2 Scott, 428; S. C. 2 Bing. N. C. 249; 1 Hodges, 324; post, Ch. X. s. i. Notice of Dishonour.

IV. De-Bill or Note to the Payee, &c.

the day it became due, but on the following morning the defendant tendered 121. to the plaintiff, including its amount and expenses thereon, which the plaintiff refused to accept, and brought an action on the note, the court held he could not recover, as the plaintiff had not demanded payment of the bill of

the defendant before the tender, as he ought to have done(e).

We shall, however, hereafter see(f) that in general when the holder has been guilty of neglect, either in presenting a bill for acceptance when necessary, or for payment, or in giving notice of non-acceptance or of non-payment, or by giving time to the acceptor, this conduct will render the original delivery of the bill equivalent to a payment of the debt, and discharge such debtor from all liability (g), unless the bill or note should turn out to be inadmissible in evidence, in consequence of a defect in the stamp(h); or be so framed as [*178] not to afford a remedy over *against prior parties to the bill or note(i); in which cases the laches of the holder cannot be taken advantage of. We shall hereafter also consider the effect of the loss of bills, notes and checks (k).

On Dishonour of Bill, when original Liability revives(1).

In general, when the bill is dishonoured, and the holder uses due diligence, not only the parties to the bill are liable to be sued thereon, but the first liability on the original consideration revives (m). And though where A. sold goods to B. for which the latter was to pay in a bill at three months, and B. gave A. a check on his bankers (who were also bankers of A.) requiring them to pay A. on demand in a bill at three months, and A. paid the check into the bankers, and took no bill from them, but the amount was transferred in the banker's books from B.'s account to A.'s with the knowledge of both, and the bankers failed before the check became due, it was held that A.

(e) Soward r. Palmer, 2 Moore, 274; 8 Taunt. 277, (Chit. j. 1025)

(f) See post, Chapters VII. to X.

(g) 4 Ann. c. 9, s. 7; Smith r. Wilson, Andr. 187, (Chit. j. 285); Chamberlain r. Delarive, 2 Wils. 353, (Chit. j. 377); Ward t. Evans, 2 Lord Raym. 930, (Chit. j. 216).

(h) Ante, 124, note (s).
(i) Plimley v. Westley, 2 Scott, 423, ante, 177, note (d)

(k) Post, Ch. VI. s. iii.
(l) The right to sue for the original consideration on dishonour of bill or note, is not destroyed as between the original parties by an alteration of the instrument. See post, 181,

(m) Smith r. Wilson, Andr. 187; Popley r. Ashley, 6 Mod. 147, (Chit. j. 225); Ward r. Evans, 2 Lord Raym. 928; Hickling r. Hardy, 7 Taunt. 312; Bishop r. Rowe, 3 Maule & S. 362, (Chit. j. 921); Tempest r. Ord, 1 Madd. 89; Bedder v. Wall, Peake, Add. 41; Taylor v. Briggs, Mood. & M. 28; Smith v. Ferrand, 7 Bar. & C. 19; 9 D. & R. 803, (Chit. j. 1338); Robinson v. Reed, 9 Bur. & C. 449; 4 Man. & Ry. 349, (Chit. j 1431). Tempest r. Ord, 1 Madd. 89. The manager

of a colliery, paying a creditor on the colliery with a bill which is not paid, the colliery remains liable to the payment of the original debt. Per the Vice-Chancellor: The justice of the case, independent of authorities, is clear. Crowther has supplied goods, and receives a bill, which turns out to be mere waste paper, and ought not therefore to be considered as a payment. Where a bill of exchange is given

in payment of a debt, and the bill is not paid, the creditor, unless he has purchased the bill out and out, has a right to resort to his original cause of action. So, if before a bill becomes due, it is dishonoured, the creditor may resort to his original debt.

Ward r. Evans, Lord Raym. 928, (Chit. j. 216). A banker's note was paid to plaintif's servant at noon, and presented for payment the next morning, at which time the banker stopped payment. On a case reserved, the Court held it was presented in time, and judgment was given for the plaintiff for the original consideration.

Puckford v. Maxwell, 6 T. R. 52, (Chit. j. 531). The defendant having been arrested by the plaintiff for 801. gave a draft for 451. and promised in a few days to settle the remainder, on which the plaintiff consented to his being discharged out of custody. The draft was dishonoured, and the defendant was again arrested upon the same affidavit. On a rule to show cause why he should not be discharged out of custody, it was urged that the draft having been accepted as part payment, could not be treated as a nullity. But per Lord Kenyon, in cases of this kind, if the bill which is given in payment do not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be, and therefore he may consider it as a nullity, and act as if no such bill had been given. These questions have frequently arisen at Nisi Prius, where they have always been determined in the same way. Rule discharged. See post, 820 (21).

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could not recover the value of the goods from B., because A., instead of IV. Detaking bills from his bankers, having agreed to leave the check with them, livery of a it was as if he had discounted it with them, and then deposited the mo- Note to the ney(n); yet where the amount was not so transferred to A.'s account, it Payee, was held that B. was still liable for the goods(o). And where A. wishing &c. to send goods to B. employed C. to carry and deliver them, and engaged On Disto pay C. for the freight, and C., on delivering them according to the order, honour of Bill, when took a bill of exchange from B., and which was not paid, it was held *that original A. was liable to pay the amount of the freight to C., notwithstanding his Liability taking the bill(p). And if a captain sign a bill of lading, and it is stated revives. that the freight is to be paid by the consignees on the delivery of the cargo, [*179] either generally, or to be paid in cash, or by approved bills, he does not, by taking a bill from the consignee, give up his claim on the consignor (q), unless he took the bill voluntarily and for his own accommodation, when he might have received cash(r). And if in case (there being no charterparty) the captain of a ship deliver the cargo, and as the best thing he can do for all parties under the existing circumstances, take a bill of the agent of the persons to whom the cargo on board belongs for the amount of the freight, this does not discharge the owners of the cargo, but they are liable for freight if the bill be dishonoured(s); though indeed it would be otherwise if it appeared he might have had money of the agent, and chose to take the bill voluntarily (t). And where a person, in payment of goods, gives an or-

(n) Bolton v. Richards, 6 T. R. 139, (Chit. j. 538); Vernon v. Boverie, 2 Show. 296, (Chit. j. 166); Ex parte Blackburne, 10 Ves.

204, 206, (Chit. j. 706).

(o) Brown v. Kewley, 2 Bos. & Pul. 518; Ex parte Dickson, in the matter of Parker, a bankrupt, cited 6 T. R. 142. Dickson sold sugars to Parker, for which the latter was to pay him in one month by a good bill at two months. Parker gave Dickson a check on his bankers at Liverpool, requesting them to pay him in a bill at three months; the Liverpool bankers drew upon their agents in London, in favour of Dickson for the amount, but before the last bill became due Parker and the banker became bankrupt. The Chancellor ordered that Dickson should prove the bill under the commission against the bankers and their agents, and claim the rest under Parker's commission.

See Harley v. Greenwood, 5 B. & Ald. 95.

(p) Tapley v. Martens, 3 T. R. 451, (Chit. j. 625). This was an action of debton charterparty from London to Ancona. Plaintiff delivered his cargo to the consignee of defendant, and applied to him for the payment of the freight. Plaintiff took a bill of exchange drawn by the consignee on defendant, which was not paid, in consequence of the consignee becoming insolvent. It was urged on the part of the defendant, that the plaintiff had given personal credit to the consignee by taking the bill in question, the defendant having furnished the consignee with money for that purpose. The court held that the plaintiff neither having taken the bill for his accommodation, nor having been guilty of any laches in enforcing the payment. the bill could not be considered as payment of the plaintiff's domand, and that the defendant was liable for the amount under the charterparty; but see Strong v. Hart, 6 B. & C. 160; 9 D. & R. 189, (Chit. j. 1318); infra, note

(t). See also wyatt v. Hertford, 3 East, 147, (Chit. j. 664); Marsh v. Pedder and others, 4 Campb. 257; 1 Holt, C. N. P. 72, (Chit. j. 945); Everett v. Collins, 2 Campb. 515, (Chit. j. 818).

(q) Christy v. Row, 1 Taunt. 300; Taylor v. Briggs, Mood. & M. 28, S. P.

(r) Strong v. Hart, 6 B. & C. 160, infra.

(s) Strong v. Hart, 2 Carr. & Pa. 55, infra. (t) Id. and see Wyatt v. Marquis of Hertford, 3 East, 147, (Chit. j. 664); and in Sheppard v. De Bernales, 13 East, 565, Lord Ellenborough said, "That if the clause in the bill of lading, that the consignee should pay the freight, were introduced with a view to the consignor's security, and made it incumbent on the master of the ship, at his peril, to look to the consignee under the bill of lading for payment of the freight, the plaintiff had no right to deliver to the plaintiff's agent, without first re-ceiving such payment, and his delivery without payment was, in that case, not a right and true delivery; but this clause was introduced for the master's benefit only, and merely to give him the option, if he thought fit, to insist upon his receiving freight abroad before he should make delivery of the goods; he had a right to waive the benefit of that provision, made in his favour, and to deliver without first receiving payment, and he is not precluded by such delivery from afterwards maintaining an action.'

Strong v. Hart, 6 B. & C. 160; 2 Car. & P. 55; 9 D. & R. 189, S. C. (Chit. j. 1313). The master, being also part-owner of a ship, carried a cargo from A. to B., and delivered it there to the consignee (he having signed bills of lading, making the cargo deliverable to the consignees or their assigns, he or they paying freight for the same.) And the master took a bill for such freight, which was afterwards disbonoured, and an action was commenced

Bill or Note to the Payee, & c.

On Dishonour of original Liability revives.

der on his banker to pay the amount in bills, and the vendor takes bills for livery of a the amount, he will not lose his remedy against his original debtor, unless he be guilty of laches (u). And it has been decided, that where the manager of a colliery pays a creditor on the colliery with a bill, which is not paid, the colliery remains liable to the payment of the original debt(x).

Most of these cases were brought under the consideration of the Court of King's Bench in a recent case (y), where a tradesman, who had supplied Bill, when goods to a ship, sent in his account to the owner's agent and *ship's husband, and took his acceptance at three months for the amount, deducting discount for that time, which was the usual credit; and when the bill became due con-[*180] sented to a renewal of it, adding interest, and in like manner took a third acceptance, which was dishonoured, and the agent soon afterwards failed: the balance in his hands in favour of his principal (the ship-owner) having during all this time exceeded the amount of the bill, which was however unknown to the principal, who had never inspected the agent's accounts; and it was held, that the tradesman might sue the ship-owner for the amount of his claim, and that it was not discharged by the acceptance of the agent.

> In Exparte Blackburne(z) the Chancellor said, "I take it to be now clearly settled, that if there is an antecedent debt, and a bill is taken, without taking an indorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to. It has been held, that if there is no antecedent debt, and A. carries a bill to B. to be discounted, and B. does not take A.'s name upon the bill, if it is dishonoured there is no demand; for there was no relation between the parties except that transaction; and the circumstance of not taking the name upon the bill is evidence of a purchase of it. of goods the law implies a contract that those goods shall be paid for. It is competent to the party to agree that the payment shall be by a particular bill. In this instance it would be extremely difficult to persuade a jury, under the direction of a judge, to say an agreement to pay by bills was satsified by giving a bill whether good or bad"(1).

against the consignor for the freight. It was held, that the jury were properly directed to find for the defendant, if they thought that the captain took the bill voluntarily and for his own convenience; and that the defendant was not bound to prove that an offer was made to pay in cash.

(u) Ex parte Dickson, cited in 6 T. R. 142, 143; ante, 178, n. (o); Ex parte Blackburne, 10 Ves. 204, (Chit. j. 706); accord; Bolton r. Richards, 1 Esp. Rep. 106, (Chit. j. 538);

semb. contra.

(x) Tempest v. Ord, 1 Mai'd. 89; anle, 178, note (m).

(y) Robinson r. Hend, 9 B. & C. 449; 4 M. & R. 349, (Chit. j. 1431); sed ride Reed

v. White, 5 Esp. 122, ante, 45, note (q).
(z) 10 Ves. 206; S. P. Tempes v. Ord, 1 Madd. 89; ante, 178, n. (m). See post, Ch. VI. s. i. Transfer, Liability of party delicering a Bill, &c.

(1) { Where a party agrees to take the note of a third person payable to bearer as money, absolutely, it will discharge the debt though the maker be insolvent, if there be no fraud on the part of the vendor. Scruggs v. Gass, 8 Yerg. 175.

Where bills of exchange are transmitted by a debtor to his creditor to be sold, and the debtor directs the creditor to credit him with the proceeds; and the creditor sells the bills partly for cash and partly for negotiable notes, and gives the debtor credit for the amount in two distinct items, first for the notes, and secondly for the balance in cash; this is a more provisional payment, and if the notes are not paid he may recur to his original claim. Hamilton v. Cunningham, 2 Brock. 350. But a payment which is merely provisional, in its inception, may be converted into an ab-

solute payment, by the subsequent conduct of the creditor. Ibid.

Where a note signed by 14 persons was taken up by 4 of them, who gave in satisfaction thereof their own joint and several note; held such a payment as would enable the four to maintain an action against a co-promissor in the first note for contribution. Chandler v. Brainard, 14 Pick. 285. }

The rules laid down in respect to the operation of payments by bills and notes are in general recognized in the United States; but with some seeming diversity arising from local usages. In New York a bill of exchange or promiseory note, either of the debtor or any other person, is 111

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And where A. being the creditor of B., and having an account with C., IV. Dedirected B. to remit the money to C., and B., keeping cash with a banking-livery of a Bill or

Note to the Payee,

Payee, not payment of any precedent debt, unless it be so expressly agreed. Murray v. Governeur, 2 &c.

John. Cas. 438. Herring v. Sanger, 3 John. Cas. 71. Tobey v. Barber, 5 John. Rep. 68.

Schermerhora v. Lomis, 7 John. Rep. 311. Johnson v. Weed, 9 John. Rep. 310. Putnam v. On Dis-Lewis, 8 John. Rep. 389. Wetherby v. Mann, 11 John Rep. 513. Arnold v. Camp, 12 John. honour of Rep. 409. See Barelli, Torre & Co. v. Brown, 1 M'Cord, 449. See also Gilmore v. Bussey, Bills, when 3 Fairf. 418; Watkins v. Hill, 8 Pick. 522; Bill v. Porter, 9 Conn. 23; New York State Bank v. original State of World & S. Hiszing v. Pauloud 2 Hall 5.17. Neither is a receipt for a note, as 1 inchiliar Fletcher, 8 Wend. 85; Higgins v. Packard, 2 Hall, 547. \ Neither is a receipt for a note, as Liability. cash, evidence that it was taken as an absolute payment. The receipt of a note is merely a suspension of the right of action on the original consideration, during the time allowed for the payment of it. Tobey v. Barber. The creditor is not obliged to sue upon such note; he may return it when dishonored, and resort to his original demand. It therefore only postpones the time of payment of the old debt until a default be made in the payment of the note. Ibid. Yet the acceptance of a negotiable note on account of a prior debt, is so far evidence prima fucie of satisfaction, that no recovery can be had on such prior debt without producing the note at the trial and cancelling it, or showing that it had been lost without having been indorsed. Holmes v. De Camp, I John. Rep. 34. Angel r. Felton. 8 John. Rep. 149. Cummings v. Hackley, 8 John. Rep. 202. Pinturd v. Tackington, 10 John. Rep. 104. Smith v. Lockwood, 10 John. Rep. 366. Clenn v. Smith, 2 Gill & John. 493. And if the creditor part with the note or bill, or if it be the note or acceptance of a third person, and the creditor be guilty of laches in not presenting it for payment in due time, it will discharge the debtor from the original debt. Tobey v. Barber. And the same rules apply to a check given in payment of a pre-existing debt, for unless it be paid by the drawee, resort may be had by the holder to his original debt. The people v. Howell, 4 John. Rep. 296. And if, upon a sale of goods, the notes of a third person payable at a future day, are, upon a fraudulent misrepresentation, agreed to be received as an absolute payment, at the risk of the vendor, the vendor may immediately bring an action for the goods sold, for the fraud will avoid the transaction. Wilson v. Force, 6 John. Rep. 110. If there be an agreement to accept notes in payment of goods sold, and before delivery of the goods, the notes turn out to be bad, the party is not bound to receive them unless he agreed to receive them at all events, and to run the risk of their being paid. Roget v. Merritt, 2 Caines' Rep. 117. And if a party receive in payment for goods sold, counterfeit bank notes, or other notes which prove of no value, it is not a payment, although the debtor paid them bona fide supposing them to be valid, unless the vendor took upon himself expressly, the risk of forgery. Markle v. Hatfield, 2 John. Rep. 455. And see Ellis v. Wild, 6 Mass. Rep. 321. Breed v. Cook & Caldwell, 15 John. Rep. 241. Keene v. Thompson, 4 Gill and Johnson, 463.

A negotiable promissory note is not an absolute extinguishment of a simple contract debt, but only sub modo; and therefore cannot be pleaded in answer to a declaration upon a simple contract. It is only evidence under the general issue, and the effect of such evidence may be destroyed by producing and cancelling the note on the trial. Hughes r. Wheeler, 8 Cowen, 77.

In the Supreme Court of the United States it has been held that no action can be maintained for goods sold by a person who has received a negotiable note as conditional payment and has passed that note away. Harris r. Johnson, 3 Cranch, Rep. 311; and that a note, without a special contract, does not of itself discharge the original cause of action, unless by express agreement it is received as payment. Semb. Sheehy r. Mandeville, 6 Cranch, 553; and that where a note has been received as conditional payment, it will be a discharge of the debt, unless it be proved that due diligence has been used to receive the money, and that it cannot be obtained. Clark v. Young, 1 Cranch, 191.

In Massichusetts, a note of the debtor, not negotiable, is not deemed a payment of a pre-existing debt. Greenwood v. Curtiss, 4 Mass. R. 93. Maneely v. M'Gee, 6 Mass. R. 148. But it has long been settled as law in that State that a negotiable note, given in consideration of a simple contract debt, is a discharge of such debt; and that the law will presume that a negotiable note is agreed by the parties to be payment of such contract. This presumption however may be encountered by proving an express agreement that the note should be received as collateral security. Thatcher v. Dinamore, 5 Mass. Rep, 299. Maneely v. M'Gee, Chapman v. Durant, 10 Mass. Rep. 47. If the note of a third person be taken in payment of a debt, it operates as a complete discharge of the debt. Wiseman v. Lyman, 7 Mass. Rep. 286. { Hutchins v. Olcott, 4 Verm. Rep. 549.} However, where an order was drawn on a third person in favor of the vendor in part payment of the cargo of a vessel, and payable on the return of the ressel from her voyage, it was held no payment of the original demand, although upon the giving of the order and receiving payment of the residue of the sum, the vendor had signed a receipt in full. The court did not think that there was sufficient proof that the vendor was to depend in all events for the payment of this sum upon the vessel's return; but that this event was probably to fix the length of credit. Tucker v. Maxwell, 11 Mass. Rep. 143. And if A. sells goods to B. and agrees to receive certain notes in payment, and it be afterwards discovered that the notes are forgeries, though unknown to the parties at the time, no action lies against B. for the price of the goods. Aliter if payment by the notes was not part of the original stipulation, but an accommodation to the vendee. Ellis v. Wild, 6 Mass. Rep. 321. See 1 Peters' Rep. 266.

A promissory note payable on demand, with interest after a limited time, will sustain an ac-

IV. Delivery of a Bill or Note to the Payee, &c.

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house wherein C. was a partner, gave an order to the banking-house to place the money due to the credit of C., so as to make the same as a payment by

tion brought before the expiration of the time; therefore, in the case of goods sold and delivered, to be paid for by such a note, if the vendee neglects to give the note, the vender may forthwith bring assumpsit for the price of the goods. Loring v. Gurney, 5 Pick. 15.

In Maine, it has been held, that the fact of drawing a bill, or making a negotiable note, which is received by the creditor, is presumptive evidence that it was intended to be an extinguishment of the original demand or cause of action: But this presumption may be rebutted or explained by the agreement of the parties, or by proof of usages or circumstances inconsistent with such presumption. Variety 8 Noblehorough 2 Greent 121

sumption. Varier v. Nobleborough, 2 Greenl. 121.

If bills are received on account of a debt, and protested for non-payment, and in an account rendered, the drawer is charged with the usual damages, this amounts to an election to consider the bill as payment. Watts v. Willing, 2 Dall. Rep. 100. See also Chapman v. Steinmetz, I Dall. Rep. 161. And if in such a case, the creditor return the bill and request a remittance on account of the debt, this amounts to an extinguishment and waiver of the bill; and, if it be one of a set, to an extinguishment of all of them. Ingraham v. Gibbs, 2 Dall. Rep. 134.

A note given by a debtor to the agent of his creditor for goods sold in order to obtain a discount thereon, and afterwards given up through misrepresentation of the drawer, is no extinguishment of the original debt. Lewis v. Manly, 2 Yeates' Rep. 200. Suckley v. Furze, 15 John.

Rep. 338.

The taking of a bill of exchange is, at most, only prima facie evidence of a satisfaction and extinguishment of an antecedent debt. Quere, how far even this is to be relied on, as a general presumption, in foreign states. Wallace v. Agry. 4 Mason, 336.

presumption, in foreign states. Wallace v. Agry, 4 Mason, 336.

Where a purchaser of goods transfers without indorsement, a note in payment, he thereby guarantees that the sum expressed in the note is due, and constitutes the seller his agent to see for the same in his name; and if suit be fairly brought and duly prosecuted, and a set-off is established by the maker, the seller may resort to the purchaser for the price of the goods sold. Jones r. Yeargain, 1 Devereux's Rep. 420.

Where a bank discounts a note for the purpose of renewing a former loan in the usual way, the negotiation seems to be equivalent to a new loan, and an independent payment of the old debt; not merely giving one note as satisfaction of another. Letcher v. Bank of the Commonwealth, 1 Dana's Ken. Rep. 84.

Where the cashier of a bank, on a note holden by the bank falling due, accepted a check of a third person for part of the amount, and a new note for the balance, and delivered up the old note, it was held, on the check being dishonored, that an action might be maintained on the original note against the maker to recover the amount of the check; and that the bare fact of delivering up the old note was not evidence that the check and new note were received in payment. Oleou r. Rathbone, 5 Wend. Rep. 490.

Where, however, the suit was brought in the name of the cashier, and there was no evidence that the note had been transferred to him, or that the suit was instituted in his name by the direction of the bank, it was holden that there could be no recovery. Ib.

Whether the bank, after the note was delivered up and the check protested, could transfer the note so as to enable the assignee to maintain an action in his own name, quere. 1b.

If one give his note, and accept a discharge of a subscription, such fact affords no presumption, either way, of a compromise or a substitution of the note for his subscription, unless he knew of the full grounds of his defence at the time. Middlebury College v. Williamson, 1 Verm. Rep. 212.

The circumstance of giving a note in payment of a subscription, does not preclude the party from defending, by proving such facts as were supposed to exist when he settled, but of which he knew no evidence whatever. Ibid.

Where A received certain promissory notes of B against a third person, in payment for services rendered for B on terms to return them if not paid, it was held that A was not obliged to receive the articles, in which the notes were payable, at a greater price than the cash value. Keyes v. Carpenter, 3 Id. 209.

A creditor receives from his debtor in payment a promissory note of other parties not indersed by the debtor—some of the signatures prove to be forged. The creditor cannot sustain an action on the original consideration, unless as soon as he discovers the forgery he tenders a return of the note, or unless with due diligence he has exhausted all the liabilities on it. Pope & Hickman r. Nance & Co., 1 Minor's Alabama Rep. 299.

It is a general rule that the payee of an indorsed note or bill cannot recover on his original demand, so long as such note or bill is outstanding in the hands of a third person; but the mere indorsement of a bill or note, by the payee, is not payment of the original demand even as to him. Davidson v. The Borough of Bridgeport, 8 Conn. Rep. 472.

Where a creditor receives the transfer of a negotiable note in payment of a precedent debt, he takes it, although transferred to him before maturity, subject to all equities existing between the original parties. Rosa v. Brotherson, 10 Wend. R. S5.

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 \text{ See also, on this subject, Goodrich v. Barney, 2 Verm. 422. Geiser v. Kershner, 4 Gill & John. 305. Curtis v. Ingham, 2 Verm. 287. Barrett & Co. v. Hall, 1 Aikin, 269. Soow v. Perry, 9 Pick. 539. \}
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a bill at a month to A.; and the banking-house accordingly wrote to C. on IV. Delivaccount of the order, who answered, that on that day month he would credit ery of a A., and on the same day wrote in the same manner to A., but before the ex- Note to the piration of the month, when the credit was to have been given, and before it Payee, had been actually given, C. and the banking-house became bankrupt, this &c. prospective engagement to pay was holden no payment(a).

But where the seller of goods received from the purchaser an order upon his banker for the price in these words, "Please to pay the Gormersal Mill Company 1931. equal to six months," requiring him in effect to pay in money, and the latter (with whom money had been deposited to meet that and certain other demands) offered to pay in cash, deducting discount for the period of credit, or by a bill upon a third person, which the seller elected to take; it was holden that (the bill having afterwards been dishonoured) he could not sue the purchaser for the price of the goods, having elected to take

the bill instead of money, minus the discount (b).

Bills, in lieu of which other bills are given, if permitted to remain with Renewed the holder, may be sued upon in case the latter bills are not paid(d). *And Bills(c). where the holder of a bill for 181, which had been dishonoured, agreed to take Sl. in cash and another bill for 10l. from the drawer, and the drawer accordingly drew another, bill upon the same acceptor for that amount, and while in the hands of the drawer, the acceptor, without the knowledge of the drawer, altered the date and vitiated the bill; it was held, that the latter bill being a nullity, the first was not discharged, and that the drawer was liable upon it(e). But where a renewed bill has been taken and paid, the party is not justified in suing on the former bill, which was left in his hands, although costs incured in taking a warrant of attorney, as an additional security, are left unpaid contrary to agreement (f). And where after a bill of exchange became due, and whilst it was in London, where it had been sent for presentment for payment, the person who had indorsed it to the plaintiff came to him with another bill for the same amount, and prevailed on him to take it for and on account of and in renewal of the first bill, and before the second bill became due, and without delivering it back, the plaintiff brought an action upon the first bill against the acceptor; it was held, that he could not recover even the expenses of noting and postages (g). Unless, however, it appear that the second bill is taken in renewal or substitution of the first, and at the

(a) Pedder v. Watt, Peake, Add. 41, (Chit. j. 547, 553).

(b) Smith v. Ferrand, 7 B. & C. 19; 9 D. & R. 803, (Chit. j. 1338); and see Strong v. Hart, 6 B. & C. 160; 9 D. & R. 189, (Chit. j. 1318); ante, 179, note (t).

(c) As to bills given in satisfaction of prior bill or note, see Sard v. Rhodes, 1 M. & W. 153; Crisp v. Griffiths, 2 C., M. & R. 159,

ante, 173, note (r); 174, note (c). (d) Ex parte Barclay, 7 Ves. 597, (Chit. j. 656). Barclay was indorsee and holder of two bills drawn by Kemp upon Dearlow, and indorsed by Clay to Barclay; these bills were dishonoured, and Clay drew two other bills upon Sampson for the amount of the former bills, interest and charges, and the former bills were permitted to remain with Barclay; one of the two last bills was paid by Sampson. Upon petition by Barclay to be allowed to prove these bills under a commission of bankrupt against Kemp, it was objected on the ground that the

two latter bills were accepted in discharge of them. Lord Chancellor, "If the two bills are dishonoured, and two others given 'in lieu' of them, but the former allowed to stay in the hands of the holder, that fact will give a construction to the words 'in lieu,' and the meaning will be only in case they are paid." See also Bishop v. Rowe, 8 Maule & S. 363, (Chit. j. 921).

(e) Sloman r. Cox, 1 Crom. M. & R. 471; 5 Tyrw. 174.

(f) Dillon r. Rimmer, 1 Bing. 100; 7 Moore, 427, (Chit. j. 1160); but see ante, 173, note (y).

(g) Kendrick r. Loniax, 2 Crom. & J. 405; 2 Tyrw. 438, (Chit. j. 1592); quære, as to the right to recover such expenses in general, at all events they are not recoverable unless laid specially in the declaration, not being a necessary consequence of the dishonour; id. ib. 409,

IV. Deliv- time of taking the second bill interest is due upon the first, and the first bill ery of a Bill or is allowed to remain in the holder's possession, an action may be maintained upon the first bill to recover the interest due thereon, notwithstanding the Note to the second bill is paid at maturity (h). Payee, &c.

V. Consequences of Alterations in Bills and Notes.

V. Consequences of in Bills and Notes(i).

If a bill of exchange or promissory note be altered without the *consent of the parties in any material part, as in the date, sum, or time when payable, or consideration, or place of payment, such alteration will, at common law, and independently of the stamp acts, render the bill or note wholly invalid as [*182] against any party not consenting to such alteration; and this, although it be in the hands of an innocent holder. Thus an alteration in the date of a bill of exchange after it has been accepted and indorsed, without the acceptor's or indorser's consent, will discharge them from liability (1) even though such alteration were made by a stranger (k); and in all cases where the date of the instrument is material, as is generally the case with bills, notes, and checks(1), any alteration or addition, as by a stranger's obliterating the top of the figure six in a bill, dated 26th March, so as to make it appear as dated the 20th March(m), or by altering the word date into sight(n), will be fatal; so an alteration in the statement of the consideration, as it professes to evidence by the instrument that which must otherwise be proved aliunde, will discharge

> (h) Lumley v. Musgrave, 4 Bing. N. C. 9; 5 Scott, 230; S. C., Lumley v. Hudson, 4 Bing. N. C. 15; 5 Scott, 238, S. C. Assumpsit by the executors of the indorsee against the acceptor of a bill of exchange for 5081; plea, an agreement between testator and defendant, by which, after the bill had become due and been dishonoured, it was agreed that a second bill drawn by one Hudson and accepted by de-fendant for the like sum of 5081. should be delivered to the testator, which, when paid, was to be in full satisfaction and discharge of the cause of action in the count mentioned, averring that the substituted bill was afterwards given and subsequently paid. Issue having been taken upon this plea, defendant offered no evidence in support of it, relying on the facts therein stated as the necessary legal inference arising out of the transaction. On the part of the plaintiff it was proved, that when the second bill was givon (which was three months after the dishonour of the first) the first was allowed to remain in the testator's hands with an understanding that interest was to be paid thereon until the second bill should be paid: held, that notwithstanding the principal debt had been discharged by the payment of the second bill, the plaintiffs were entitled to recover in the shape of damages in-

terest upon the first bill.

(i) See in general, Chitty's Stamp Acts, 23 to 38. Good defence under plea of non-acceptance; Cock v. Coxwell, 2 C., M. & R. 291; S. C. 4 Dowl. 187; 1 Gale, 177; Calvert v. Baker, 4 M. & W. 417; 7 Dowl. 17, S. C.; poet, Part II. Ch. IV. Defences and Pleas.

to pleading identity of altered bill, see Haydon v. Thompson, 2 N. & M. 403.

(k) Master v. Miller, 4 T. R. 320; 5 T. R. 867; 2 H. Bla. 141; 1 Anstr. 225, S. C.; Com. Dig. Fait, (F 1); Powell r. Divett, 15 East,

Master v. Miller, 4 T. R. 320; 1 Anstr. 225; 2 H. Bla. 141, (Chit. j. 482, 490), S. C. in error. In an action by indorsees against the acceptor of a bill, payable three months after date to Wilkinson and Cooke, the declaration had one count on the bill as dated the 20th March, and another as dated the 26th March. The jury found a special verdict, stating that the bill was drawn and dated the 26th, that it was accepted, and that afterwards, and whilst it remained in the hands of Wilkinson and Cooke, the date was altered from the 26th to the 20th March without the defendant's knowledge, and by some person unknown to the jury. That after such alteration it was indorsed for a valuable consideration by Wilkinson and Cooke to the plaintiffs. After two arguments, Lord Kenyon, Ashurst, and Grose, Justices, held that the alteration, although by a stranger, vacated the bill. Buller, J. differed, but on error judgment for defendant affirmed. See Henfree r. Bromley, 6 East, 309.

(1) Walton v. Hastings, 4 Campb. 223; 1 Stark. R. 215, (Chit. j. 944, 953); S. C. Outhwaite v. Luntley, 4 Campb. 179, (Chit. j.

(m) Master v. Miller, 4 T. R. 320, supra-(n) 2 Stark. Ev. 294; but see 1 Taunt. 20.

(1) { Hervey v. Hervey, 15 Maine Rep. 357. }

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the parties(o). So when a bill has been accepted generally, and the draw- V. Conseer, without the consent of the drawee, adds a particular place of payment quences of Alterations under the acceptance, this is considered a material alteration, and discharges in Bills and the acceptor, although made since the 1 & 2 Geo. 4, c. 78, and still operat- Notes, &c. ing only as a general acceptance, because it induces the holder to present 1. At at the particular place instead of presenting to the acceptor himself, and Common the bill might be treated as dishonoured, and the defendant be put to in- Law. convenience when in fact no presentment had been made to $\lim(p)(1)$. Nor will a *letter from the defendant's attorney to the plaintiff complaining of the [*183] alteration, and stating that the defendant had been prepared for payment, and that the plaintiff might have the money by calling at his house, be any acknowledgement of a subsisting debt, so as to support a count upon an account stated (q). So where the drawer of a bill of exchange, which was accepted payable at the house of a banker who had become insolvent, erased the name of that banker, and substituted the name of a solvent banker, without the consent of the acceptor, such alteration was considered so material as at common law to invalidate the bill against him, though in the hands of an indorsee for a valuable consideration, who was ignorant of the circumstances, upon the ground that it caused the bill to carry with it the appear-

j. 761).

(p) Cowie v. Halsall, 4 Bar. & Ald. 197, (Chit. j. 1099); M'Intosh v. Haydon, Ry. & Moo. 362, (Chit. j. 1287); Tidmarsh v. Grover, 1 Maule & S. 735, (Chit. j. 891); The King v. Treble, 2 Taunt. 329, (Chit. j. 791); Sparkes v. Spur, MS. Chitty's Stamp Laws, 26; Calvert v. Baker, 4 M. & W. 417.

M'Intosh v. Haydon, Ry. & Moo. 862, (Chit. j. 1287). After the 1 & 2 Geo. 4, c. 78, the drawee had accepted by writing the word "Accepted, J. Haydon." The drawer, without the control of without the acceptor's consent, added, "payable at Messrs. Ransom and Co. bankers, London. Lord Tenterden held that the acceptor was discharged, and said, "there is another view in which the words added materially alter the character of the bill. Suppose the indorsee, who was cognizant of such an alteration, were to pass the bill while current to another person without communicating the fact, and he to a third, the right of the last indorsee to sue his immediate indorser would, as the bill now appears, be complete upon default made at the bankers, and notice thereof; whereas in truth, the acceptor not having in reality undertaken to pay there, would have committed no default by such non-payment. I am of opinion, therefore, that the alteration is in a material part of the bill, and that the defendant (the acceptor) is in consequence discharged." See also S. P. in

(o) Knill v. Williams, 10 East, 401, (Chit. Tidmarsh v. Grover, 1 Maule & S. 785, (Chit.

(Chit. j. 791); The King v. Treble, 2 Taunt. 329, (Chit. j. 791); and Desbrow v. Weatherley, 6 C. & P. 758, post, 190, note (r).

Sparkes v. Spur, 16th February, 1827, at Guidhall. The defendant had accepted the bill thus, "Accepted, I. Spur," and some person interlined in such acceptance "at Fry and Co." Abbott, C. J., on the authority of M'Intosh v. Haydon, nonsuited plaintiff. Upon motion for a new trial, after rule nisi, the question was much discussed; and Marson v. Petit, and Jacobs v. Josephs, 2 Stark. R. 45, were cited in support of the motion. Rule absolute on payment of costs. Lord Tenterden said, "the plaintiff would then have an opportunity of putting the question upon the record by tendering a bill of exceptions; that was the utmost the court could do, as the other judges were strongly inclined to think the nonsuit quite right. MS. Chitty's Stanip Laws, 26, note.

But see Marson v. Petit, 1 Campb. 82; and Trapp v. Spearman, 3 Esp. Rep. 57, (Chit. j. 619); semble contra, post, 194, note (a). But those cases were decided by learned judges, who considered that the addition of the place of payment was immaterial, and the above view of the effect of the alteration was not suggested.

When made by consent, see Walter v Cubley, 2 C. & M. 151, post, 184, note (b).
(q) Calvert r. Baker, 4 M. & W. 417.

^{(1) {} An alteration of a general acceptance of a bill by the addition of a place of payment, discharges the acceptor, if made without his privity. Desbrowe r. Wetherby, 1 Moo. & Rob. 438. S. C. 6 Car. & Payne, 758. S. P. Taylor r. Mosley, Idem, 439. Oakey v. Wilcox, 3 How. Rep. 330. }

Where after a note was made and indorsed, the maker, without the knowledge or consent of the indorser, (both of whom resided in Albany, where the note was made,) added in the margin "payable at the bank of America;" (which is in the city of New York,) and payment was accordingly demanded at that bank, and due notice of non-payment was sent by mail to the indorser at Albany, it was held that the addition of the place of payment was an immaterial alteration, and that the demand and notice was sufficient to charge the indorser. Bank of America v. Woodworth, 18 Johns. 815. But this judgment was afterwards reversed on error. 18 Johns. 391.

Notes.

1. At Common Law.

V. Conse- ance of solvency, by being directed to a solvent house instead of an insolquences of vent one, and thereby held out a false colour to the holder, and likewise va-Atterations ried the contract of the acceptor by superadding an order upon another house in Bills and to pay the bill(r). And where such an alteration has been made with a fraudulent intent, it will even amount to forgery(s). So if a joint note be altered into a joint and several note, the party who signed the former will be discharged, although his co-partner assented to the alteration(t); and if there he no privity between the holder and the party sued, the former cannot recover even for the consideration of the bill(u). And if the indorsee of a bill alter it in a material respect, he thereby not only vitiates the bill, but causes it to operate as a satisfaction of the original *debt, and consequently cannot sue the drawer, the immediate indorser, either upon the bill or for the original consideration(x). But as between the drawer and acceptor, such alteration, though it will vitiate the bill, will not prevent the former from suing the latter for the original consideration (y).

Immaterial Alterations.

But if an alteration be made in any part of a bill which is not material, even without consent, it will not, though made after the bill is complete, invalidate it either at common law or with regard to the stamp laws (z). Thus, when the law was considered to be, that an acceptance engaging to pay at a particular place did not qualify the contract, if after a bill had been accepted generally, the acceptor wrote upon it the place where he wished it to be presented for payment when due; or if the holder merely subscribed the real residence of the acceptor, to save trouble in inquiring after him, it was held that such addition would not render the bill void(a). And where in an

(r) Tidmarsh v. Grover, 1 Maule & S. 735; and Rex v. Treble, next note; and see per Bayley, B. in Walter v. Cubley, 2 C. & M. 151,

post, 184, note (b).

(s) The King v. Treble, 2 Taunt. 329; Russ. & Ry. C. C. 164, (Chit. j. 791). Indictment for forgery, with intent to defraud Messrs. Kellingry William V. Market Edition 18 liway. Messrs. Kelliway, bankers in the country, made their re-issuable notes payable at Sir M. Bloxam and Co. bankers, London. Upon the failure of Bloxam and Co., Messrs. K. appointed Messrs. Ramsbottom and Co. their agents, and caused the words "Ramshottom and Co." to be engraved on small slips of paper, with which they covered the words "Sir M. Bloxam and Co." and fastened them on their notes with gum-water. It also appeared that a parcel of notes which had been sent by Messrs. Bloxam and Co. to Messrs. K. by the coach had been stolen, and that the defendant had caused similar slips of paper to be pasted over divers of the stolen notes, containing the words "Rams-bottom and Co." and negotiated them, but it did not appear that either Messrs. Ransbottom and Co. or Messrs K. had paid any of the notes so altered. It was objected for the defendant, this alteration did not amount to forgery, and the prisoner was respited until the opinion of the twelve judges could be had. After argument, the judges were of opinion that the act done by the prisoner was a false making, in a circumstance material to the value of the note and its facility of transfer, by making it payable at a solvent instead of an insolvent house. And sec further, post, Part III. Ch. I. Forgery.

(1) Perring v. Hone, 4 Bing. Rep. 28; 12 Moore, 135; 2 Carr. & P. 401, (Chit. j. 1313);

ante, 46, note (g), 58, note (u). whether the holder of a joint and several promissory note, by merely erasing the name of one of two co-promisors, discharges the other; Nicolson v. Revill, 6 Nev. & Man. 192; S. C. 4 Ad. & Ell. 675; 1 Har. & Wol. 753.

(u) Long v. Moore, cited 3 Esp. Rep. 155. Assumpsit by indorsee of a bill against acceptor; after the acceptance, the word "date" was inserted in place of "sight," in which form it had originally been drawn. The acceptor being thereby discharged, the plaintiff wanted to go on the common counts, and offered in evidence another bill drawn by the same drawer on the defendant for the same amount, but not accepted. Lord Kenyon ruled that it could not be done; nor could the plaintiff recover at all against the acceptor (the defendant), for he was liable only by virtue of the instrument, which, being vitiated, his liability was at an end. See Master v. Miller, 4 T. R. 320; ante, 182, note (k).

(x) Alderson v. Langdale, 3 B. & Ad. 660. (y) Atkinson v. Hawdon, 2 Ad. & El. 628; 1 Har. 77, S. C., post, 191, note (d).
(z) Sanderson v. Symonds, 1 Brod. & Bing.

426; Walter v. Cubley, 2 C. & M. 151; 4 Tyr.

87, S. C.
(a) Trapp v. Spearman, 3 Fsp. Rep. 57; (Chit. j. 618). cited 2 C. & M. 153. In an action on a bill by an indorsee against the acceptor, the defence was that the bill had been altered by the insertion of the words "when due, at the Cross Keys, Blackfriars Road." But Lord Kenyon said that the alteration was immaterial, and the plaintiff had a verdict; and see 1 & 2 Geo. 4, c. 78.

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action by the payee against the acceptor of a bill of exchange, it appeared that V. Consethe bill had originally been accepted by the defendant payable at his own quences of house, King's Road, Chelsea, but six weeks after the delivery of the bill to in Bills and the plaintiff, the defendant, at the plaintiff's request, altered the description by Notes. making it "payable at J. Bland's, Great Surrey Street, Blackfriars," it 1. At Comwas held that this alteration was immaterial, being a mere memorandum made mon Law. by consent(b). So where a bill was addressed to A. and B., by the style of A., B., and Co., and they accepted in the name of A. and B., and the address of the bill was afterwards altered to A. and B. striking out "and Co.," this was held an immaterial alteration, and that the acceptors were not discharged (c).

So an addition or correction to supply or declare the real intention of the Alteration parties may, as well at common law as under the stamp laws, be made even Mistake alafter a bill or note has been in circulation. Thus a bona fide holder of a lowed. bill accepted payable to --- (blank) or order, may, we have seen, insert his own name as payee, and indorse the same, without rendering the bill void(d). So the insertion of the words "or order," in a note intended to be negotiable, but which have been omitted by mistake, will not render it inoperative against any of the parties(e). *So where a person who was in- [*185] debted to another had agreed to give him a bill of exchange in payment, which was to be drawn by him and accepted by a third person, sent a promissory note drawn by himself and indorsed by the person who was to have been the acceptor, it was held that such promissory note might before it was circulated be altered into a bill of exchange, according to the original agreement of the parties, such alteration being considered as a mere correction of a mistake(f); and at the request of the drawer, a bill may before accep-

Marson v. Petit, 1 Campb. 82. Indorsee against the acceptor of a bill. After acceptance, the drawee, without the consent of the defendant, wrote under his name the words " Prescott and Co." Lord Ellenborough held it immaterial, as it did not alter the responsibility of the acceptor; but those cases appear overruled, unless considered merely as authorities that a memorandum as to the place of payment may be made with consent of the parties; see observations of Lord Tenterden in M'Intosh v. Haydon, ante, 182, n. (p); Tidmarsh v. Grover, 1 Maule & S. 735, (Chit. j. 891); French v. Nicholson, 1 Marsh. 72; Cowie v. Halsall, 4 Bar. & Ald. 197; 3 Stark. 36, (Chit. j. 1099); ante, 182, note (p), and Walter v. Cubley, 2 Crom. & Mee. 151, next note.

(b) Walter v. Cubley, 2 Crom. & Mee. 151; 4 Tyr. 87, S. C. The objection in this case was that a fresh stamp became necessary.
(c) Farquhar v. Southey and others, 1 M. &

M. 14; 2 Car. & P. 497, (Chit. j. 1315). (d) Attwood v. Griffin, Ryan & Moo 425,

(Chit. j. 1805); ante, 156, n. (l).

(e) Kershaw v. Cox, 3 Esp. Rep. 246, (Chit. 692); recognized in Knill v. Williams, 10 East, 485, 437, (Chit. j. 761), and 12 East, 475; and Bathe v. Taylor, 15 East, 517, (Chit. j. 857), and see Robinson v. Tourays, 1 Maule & 8. 217. In an action on a bill it appeared that the defendant, who was the payee, had indorsed the bill to one K., by whom it was indorsed to the plaintiffs; that they, on discovering the words "or order" had been omitted, returned

it the day after it was drawn, and the drawer, with the consent of the defendant, then inserted those words. Le Blanc, J. held that no new stamp was necessary, that this was not a new instrument, as in Bowman v. Nicholl, but merely a correction of a mistake, and in furtherance of the original intention of the parties, and the plaintiff had a verdict. A new trial was afterwards refused. In Knill v. Williams, 10 East, 437, (Chit. j. 761), Le Blanc, J. said that Kershaw v. Cox could only be supported on the ground that the alteration was merely the correction of a mistake, for the alteration was a very material one. And see Coles v. Parkin, 12 East, 471. See post, 820, (22).

(f) Webber v. Robert Maddocks, 3 Camp. 1, (Chit. j. 831). Indorsee against acceptor. Samuel and Robert Maddocks being indebted to plaintiff in 110l. agreed to give him a bill at four months, to be drawn by Samuel and accepted by Robert. Instead of a bill they sent a note as follows:-

London, 10th Dec. 1810.

Four months after date, I promise to pay to my own order one hundred and ten pounds, value received.

S. Maddocks.

Indorsed, S. Maddocks. R. Maddocks.

The plaintiff returned it that it might be altered into a bill, according to the agreement. The words "I promise to" were immediately struck out, a direction to R. Maddocks was subjoined, and he wrote his name as acceptor.

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Notes.

1. At Common Law.

v. Conse- tance be altered and postponed as to the date, without vitiating it, or renderquences of ing a new stamp necessary (g). And where a bill was dated by mistake in Alterations 1822 instead of 1823, and the agent of the drawer and acceptor, without their knowledge or consent, corrected the mistake, it was held such alteration did not vacate the bill(h); and the introduction of words which were implied may be made without discharging the parties or rendering a new stamp necessary (i)(1).

> A court of equity will reform an instrument, which by the mistake of the drawer admits of a construction inconsistent with the true agreement of the parties, although the party seeking to reform it himself drew the instrument(k).

2. Under Stamp Acts. Material Alteration after Bill has become an available Security, destroys it, though with Consent. [*186 i

Any material alteration made in a bill of exchange or promissory note after it has been once perfected, and has become an available security, even with the consent of the parties, except in the before-mentioned cases of an alteration to correct a mistake(1), will render it absolutely void, it having been enacted, that there shall be no alteration in any stamped instrument after it has been used for one purpose; and a material alteration creates a new contract, and the stamp *appropriate to it ought to have been impressed before such contract was made, so that the instrument is rendered wholly inoperative (m). The usual expression inaccurately is, that a material alteration renders a fresh stamp necessary; but as a bill or note must be properly stamped before it is made or signed, and no fresh stamp can be legally imposed, the real consequence of such alteration is that the new contract is wholly unavailing, and the expression should more properly be varied accordingly (n).

It was then delivered back to the plaintiff.

For the defendant it was insisted that the instrument was completely vitiated by this alteration.

Lord Ellenborough. "I think the stamp impressed upon this paper is sufficient to render the instrument available in its present form. It cannot be considered as having been negotiated as a promissory note. It never was issued to third persons. It remained in the hands and under the dominion of the original parties. Every thing continued in fieri till after the altera-tion. The stamp was not occupied till then. Webber instantly rejected it as a promissory nete. The alteration only fulfilled the terms of the agreement, and may be treated as the cor-rection of a mistake." The plaintiff recovered.

(g) Peacock v. Murrell, 2 Stark. R. 558, (Chit. j. 1077); anle, 103; Upstone v. Marchant, 2 Bar. & Cress 10; 3 Dowl. & Ryl. 198, (Chit. j. 1182); where a bill was in fact drawn on the 21st December for 211., payable

two months after date, but on the face of it purported to bear date on the 31st December, it was held to require only a 2s stamp, which is imposed by 55 Geo. 3, c. 184, on bills for that sum not exceeding two months after date, the word "date," as there used, meaning the period of payment expressed on the face of the bill. See ante, 115.

(h) Brutt v. Picard, Ryan & Mood. 37,

(Chit j 1205); Peake's Rep. Addenda, 97.
(i) Doe v. Houghton, 1 Man & Ry. 208.
(k) Ball v. Storey, 1 Sim. & Stu. 210. (1) In Jacobs v. Hart, 6 Maule & S. 142,

(Chit. j. 990), the date was mistaken. (m) See 1 Ann. stat. 2, c. 22, s. 2 and 3, to which the subsequent acts refer; per Le Blanc, J. in Bathe v. Taylor, 15 East, 416, (Chit. J.

857) (n) Wilson v. Justice, Peake's Rep. Addenda, 96, (Chit. j. 574). A note of nine months after date was, by consent of all parties, a fortnight after it had been delivered to the

In such a case the question as to the sum intended to be inserted is properly submitted to a jury. lb.

The maker of the note is a competent witness to prove such intention. lb

⁽¹⁾ Where a note is intended to be made for eight hundred dollars, and is indorsed by the payee for the accommodation of the maker and delivered to him, and by mistake the words hundred dollars are omitted, so that it purports to be a note for eight , the maker, without the assent of the indorser, may insert the words hundred dollars; and in an action by the holder to secure a debt to whom the note was made, the indorser cannot object to the insertion of such words. Boyd v. Brotherson, 10 Wend. Rep. 93.

But the holder of a bill has no right to make an alteration in it, even to correct a mistake, unless to make the instrument conform to what all parties to it agreed or intended it should have been. Hervey v. Hervey, 15 Maine Rep. 857. }

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Every alteration of a bill or note, after it is once complete, and become an V. Conseavailable security, is considered as a fresh drawing or making, and the cir-quences of cumstance of the bill or note not having been negotiated will not in that case in Bills and afford any exception(o).

In these cases, therefore, the true question is not, whether the material 2. Under alteration was made before or after negotiation of the instrument; but whe- Stamp ther it was made before the instrument and transaction respecting it was com- Acts. plete, and had become an available security, that is, whether it was then in At what the hands of a party who could enforce payment thereof for some other parterations ty thereto(p); if before, the instrument is valid; if after, void. When a may be bill is drawn for value, or for a debt due from the drawee to the drawer, made. then whilst it is in the hands of the drawer, and before acceptance, it may by consent be altered in any material respect, as in date and time of payment, because until acceptance it had not become an available security (q). So even after acceptance, and before the bill has been completely delivered over to the drawer or payee, it may, it seems, be so altered; and therefore where a person having made and signed a promissory note, handed it to a third person to attest, and then to deliver it to *the payee, but before it was [*187] given to the payee it was altered by the consent of all parties; it was held, that the so delivering it to the third person was not an issuing of it, and that

it did not require a new stamp(r). And where a joint and several promisso-

payee, altered to ten months after date. Lord Kenyon held a new stamp necessary, and nonsuited the plaintiff. In Eayl. 5th edit. 110, it is called a bill.

The day after a promissory note had been delivered to the payee, and by consent of the maker, words denoting the consideration were inserted, and they were held to invalidate for want of a fresh stamp, because this alteration was material, for the words introduced must, if not there, have been proved as a fact by dif-ferent evidence; Knill v. Williams, 10 East, 431, (Chit. j. 761); rost, 189, note (g). (o) Bowman v. Nicholls, 5 T. R. 537, (Chit.

j. 522). A bill was dated 2nd September, and payable twenty-one days after date; afterwards, and after acceptance, and while it was in the hands of the drawer, it was altered, with the consent of the acceptor, to fifty-one days; on the 20th September it was again altered to twenty-one days; but the date was brought forward to 14th September, after which it was negotiated, and an action brought against the acceptor. Lord Kenyon said, that every alteratien in an instrument requiring a stamp made a new stamp necessary, and nonsuited the plaintiff. Upon a rule nisi for a new trial, it was urged that there was a distinction between an alteration made after the negotiation of a bill, and an alteration made before, and in the latter case, the whole might be considered as one transaction; but the court said, "that as the operation of the bill as it originally stood was quite spent when the last alteration was made, that alteration made it a new and distinct transaction between the parties, and therefore there should have been a new stamp," and the nonsuit was confirmed.

In Bathe v. Taylor, 15 East, 412, (Chit. j. 857), is was held, that a bill drawn on the 1st of August, at two months, by A. on B. payable to the order of the drawer, and accepted and

re-delivered by B. as a security for a debt, and kept by A. for twenty days, could not be altered in its legal effect by bringing forward the date to the 21st without a new stamp, though with the consent of the acceptor, and lefore indorse-ment and delivery to a third person. See M'Intish r. Haydon, Ry. & Mood. C. N. P. 362, (Chit. j. 1287); ante, 182, note (p); Prince v. Nicholson, 1 Marsh. 72, note (c). But see Leykrieff v. Ashford, 12 Moore, 281, (Chit.

j. 1824); 10st, 191, note (2).
(p) Per Bayley, J. in Downes r. Richardson, 5 Bar. & Ald. 680; 1 D. & R. 332, S. C.,

(Chit. j. 1385).

(q) Kennersley v. Nash, 1 Stark. R. 452, (Chit. j. 977); Jacobs r. Hart, 2 Stark. R. 45; Outhwaite r. Luntley, 4 Campb. 179, (Chit. j.

(r) Sherrington r. Jermyn, 3 Car. & P. 374, (Chit. j. 1409). Assumpsit against the defendant as the maker of a promissory note, payable to the plaintiff or order one month after date. It appeared from the evidence of Mr. Freeman, that he was present with the plaintiff and the defendant when the note was made. That the body of the note was written by the plaintiff, and signed by the defendant, and that after signing it the defendant handed it to the witness to attest, and to give it to the plaintiff, and that when it was so handed to Freeman the note ran thus:

"I promise to pay to Mr. S. Sherrington, or order, on demand, the sum of two hundred pounds, with interest."

But after it was so put into the hands of Freeman, and before it was given to the plaintiff, it was with the consent of all parties, altered to its present form, which was this:-

"One month after date I promise to pay to Mr. S. Sherrington, or order, two hundred pounds.'

The words "on demand" being struck out

Alterations Notes. 2. Under Stamp Acts.

V. Conserry note was made by several parties concerned in a joint undertaking, for quences of the purpose of securing the re-payment of a loan of money, and one of the in Bills and parties signed it some days after the party who borrowed the money, it was held that the note did not require an additional stamp if the last signature was put before the money was advanced, or if the party last signing had promised to sign a note before the advance of money, notwithstanding it might not have been issued till afterwards(s). And it has been held that an accepted bill might, after it had been delivered to the drawer, with the consent of the acceptor, be altered by merely stating a place of payment(t), or changing the place of payment(u), without requiring a new stamp; though these must be considered as cases of mere memorandums made by consent, because, we have seen, that such alteration is now considered material (x). But after an accepted bill drawn for value has been delivered over to the drawer, and the parties have separated, it cannot be altered in any material respect, unless to correct a mistake, because the drawer had already acquired a perfect right to insist on payment according to the original terms of the bill(y); and even an unaccepted bill, which has been delivered by the drawer to a payer for value, cannot, though before acceptance, be altered, because the payee had acquired a perfect right against the drawer(z). An accommodation bill is not to be considered as issued until it is in the

and, therefore, where three persons joined, as drawer, acceptor, and first indorser, in making an accommodation bill, and it was afterwards issued for value to J. S., and previously to its being so issued its date had been altered, it was held that the acceptor having assented to the alteration when he was informed of it, it was no answer to an action on the bill against him that the bill had been so altered without the consent of the drawer aud first indorser, [*188] *and that a fresh stamp was not necessary in consequence of such alteration, the bill having having been altered before it was issued in point of law, viz. before it was in the hands of a person who could sue any prior party thereon(a). On the other hand, where the date of a bill of exchange was altered by the payee at the request of the acceptor before the acceptance but after the bill had been delivered to the payer for a bona fide debt, such alteration was considered to render the bill wholly void, and to preclude the payee from maintaining any action thereon even against such acceptor, because before the alteration it had become an available security in the hands of the payee And if a bill be altered in the date by the drawee against the drawer(b).

hands of some person who is entitled to treat it as a security available in law;

with a pen, and "one month after date" substituted, and the words "with interest" being altogether erased.

F. Pollock, for the defendant, submitted that the note having been handed over to Freeman in the manner stated, after it had been signed and perfected by the defendant, it was to be considered as issued from that time, and that consequently it was void under the stamp laws.

Lord Tenterden, C. J. "1 am of opinion, that as it was all one transaction, it could not be considered as issued at the time of the al-

teration." Verdict for the plaintiff.
(s) Ex parte White, 2 Dea. & Chitty, 334, (Chit. j. 1612). See Clerk v. Blackstock, Holt's N. P. C. 474.

(t) Jacobs v. Hart, 2 Stark. 45; 6 Mau. & S. 142, (Chit. j. 990); Stevens v. Lloyd, Mood. & M. 292, (Chit. j. 1427).

(u) Walter v. Cubley, 2 C. & M. 151; ante,

184, note (b).

(x) M'Intosh r. Haydon, Ry. & Mood. 362, (Chit. j. 1278); Desbrow v. Weatherley, 6 C. & P. 758; ante, 182, note (p).

(y) Wilson r. Justice, Peake Rep. Addenda, 90, (Chit. j. 574); ante, 186, note (n); Bathe v. Taylor, 15 East, 412, (Chit. j. 857); is expressly to this effect; ante, 186, note (n).

(z) Id. ibid.; Walton v. Hastings, 4 Camp. 223; 1 Stark. Rep. 215, (Chit. j. 944, 953); post, 188, note (b)

(a) Per Holroyd, J. in Downes v. Richardson, 1 D. & R. 332; 5 B. & Ald. 674, S. C. (Chit. j. 1135). And see Johnson v. Gibbs, 2 Chit. Rep. 123, (Chit. j. 932); Sherrington v. Jermyn, 3 Car. & P. 374, (Chit. j. 1409). These cases over-ruled Calvert r. Roberts, 3 Campb. 843, (Chit. j. 884); where it was held, that the alteration even of an accommodation bill after acceptance and whilst in the hands of the drawer invalidated it.

(b) Walton v. Hastings, 4 Camp. 223; 1

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after it has been indorsed, but before it has been accepted, and with the V. Consedrawer's consent, such alteration will invalidate the bill, and discharge the quences of Alterations drawer and indorsers from liability, though it be in the hands of a bona fide in Bills and holder, who was ignorant of the circumstances(c). And after a promissory Notes. note has been made by one person, the name of another cannot be added 2. Under thereto as surety, unless by indorsement, because his becoming a joint maker slamp would be making a new contract(d). In a recent case, however, it was Acts. held that the addition of a name as a second surety to a joint and several promissory note, after it had issued, but with the consent of all the parties to it, was not a material alteration, so as to preclude the original surety, who had paid a moiety of it, from recovering the amount as money paid to the use of the maker(e). Where A. and B. exchanged their acceptances, it was held that the delivery of the respective bills for acceptance, and the re-delivery of the same by the acceptors to the respective drawers, was a negotiation of the bills, and that such bills could not, after they had been so exchanged for a valuable consideration (as the exchange of acceptances is) for twenty days, be post-dated, although during all that time each had remained in the hands of the original drawer(f). And even the subsequent *inser- [*189]tion of the nature of the consideration of the bill will render it void(g). should also seem that no bill after it would have fallen due according to its original shape can be altered even with consent, unless a fresh stamp be impressed(h).

If upon a bill being presented for acceptance, the drawee alters it as to the time of payment, and accepts it so altered, he vacates the bill as against the drawer and indorsers; but it is said, that if the holder acquiesces in such alteration and acceptance, it is a good bill as between him and the acceptor; and keeping the bill and presenting it for payment at the deferred

Stark. Rep. 215, (Chit. j. 944, 953). Payee against the acceptor of a bill of exchange. The bill was drawn by one Brooks on the defendant, payable to the order of the plaintiff, dated 5th July; when the bill was presented for acceptance, defendant requested that the date of the bill might be altered to the 10th, to which plaintiff agreed, but did not inform Brooks. The plaintiff contended, that as the alteration was made before acceptance, the defendant was liable as acceptor, although the drawer might be discharged. Lord Ellenborough: "Upon the Stamp Laws, I think the bill is void. It was an existing valid instrument before the alteration. It was negotiated when delivered by Brooks to the plaintiff. The plaintiff, as payee, had acquired an absolute interest in it, and might have maintained an action upon it against the drawer. It did not remain in fieri till the acceptance. As to the drawer, it was before then a perfect instrument. Nor was there any mistake to be rectified. When drawn on the 5th July, it corresponded with the intentions both of the drawer and payee. Here, when the date was altered, a new bill was drawn, and that could not be done without a new stamp.

(c) Outhwaite and another v. Huntley, 4 Campb. 179, (Chit. j. 932). Lord Ellenborough said, that "before acceptance the bill of exchange was a perfect instrument, on which the drawers might have been sued; any material alteration of it in that state, therefore, rendered it void. Besides, consent would not

justify the alteration, with a view to the Stamp Laws, after the bill had been negotiated.

(d) Clarke v. Blackstock, Holt, C. N. P. 474, (Chit j. 968). A promissory note signed by A., and subsequently by B., whilst in the hands of the payee, as surety for A., will be void without an additional stamp, unless such signature of B. is in virtue of a previous agreement at the time of making the note.

(e) Cattin v. Simpson, 3 Nev. & P. 248; 8 Ad. & El. 136.

(f) Cardwell v. Martin, 9 East, Rep. 190; 1 Camp. 79, (Chit. j. 744). Note. Each bill was payable to the drawer's order, and the plaintiff was a bon't fide indorsee; 9 Fast. 357; 6 Fast, 312.

(g) Knill v. Williams, 10 East, 431, (Chit. 761). This was an action on a note, by which, nine months after date, the defendant promised to pay the plaintiff or order 1001. value received, for the good-will of the lease and trade of Mr. F. Knill, deceased. It appeared at the trial before Le Blanc, J. at Hereford, that the words in italics were added by the consent of both parties, on the day after the note had been signed and delivered to the plaintiff, without any new stamp being impressed upon it; upon this the plaintiff was non-suited; and upon a rule nisi to set aside the nonsuit, the whole court held that the alteration was material, and therefore discharged the rule.

(h) Bownian v. Nicholls, 5 T. R. 537, (Chit.

j. 522); ante, 186, note (v).

v. Conse- period is proof of such acquiescence; and the holder cannot afterwards quences of maintain an action on the case against the acceptor for thereby destroying Alterations the bill(i). The effect of an alteration in the acceptance of a bill will be in Bills and Notes, hereafter considered (k). As the stamp is impressed on the bill, and not on the acceptance of it, a deviation or alteration in the terms of an accep-2. Under tance does not render a new stamp necessary, and therefore to save the Stamp stamp, it should seem, that if the drawer wish to alter the sum, or extend Acts. the time of payment, the alteration may be effected by accepting accordingly(l)(1).

> (i) Paton v. Winter, 1 Taunt. 420, (Chit. j. 763). See 6 East, 309. The drawee altered the time of payment of a bill from one month to two, and accepted it; the holder kept it two months, and then presented it for payment. The court held that this was an acquiescence in the alteration, and directed a nonsuit to be entered, in an action on the case brought by

the holder against the acceptor, for having mutilated the bill. Sed ride Walton v. Hastings,

1 Stark. Rep. 215; 4 Campb. 223; S. C., anle, 188, note (b), where Lord Ellenborough said, the only tenable objection, i. e. on the Stamp Law, was not taken in Paton v. Winter, and

which was scarcely worth reporting.

(k) Post, Ch. VII. s. ii. Liability of Acceptor-How discharged. (1) Stevens v. Lloyd, Mood. & M. 292,

(Chit. j. 1247).

(I) Any alteration, whether material or not, in an instrument under seal, made by the party to whom it is given, will avoid it, unless made by the consent of the party who executed it. But this consent may as well be implied from the nature of the alteration as be expressed. In a simple contract, which is merely evidence of a promise, an immaterial alteration, however made, not at all affecting the terms of the promise, seems not to be within the same principle of deeds, which, from the alteration, may not be the deeds of the parties; while a similar alteration in a written simple contract might leave it complete evidence of the same contract. Indeed the assent of the party signing such contract, that the omission of a word by a clerical mistake which the law will supply, might be cured by inserting such word, ought to be presumed, to protect him from the imputation of intentional fraud. And in a simple contract an addition by the unnecessary supplying of a word, which the law would supply, is not an alteration in matter or form which would destroy the contract. *Per Curiam*, Hunt v. Adams, 6 Mass. Rep. 519. See Griffith v. Cox, Overton's Rep. 210.

If an acceptance of a bill be cancelled by mistake, it does not avoid the acceptance, and all parties to the bill are bound in the same manner as if the act had not been done. Nevins et al. r.

De Grand, 15 Mass. Rep.

An alteration of the date of a promissory note by the payee, whereby the time of payment is retarded, and afterwards discounted with innocent persons by the payer on indorsing it, avoids the note. Bank of U. S. v. Russell and Boone, 3 Yeates' Rep. 391. See 3 Cranch, 37.

The law will not presume that an alteration apparent on the face of a note was made after its execution. Cumberland Bank v. Hall, 1 Halsted, 215. But whether the alteration was made after or before the execution of the note, seems to be a question for the jury. Ibid.

An alteration of the date of a promissory note without consent, vitiates it in the hands of an in-

nocent indorsee. Stephens v. Graham, 7 Serg. & Rawle, 505.

If the obligee of a sealed bill procure persons not present at the execution, to add their names as witnesses, without the knowledge of the obligor; this is such an alteration as avoids the instrument. But if they did it by mistake, supposing that they were witnessing an assignment then made by the obligee, the bill is good. Marshall r. Gougler, 10 Serg. & Rawle, 164.

If a person draw a note leaving a blank for the name of the payee, and authorize a person to

obtain the money from the payee and insert his name, the note is valid, if the directions are com-

plied with. Stahl v. Berger, Ib. 170.

Where a bill was deposited by H. with B., as a security for monies advanced, but not indorsed, and which fell due after the acceptor, without the knowledge or consent of A., altered it to \$120, and then passed it to H. for that sum, it was held that A. was not liable to pay the note. Goodman v. Eastman, 4 New Hamp. Rep. 455.

The rule of law that where one of two innocent parties must so suffer by the fraud of a third person, he who trusted such third person and enabled him to commit the fraud must abide the consequences, does not apply in such a case. Ibid

A bill of exchange indorsed in blank by the payers and left by them in the hands of the drawer was transferred to the plaintiff without the knowledge of the indorsers, with the following words written by the drawer under his name. "Left with Mr. B. (the plaintiff) as collateral." It was held, that this was not an alteration of the bill, and therefore that it did not render it void as against the indorsers. Bachellor v. Priest, 12 Pick. Rep. 399.

One who executes a note as a surety and gives it to the principal to be executed by him, and delivered to the payee, but who, before so doing, alters the amount mentioned in the note from d'are .. ii. 🖫

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quently give the transaction the appearance of fraud(m); and though it has quences of Alterations been laid down that if an interlineation appear in a deed, and there be no ev- in Bills and idence to show how it was done, it will be presumed to have been done before Notes. the execution (n), yet with respect to bills and notes, and other negotiable 2. Under securities, a contrary rule has been laid down, namely, that if the instrument stamp appear upon the face to have been altered, it is for the holder to prove, and Acts. not for the defendant to disprove, that it was altered under circumstances Evidence

It may be here proper to observe, that alterations and erasures will fre- V. Conse-

And where in an action tried on in case of

(m) Singleton r. Butler, 2 B. & P. 283.

which will make it still available (o)(1).

(n) 12 Vin Abr. 58.

(o) Johnson v. The Duke of Marlborough, 2 Stark. Rep. 313, (Chit. j. 1020); Henman v. Dickenson, 5 Bingh, 183; 2 Moore & P.

289, (Chit. j. 1461); Bishop v. Chambre, Mood. & M. 116; 3 Car. & P. 53, (Chit. j. 1365, 1411). Over-ruled on another point in Jardine v. Payne, 1 B. & Adol. 671, (Chit. j.

a greater to a less sum, cannot take advantage of such alteration upon the plea of non est factum. Ogle v. Graham, 2 Penn. Rep. 182.

Nor closs it affect the validity of a note, that it was executed by one of the payors in the presence of one witness, and by the other, in the presence of another; although it purports to be executed by both, in the presence of two subscribing witnesses. Ibid.

Any alteration, however immaterial, made in a deed or promissory note, made by the obligee without obligor's consent, renders it void. Bank of Limestone v. Penick, 5 Monroe's Rep. 31.

The attestation of a note not before witnessed, by a person who was not present at the signing, is a material alteration of the contract, and destroys its validity. Brackett v. Mountford, 2 Fairf. 114.

But where, previous to the delivery of a note executed by two persons and attested by one witness, the name of another person was added to the note as a witness, without the knowledge of such person; but it did not appear that this was done by the payce, and no fraud on his part was suggested; it was held that the addition of such name was not a material alteration, and did not render the note void. Ford v. Ford, 17 Pick. 418. So, where a joint and several promissory note was signed by A., B., and C.; and afterwards A. acnowledged his signature to a witness, who subscribed his name in the presence of A and of the payee, without stating that he witnessed only the signature of A, it was held in an action against the three makers, that this was not such an alteration of the instrument as to discharge B. and C. Beary v. Haines, 4 Whart. 17. Neither is the adding of a date to an endorsement of a partial payment on the back of a note an alteration of the instrument. Howe v. Thompson, Idem, 152.

A promissory note in these words was made by the defendant: "For value received I promise to pay to Quincy Railway Co." (the plaintiffs) "or order, \$1000." &c. The note was then indorsed by E. P. and delivered to the treasurer of the plaintiffs, who, without the knowledge or consent of the maker, inserted the words "the order of E. P." above the words "Quincy R. Co. or order," but without erasing the latter words; held it was not an alteration affecting the validity of the note. Granite Railway Co. v. Bacon, 15 Pick. 239.

Where an instrument in the form of a promissory note for the payment of a certain sum of money to A. or bearer is signed by three persons, and a seal affixed at the signature of one of them, a joint action cannot be maintained against the three; and if the seal be affixed afterwards, and in the absence of the other two, the instrument is rendered void as to the latter. Biery v. Haynes, 5 Whart. 563.

An alteration of a note, changing the liability of an indorser from a conditional to an absolute

engagment, is a material alteration. Farmer v. Rand, 14 Maine Rep. 225. Where the surname of the payee of a note was interlined after delivery, but it was proved that the note was originally given to the payee, whose name was inserted; held that the alteration did not vitiate the note. Monchet v. Cason, 1 Brev. 307. }

(1) In an action on a promissory note, on which a small payment had been indorsed, but afterwards erased, it was held, that the note might be read in evidence, without any previous explanation of the reason why the indorsement had been cancelled. Kimball v. Lamson, 2 Verm, Rep.

K. held a note against L. and indorsed thereon one dollar for services rendered for him by L, L. afterwards sued K. for the services so indorsed on the note, and recovered, L. having testified that he had never authorized K. to make the indorsement. In an action against L. on said note, it was afterwards held, that K. might erase said indorsement without prejudice to to the note. Ib.

Erasures or interlineations in the substantial part of an acceptance or other instrument, are presumed to be false or forged, and must be satisfactorily accounted for before the instrument can be received in evidence. M'Micken v. Beanchamp, 2 Miller's Louis. Rep. 290.

An erased credit on a note in the possession of the creditor, is not conclusive proof of payment, but may be repelled by other proofs or presumptions, to show it was indorsed on the note erroneously. Benson r. Mathews, 7 Louis. Rep. 356.

V. Conset the 8th December, 1827, on a promissory note declared on as dated 27th Notes.

2. Under Stamp Acts.

quences of May, 1814, the defendant pleaded the general issue and the statute of limi-Alterations tations, and there was evidence of an ambiguous acknowledgment of the note to take the case out of the statute, and the end of the note produced in evidence, after the figures 27 had been cut off and the word "May" written over the 27 and the 1814 underneath, and in the cutting off some of the writing had also been cut; Lord Tenterden told the jury that it *certainly lay [*190] on the plaintiff to account for the suspicious form and obvious alteration of the note, and that if they thought that the alteration had been made after the note had been signed by the defendant, they should find for him, and he advised them to find for the defendant, as the plaintiff had adduced no evidence to explain the alteration, and the jury found accordingly (p). there was an apparent alteration in the date, the same judge required the plaintiff not only to prove that it had been altered with the consent of the acceptor, the defendant, but also that such alteration had been made before it had been issued, but upon proving that the defendant himself had altered the date, and that the bill was in the hands of the drawer after such alteration, and before it was indorsed to the plaintiff, he recovered (q). And in an action by the indorsee against the acceptor of a bill of exchange, if it appear that following the acceptance there are words not in the acceptor's handwriting, making the bill payable at a particular place, it is incumbent on the plaintiff to show that the words were written by the acceptor's authority, because the addition of such words is a material alteration notwithstanding the 1 & 2 Geo. 4, c.78(r). But where the making of the bill or note is admitted upon the record, and issue taken upon the indorsement, the plaintiff is not bound to explain an apparent alteration in the date of the instrument(s). And where the date (20th April) of a bill payable three months after date appeared to be on an erasure, and it was proved that it had been dated the 28th January, yet, as the acceptor himself had written at the top "due July 23," it was held that this was sufficient to negative any fraud, and also afforded an inference that the alteration was antecedent to or coeval with the acceptance, and therefore valid, and it was left by the judge to the jury with that suggestion, and they found for the plaintiff (t). So in an action against the acceptor, where the defendant traversed the acceptance, and it appeared in evidence that a space which was originally left between the word "accepted" and the acceptor's name, had been filled up in the handwriting of a third party with the name of the place of payment, but it was shown that the defendant was not in the habit of writing acceptances in this manner, and that when applied to for the amount of the bill he promised payment in a month; it was held that the acceptance had been sufficiently proved, and that it was not incumbent on the plaintiff to give further evidence to show that the addition to the acceptance had been made with the consent of the And where the defence is that the bill had been altered, the defendant(u). defendant cannot go into evidence to show that other bills have been likewise altered (x). In an action by the indorsee against the acceptor, the bill appeared on inspection to have been altered in amount, and after the ac-

⁽p) Bishop v. Chambre, at Westminster, 8th December, 1827. Denman for plaintiff. Brougham for defendant, MS.; Mood. & M. 116; 3 Car. & P. 55; 1 Dans. & Lloyd, 83, (Chit. j. 1365, 1411).

⁽q) Johnson v. The Duke of Marlborough, 2 Stark. Rep. 368, (Chit. j. 1020); and sco Bul. N. P. 255.

⁽r) Desbrow v. Wentherley, 6 Car. & P. 758. See ante, 182, note (p).

⁽s) Sibley v. Fisher, 7 Ad & El. 444; 2 N. & P. 430, S. C.

⁽t) Leykrieff v. Ashford, 12 Moore, 281. (u) Semble v. Cole, H. T. 1839, Ex., 3 Jurist, 268.

⁽x) Thompson v. Moseley, 5 Car. & P. 501.

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ceptance were the words "at Cockburn's," which were not in the defend- V. Conseant's handwriting. Neither the plaintiff nor the defendant gave evidence as quences of to when or by whom the alterations were made; and it was held that it was in Bills and for the jury to say under the circumstances whether the bill had been alter- Notes. ed after acceptance, and that if they *thought it had, the plaintiff could not 2. Under recover(y). From this and the other cases it appears that the question stamp whether there has or not been any alteration, and when it was made, and Acts. with what view or motive, is always for a jury, and not for the court(z).

It was for some time supposed, that a bill or note, rendered inadmissible ABill, &c. in evidence as a security by a material alteration, might nevertheless be look- altered ed at by a jury for collateral purposes, and might assist in evidence in proof of not admisa common count in a declaration(a); but that supposition is now refuted, and sible in such a vitiated instrument cannot be read in evidence for any available pur- for any pose whatever in favour of the holder (b), though it is admissible to defeat a available claim on the ground of fraud, or convict a party of a crime(c). But the ma- purpose. terial alteration does not extinguish the prior debt, and between the original When oriparties, after the expiration of the period for which the bill or note was made, sideration the original debt or consideration is recoverable upon adducing other evidence recoverain proof thereof; and proof of reputed payment of a fixed sum, as interest ble. for a named period, may suffice to establish the amount of a debt, the interest of which would be equal to the sums from time to time paid(d). Unless, however, the payment or other admission enable a jury to ascertain the precise amount of debt, the proof is insufficient, and the plaintiff cannot recover even nominal damages (e). And the right to recover for the consideration of the bill or note being confined to the original parties thereto, such consideration cannot be recovered in an action by an indorsee against either the acceptor or maker, or against the drawer or indorser; because as against the former the only privity between the parties is by means of the bill or note, which is destroyed by the alteration; and as against the latter, their remedy over against prior parties is also destroyed (f).

(y) Taylor v. Moseley, 6 Car. & P. 273; see post, 820, (23).

(z) Leykrieff v. Ashford, 12 Moore, 291, (Chit. j. 1324). A case of this nature arose in Scotland, where by the express enactment in the act, A. D. 1696, c. 15, and the practice thereon, erasures in general vitiate. It was insisted before the Lord Ordinary and the judges of the First Division, that the bill had been improperly vitiated and erased. The bill was produced, and the Lord Ordinary having inspected the same, and declared that the same was not vitiated or erased, judgment was accordingly pronounced against the suspender. Upon a reclaiming petition, the judges, on inspecting the bill, were generally of opinion that there was no vitiation; but as the allegation was insisted on, they allowed a proof, and a remit was accordingly made to engravers and other skilful persons to report. Thereafter the reporters having stated their unanimous opinion that the bill had been vitiated, the judges recalled the decision complained of, and remitted to pass the bill without caution or consignation; Hamilton r. Kinnear and Sons, 4 Shaw & Dunlop, 102. See further as to erasure and alterations, Sir Thomas Craig, lib. 11; Digg. 5, ss. 23, p. 215; Blair's edit. Stair, B. 10, tit. 42; Bankton, B. 1. tit. 11; Erskine, B. 3, tit. 12, ss. 20; Ross on Conveyancing, vol. i. 145; Gaywood v. M'Keand,

House of Lords, 1831, case No. 64. The Scotch Act, 1696, c. 15, is particular as to attestation, &c.

(a) Bishop v. Chambre, 1 Dans. & Lloyd Rep. 83; Mood. & M. 116; 3 Car. & P. 55; (Chit. j. 1365, 1411); (expressly overruled as to that point in Jardine v. Payne, 1 Barn. & Adol. 671, (Chit. j. 1521)); and see Sutton, Toomer, 7 B. & C. 416; 1 Man. & R. 125, (Chit. j. 1352).

(b) Jardine v. Payne, 1 B. & Adol. 671, (Chit. j. 1521); Sweeting v. Halse, 9 B. & C. 365; 4 M. & R. 287, (Chit. j. 1423); ante, 122, note (a). And see Jones v. Ryder, 4 M. & W. 32; ante, 124, note (n).

(c) Ante, 124.

(d) Sutton v. Toomer, 7 B. & C. 416; 1 M. & R. 125, (Chit. j. 1352); Payee r. Ma-And if the drawer sues the acceptor upon the bill and fails in consequence of having altered the bill in a material part, he may still recover upon counts on the original consideration; Atkinson v. Hawdon, 2 Ad. & El. 628; S. C. 4 N. & M. 409; 1 Har. & Wol. 77. Aliter, in action by indorsee against drawer; Alderson v. Langdale, 3 B. & Ad. 660; infra, note (f).

(e) Green r. Davies, 4 B. & C. 255; 6 D. & R. 306, (Chit. j. 1251); ante, 119, note (i). (f) Alderson v Langdale, 3 Bar. & Adol.

Notes. 2. Under Stamp Acts.

V. Conse-

*A drawee should not accept a bill that has the least appearance of erasure quences of or alteration, until he has ascertained that the drawer intended it to stand Alterations in that form, and if he do he may be liable pay a smuch larger sum than was Alterations in that form, and if he do, he may be liable pay a much larger sum than was intended, without having any remedy against the drawer(g); on the other hand, the drawer and holder should ascertain that the alteration was made before the bill was a complete available security, and to prevent subsequent dispute should request the acceptor and all other parties to signify their con-So the drawee ought not to pay an apparently altered bill unless he be quite certain that it was made before it was an available security. If a banker pay a check that has been altered after it was issued, in fraud of the drawer, he cannot debit such drawer with the amount as a valid payment (h), unless the drawer himself was guilty of negligence in filling up the check so as to have enabled some holder to practise the fraud(i).

Consequences of Holder's making Erasures, delivering

Where the holder of a bill or note is required by an indorser or drawer to deliver it up on payment to the former of the amount, he ought to deliver it up in such a state as not to prejudice the right of the payer to proceed on the security against the prior parties, though he might undoubtedly cancel his &c. before own name, so as to prevent the possibility of the bill being ever again available against himself or subsequent indorsers. Where the plaintiff, in an action against the acceptor, was ordered by rule of court generally to deliver up the bill upon payment of debt and costs, it was decided that he had complied with such rule, though before it was delivered up he had rendered it a nullity by considerable erasures (k). It should however be observed, that in general, if a party to a bill, or a third person, deface it, so as to prejudice the claim of a holder, a special action on the case, and perhaps of trover, might be sustainable, unless he acquiesced (l)(1).

VI.—LIABILITY OF THE DRAWER.

VI. Liability of the Drawer.

Upon delivery of the bill to the payee or indorsee, the liability of the draw-The act of drawing a bill implies a contract from er becomes complete. the drawer to the payee, and to every subsequent holder fairly entitled to the possession, that the person on whom he draws is capable of binding himself by his acceptance; that he is to be found at the place where he is described to reside, if that description be mentioned in the bill; that if the bill be duly

660. The vendee of goods paid for them by a bill of exchange drawn by him on a third person, and after it had been accepted the vendor altered the time of payment mentioned in the bill, and thereby vitiated it; and it was held that by so doing he made the bill his own, and caused it to operate as a satisfaction of the original debt, and consequently that he could not recover for the goods sold. And see Atkinson v. Hawdon, 2 Ad. & El. 629; ante, 191, note (d), where the distinction between the rights of drawer and indorsee was fully admitted.

(g) Bulkley v. Butler, 2 B. & C. 484; 3 D.

& R. 625, (Chit j. 1198); and Hall r. Fuller,

5 B. & C. 750; S Dowl. & Rv. 464, (Chit. j.

(h) Hall and unother v. Fuller and others, 5 Bar. & Cres. 750; S Dowl. & Ry. 464, (Chit. j. 1294).

(i) Young r. Grote, 4 Bing. 258; 12 Moo. 484, (Chit. j. 1844).

(k) Tomlins v. Lawrence, 6 Bing. 376, (Chit. j. 1465, 1486); 4 Moo. & P. 54; post, Part II. Ch. III. Motion to stay Proceedings.

(1) Paton v. Winter, 1 Taunt. 420, (Chit. j. 763); Henfree v. Bromley, 6 East, 809; see post, 820, (24).

⁽¹⁾ Where the payee of a promissory note mutilated it, by cutting off the name of the attesting witness, held, that he was entitled to no relief in a court of equity. Sharpe r. Bagwell, I Devereux's Eq. Rep. 115.

hE.

presented to him, he will accept in writing on the bill itself according to its VI. Liabiltenor; and that he will pay it when it becomes due, if presented in proper ity of the Drawer. time for that purpose; and that if the drawee fail to do either, he, the drawer, will pay the amount, provided he have due notice of the dishonour.

The drawer of a bill stands in some respects in the situation of a surety for the drawee. The implied contract of the maker of a note is, that he will duly pay it on its being presented to him, and he is *primarily liable, and [*193]

stands in that respect in the situation of the acceptor of a bill.

The engagement of the drawer of a bill is in all its parts absolute and irrevocable, and therefore where A. in England drew a bill of exchange on B. in a foreign country, who, by the laws of that country, was prohibited from paying it, although it was urged that the undertaking of the drawer did not extend to the case of a prohibition to accept or pay the bill, imposed by the law of a foreign country in which the drawee resided, yet it was ruled, in an action against the drawer, that this was no defence, it not being necessary for the holder to inquire for what reason the bill was not paid(m). payment or acceptance be prohibited by the law of this country it is otherwise(n), though if after the prohibition has been removed, the drawer promise to pay, he may be sued(o). The drawer will also be equally liable, whether he draw the bill on his own account, or as agent of a third person(p), unless he added words of qualification (q); and if A. permit B. from time to time to draw bills in his name for a particular purpose, he will be liable to bond fide holders, although B. has abused such confidence by drawing bills in the name of A. for other and fraudulent purposes (r). So he is liable for the signature of his partners in the name of the firm(s), though he cannot in that case be sued by a person who was a partner and liable to contribute(t); nor can he be sued by a party who has expressly or impliedly engaged even verbally not to sue(u). We have seen that a person signing his name on a blank paper, stamped with a bill stamp, will be liable to pay to a bona fide holder any sum inserted in the bill, and warranted by the stamp(x). executor, administrator or trustee, draw, accept, or indorse a bill or note, with-

(m) Mellish v. Simeon, 2 Hen. Bla. 378; Poth. pl. 58; Tooting v. Hubbard, 3 Bos. &

Mellish v. Simeon, 2 Hen. Bla. 379, (Chit. j. 534). A bill drawn in London upon Paris, and negotiated through Holland; before it became due, the French government prohibited the payment of any bill drawn in England, in consequence of which it was dishonoured, and sent back through the different hands by which it had before been negotiated to London; the re-exchange between Paris and Holland raised the bill from 603l. 12s. 10d. to 905l. 13s. 9d and the re-exchange between Holland and London, to 9131. 4s. 3d. which the plaintiff, the payee, paid; and upon an action by him against the drawer, Eyre, C. J. left it to the jury, whether the defendant was liable for the re-exchange occasioned by returning the bill through Holland, and they found that he was. An application was made for a new trial, upon the ground that the defendant was not liable for the re-exchange, because there was no default in him, the payment being prohibited by the government of France. But the court held it immaterial why the bill was not paid; that as it was not paid, he was liable to all the consequences, of which the re-exchange was one,

and the rule was refused.

(n) Pollard v. Herries, 3 Bos. & Pul. 340, (Chit. j. 672). Lord Alvanley, C. J. "It cannot be disputed, that whatever be the nature of the contract into which a subject of this country enters, he is excused from the performance of it if the laws of his country interpose and forbid the performance.'

(o) Duhammel v. Pickering, 2 Stark. Rep.

90, (Chit. j. 994); ante, 14, note (g).
(p) Le Feuvre v. Lloyd, 5 Taunt. 749; 1 Marsh. 318, (Chit. j. 915); ante, 34, n. (b), note (g). And see Sowerby v. Butcher, 2 C. & M. 318; 4 Tyr. 320, S. C. (q) Ante, 32, 33, 34.

(r) Smith v. Stranger, Peake Rep. Add. 116, (Chit. j. 581); ante, 32.

(s) Ante, 39, et seq. (t) Teague v. Hubbard, 8 Bar. & Cres. 345; 2 Man. & Ry. 869, (Chit. j. 1896); ante, 60. (u) Pike v. Sweet, Dans. & Lloyd, 159, (Chit. j. 1410); ante, 71.

(x) Ante, 29, n. (s); Russell v. Langstaffe, Doug. 496, 514, (Chit. j. 415); Collis v. Emmett, 1 Hen. Bla. 313, (Chit. j. 461); Schultz v. Astley, 2 Bing, N. C. 544; 2 Scott, 815, S. C.; post, Ch. VI. s. i. Transfer—Time of.

ity of the Drawer.

VI. Liabil- out words of qualification (as "sans recours") he will be personally liable, although he intended only to subject himself to liability in the event of his hav-Thus, if an executor draw a bill or note as executor of J. S. and sign it in terms as such, yet if it be in the general form, or in any form which [*194] implies assets, it will bind him personally (y). *On failure of the performance of the engagement, that the drawee will accept, the drawer of a bill will immediately and before the time specified in the bill for payment, be liable to an action(z), not only for the principal sum, but also in certain cases for interest, re-exchange, and costs, as a consequence of the bill not being honoured(a).

> On non payment and due notice a fortiori he is liable to pay(1). These are the principal obligations of a drawer in cases of a regular bill transaction. In cases of an irregular bill transaction, such as those of accommodation bills, besides the implied contract to the payee and the holder, the drawer is also bound to indemnify the acceptor, if he accepted for his accommodation, for

any loss he may sustain in consequence of his acceptance (b).

These obligations, though absolute and irrevocable, may be discharged or released by the laches or neglect of the holder, or by other means, which will be spoken of hereafter; for if a party take a negotiable security of this nature, he takes it subject to the law incident to all bills. If a bill be drawn abroad on a person in this country, and the latter refuse acceptance or payment, the drawer will, if discharged by the foreign law, be discharged in this Where an annuity was granted in consideration of a bill accepted, which was dishonoured by the acceptor, but paid by the drawer on notice, it was held that this was not such a non-payment of the bill in the terms of the annuity act as to vacate the annuity, though the bill was accepted for the accommodation of the drawer, who undertook to furnish assets, but neglected so to do(d).

(y) King v. Thom, 1 T. R. 487, (Chit. j. 438). The court held, that upon a bill payable to several as executors, they might sue as such. And per Buller, J. "If they indorse, they are liable personally, and not as executors; further indorsement would not give an action against the effects of the testator."

(z) Ballingalls v. Gloster, 3 East, 481, (Chit. j. 673); Bright v. Purrier, Bul. Ni. Pri. 269, (Chit. j. 371). A foreign bill payable one hundred and twenty days after sight was presented for acceptance, but acceptance being refused, the holder brought an action immediately against the drawer; the defendant objected that he was not liable till the expiration of the one hundred and twenty days, and offered to call witnesses to prove that such was the custom of merchants; but Lord Mansfield said, the law was clearly otherwise, and refused to hear the evidence; so the plaintiff recovered.

Milford v. Meyor, Dougl. 54, (Chit. j. 400). Indorser against the drawer of a bill, which the drawee had refused to accept. On a rule to show cause why the defendant should not be

discharged, the ground stated was, that the bill was not due. Per curiam. It is settled, that if a bill of exchange is not accepted, an action on the bill will lie immediately against the drawer, because his undertaking that the drawee shall give him credit is not performed.

In France it seems that a drawer or inderser is not upon non-acceptance liable to be immediately sued, though he must find caution or security for the ultimate payment; I Pardessus, 344. So Pothier considers the drawer as merely liable to indemnify the holder against the more probable non-payment at maturity. Traite du Contrat de Change, Part 1, Chap. 4, num. 70.

(a) Mellish v. Simeon, 2 Hen. Bla. 379, (Chit. j. 534); ante, 193, note (m); Poth. pl.

(b) Poth. pl. 97, 98, 99. (c) Potter v. Brown, 5 East, 131, (Chit. J.

(d) Cook v. Tower, 1 Taunt. 372. Under the 17 Geo. 3, c. 26, s. 4. See the last act, 53 Geo. 3, c. 141, s. 6, 3 Younge & J. 136.

^{(1) {} Jordan v. Bell, 8 Porter 53; Evans v. St. John, Gid. 186. }

*CHAPTER VI.

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OF THE TRANSFER OF BILLS AND NOTES-OF RE-STRAINING THEIR NEGOTIATION-AND OF THE LOSS OF BILLS, &c.

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I. Of the Transfer of Bill; and Notes.

THOUGH inland bills are frequently accepted before they are indorsed, I. Of the Transfer tag all bills may be transferred before greentance we will consider the yet as all bills may be transferred before acceptance, we will consider the of Bills and points relative to the transfer of bills and notes in this Chapter.

It has been already observed(a), that it is the transferable quality of bills and notes which principally distinguishes them from other contracts, and that on account of this property and of their utility in mercantile transactions they have been peculiarly favoured by our courts. The above divisions and points relating to the transfer of bills are to be considered:—

First, What bills or notes are transferable. If a BILL or note has been Bills, drawn or transferred, or is payable in a foreign country, it is *essential for Notes, &c.

are transferable. [*196]

(a) Ante, 159. 29

I. Of the transfer of Bills and Notes.

1st. What Bills, &c. transferable.

the holder to be well informed of the law of that country relating to the transfer of bills. In France it is absolutely essential that bills be drawn expressly payable to order, and they must not be payable to bearer(b); and it appears that bills were not transferable in France by the law-merchant but by a particular ordonnance(c). And in a late case a doubt was entertained whether a Bank of England promissory note is transferable by the law of France(d). In Scotland bills are transferable although they did not contain the word "order" or other transferable words(e).

With respect to bills payable to a certain person or order, or to the order of a third person, no doubt seems ever to have been entertained respecting their negotiability; and though bills payable to bearer, or to a certain person or bearer, were formerly thought not to be negotiable and considered as mere choses in action, upon a supposition that such instruments contained on authority to assign them so as to enable the assignee to demand payment of the drawee(f); yet it is now completely settled(g) that the decisions tending to support this doctrine and the reasoning on which they were founded were equally erroneous. In short, it is now well established that in this country bills, whether payable to order or to bearer, are equally negotiable from hand to hand ad infinitum; and that the transfer vests in the assignee a right of action on the instrument assigned sustainable in his own name.

But in general in England and Ireland(h), unless the words "or order," "or bearer," or some other equivalent words(i), authorising the payee of a bill or note to assign it, be inserted therein, it cannot be transferred so as to give the assignee a right of action thereon against any of the parties (k); unless the negotiable words were omitted by mistake, in which case they may be supplied(1); or unless perhaps in the case of a bill or note being vested in the king, who may assign a chose in action, and that by his sign manual only(m). And though before the passing of the stamp acts the indorser of a bill not negotiable for want of the words "or order" was held to be liable to his immediate indorsec, on the ground of the act of indorsing being equivalent to a new drawing (n)(1); yet since those acts, in order to charge such indorser as a new drawer, a second stamp will be necessary (o). It may,

(b) 1 Pardess. 346, 358, 359, 360; Pailliet,

Manuel de Droit Français, 840, 848.
(c) Pothier, Traité de Contrat de Change;
Œuvres de Pothier, Dupin, Paris, 1825, vol. iii.
123; and see part ii. article ii. sect. v.; Billets à Ordre, 222; De la Chaumette r. Bank of England, 9 B. & C. 215; Dans & L. 319; 2 B. &

Ad. 385, (Chit. j. 1418, 1542).
(d) Per Lord Tenterden, in De la Chaumette v. Bank of England, 9 B. & C. 215. See post,

820 (25).

(e) Thompson on Bills, 101.

f) Horion v. Coggs, 3 Lev. 299, (Chit. j. 185); Hodges v. Steward, 1 Salk. 125, (Chit. j. 184); Nicholson v. Sedwick, 1 Ld. Raym. 180, (Chit. j. 203); Mod. Ent. 313. Bills and notes are valid, though they do not contain any words rendering them negotiable; Smith v. Kendall. 6 T. R. 124, (Chit. j. 533); ante, 159, note (i)

(g) Grant v. Vaughan, 3 Burr. 1516; Ela.

Rep. 481, 485, (Chit. j. 365); post, 198, note (i); Hinton's case, 2 Show, 235, (Chit. j. 166); and see Miller v. Race, 1 Burr. 452, (Chit.) 346).

(h) See the Irish Act, 9 Geo. 4, c. 24, s. 2. This act assimilates the law relating to bills and notes in Ireland to that of England.

(i) 1 Parders. 360. 361.

(k) Hill v. Lewis, 1 Salk. 132, S. C. nom-Tassell, and Lee r. Lewis, 1 Lord Raym. 743,

(Chit. j. 187, 188); and infra, note (o).
(1) Kershaw r. Cox, 3 Esp. Rep. 246, (Chit.

j. 629); ante, 184, note (e).
(m) Lambert v. Taylor, 4 B. & C. 189; 6
D. & R. 188, (Chit. j. 1428).

(n) Hill v. Lewis, 1 Salk. 132, 133; 1 Ld. Raym. 743, S. C. nom. Tassell and Lee r. Lewis; see post as to Liability of Indorser.

(o) Plimley v. Westley, 2 Scott, 423; S.C.

2 Bing. N. C. 249; 1 Hodges, 324. This was

⁽¹⁾ The same point was decided in actions brought in Pennsylvania by the indorses of a note and bill, not negotiable, against the acceptor of the latter and the maker of the former. Gerard v. La Coste, 1 Dall. 194. Barriere v. Nairac, 2 Dall. 249.

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however, be collected* from the cases relative to bills payable to fictitious I. Of the persons (p), that any words in the bills or extraneous facts, from whence it Transfer of Bills and can be inferred that the person making it, or any other party to it, intended Notes. it to be negotiable, will give it a transferable quality against that person. Victualling bills are not assignable; but by usage, a power of attorney to the 1st. What Bills, &c. attorney, his substitutes and assigns, to receive the money, authorises the at- transfertorney to assign. Such a power is called a general power, in contradistinc-able. tion to a special power, which authorises the attorney only to receive. where an attorney, acting under the latter power, deposited certain victualling bills with the defendant, as a security for money borrowed from him, it was held that the payee of the bills was entitled to recover them in an action of trover(q). So East India certificates are not indorsable so as to transfer the legal interest(r); and it was held that East India bonds were not transferable so as to pass the legal interest to the purchaser, but this has been altered by statute(s). East India Company's warrants are not negotiable instruments within the 6 Geo. 4, c. 94, s. 2, as they pass by delivery and not by indorsement(t). But an Exchequer bill, the blank in which has not been filled up with any person's name, is transferable by delivery (u). So is a Prussian bond (x). A doubt was once suggested whether a check or draft on a banker were negotiable out of the bills of mortality (y); but it is now settled that this instrument is as negotiable as a bill of exchange (z) (1). X and it seems that a bill or note payable to bearer may be transferred and declared on as indorsed(a)(2)

The law having in general already determined when a bill is assignable, and the mode by which the transfer is to be effected, it is the province of a court(b), and not that of a jury, to decide on the negotiability of these instruments, unless in new cases where the law-merchant is doubtful, when evidence of the custom may be received (c).

the case of a promissory note not negotiable; but we shall hereafter see that the indorser of a negotiable note cannot be charged as a new muker, because the maker of a note stands in the situation of the acceptor of a bill; Gwinnell v. Herbert, 5 Ad. & El. 436; 6 N. & M. 723, S. C.; post, Liability of Indorser. In the 593). case of a negotiable bill no second stamp is ne- (a) Wayman v. Bend, 1 Campb. 175, (Chit. cessary in order to charge an indorser as a new drawer, because the instrument remains the same; Penny v. Innes, 1 C., M. & R. 439; 5 Tyrw. 107, S. C.

(p) Minet v. Gibson, 3 T. R. 481; 1 H. Bla. 569, (Chit. j. 460); vide ante, 158, in notes. (q) Tonkin v. Fuller, 3 Dougl. 300, M. T.

(r) Williamson v. Thomson, 16 Ves. 450. (s) Glynn v. Baker, 13 East, 509; 51 Geo. 3, c. 64. As to a navy bill, see M'Lieske v. Ekins, Say. 73, cited 13 East, 515, note (a).

(t) Taylor v. Trueman, Mood. & M. 456. (u) Wookey v. Pole, 4 B. & Al. 1, (Chit. j. 1086); post, 199, note (o).

(x) Gorgier v. Mieville, 3 B. & C. 45; 4 D. & R. 641, (Chit. j. 1212); post, 199, note (p).
(y) Grant r. Vaughan, 3 Burr. 1517, (Chit.

j. 365).

(2) Boehm v. Stirling, 7 T. R. 439, (Chit. j.

j. 746). In an action against the maker of a promissory note, payable to T. L. or bearer, the defendant averred an indorsement by T. L.; and Lord Ellenborough held, that the plaintiff having stated such indorsement, though unnecessarily, was bound to prove it, and that the plaintiff could not recover on the money counts, as he was not an original party to the bill. Sed

vide Quarterman v. Green, 1 Carr. & Pa. 92.

(b) Edie v. East India Company, 2 Burr. 1224, (Chit. j. 358); Grant v. Vaughan, 3 Barr. 1523, 1528, (Chit. j. 365).

(c) Stone v. Rawlinson, Willes, 561, (Chit. j. 313); Edie v. East India Company, 2 Burr.

If the payee of a note, payable to bearer, indorse his name on the note, he will be liable on the note in the same manner as if it were payable to order. Brush v. Beeves' adm. 3 John. Rep. 489. { Dean v. Hall, 7 Cowen, 214. And the endorsee may maintain an action upon such a note in his own name. Kimmey v. Campbell, 1 Ala. Rep. (New Series) 92. }

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^{(1) {} Alwood v. Haselden, 2 Bai. 457. }
(2) The indersement of a bill or note is not merely a transfer of the paper; but it is a new and substantive contract. Slacum v Pomeroy, 6 Cranch, 222. It is in fact the same as a new bill drawn by the indorser on the acceptor in favor of the indorsee. Van Staphorst v. Pearse, 4 Mass. Rep. 258. See Lenox v. Prout, 3 Wheaton, 520. Bank of N. America v. Barriere, 1 Yeates' Rep. 360. Eccles v. Ballard, 2 M'Cord, 388.

I. Of the Transfer of Bills and Notes.

fer.

Secondly, Who can or cannot transfer.—With respect to the persons who may transfer a bill or note, whoever has the absolute property may assign it if payable to order (d). In general a valid transfer can only be made by the 2dly. Who payee or the person who is legally interested in the instrument or by his may trans- agent, and consequently an indorsement by a person of the same name is inoperative (except against the party making it and the subsequent indorsers,) [*198] *although the person entitled to transfer the instrument was not particularly described in it(e). The same rule applies to the right of transferring a bill made payable to bearer or to order, and indorsed in blank, if the person to whom it was assigned or pledged knew, at the time he became the holder, that the person making the transfer had no right to make it (f). So the party himself, who has received a bill or note as agent, or for a particular purpose, must apply the same accordingly, and neither he nor any third person knowing the facts, can, by afterwards receiving the amount, detain the same from the principal, or avail himself of a set-off(g)(1). But if A. remits a bill of exchange to B. to be paid to a third person on A.'s account, and B. discounts the bill, but does not pay over the proceeds, and A. instead of bringing a special action against B. for the breach of duty, sues him in assumpsit for money had and received, the latter is entitled to a set-off(h). Where the holder has no knowledge of the special circumstances and takes the bill bond fide, either absolutely or as a pledge, such transfer will be as operative, and will convey the same rights as if it had been made by a person authorised to make it; for it would be a great clog on the negotiability of bills and checks, if the holder were bound in every instance where there

> 1216; 1 Bla. Rep. 295, (Chit. j. 358); Carvick defendant, payable to Hunt, or order, on dev. Vickery, Dougl. 653, (Chit. j. 410); ante, 57, note (l).

(d) Per curiam, in Stone v. Rawlinson,

Barnes, 165; Willes, 560, (Chit. j. 313).

(e) Mead v. Young, 4 T. R. 28, (Chit. j. 467); Gibson v. Minet, 1 Hen. Bla. 607, (Chit. j. 479). A bill payable to Henry Davis, or order, was sent by post, and got into the hands of a wrong Henry Davis, who indorsed it to plaintiff; there was no description of Henry Davis in the bill, in addition to his name, nor was any fraud imputable to the plaintiff. This was an action against the acceptor, and on his offering evidence to show that the Henry Davis who indorsed the bill was not the person in whose fayour it was drawn, Lord Kenyon was of opinion that the evidence was inadmissible, and he retained that opinion after cause shown against an application for a new trial; but Ashhurst, Buller, and Grose, Justices, held, that unless the indorsement was made by the person to whom the bill was really payable, it was a forgery, and could confer no title, and that therefore it was competent for the defendant to show that the person who indorsed the bill was not the person in whose favour it was made, and a new trial was accordingly granted.

(f) Roberts r. Eden, 1 Bos. & Pul. 398, (Chit. j. 615). The plaintiffs were assignees of the indorsee of a promissory note, made by

mand, for money borrowed, and who indorsed to bankrupt. Hunt and the defendant afterwards settled accounts, but the promissory note was not mentioned; it was given in evidence that the note had passed several times between Hunt and the bankrupt, but upon one occasion, Hunt told him that it must not be negotiated, as he should want it when he settled accounts wilk defendant. The jury, upon the trial, found a verdict for the defendant, and upon a motion for a new trial, the court held that the verdict was right, and that the evidence was decisive to show that the note was not negotiated to the bankrupt, but only deposited with him as a pledge, and that it must remain in his hands subject to the same equity as if it were in the hands of the original payee. S. P. Trouttel v. Barandon, 8 Taunt. 100, (Chit. j. 1002); post, 200, note

(g) Buchanan v. Findlay, 9 Bar. & Cres. 738; 4 Man. & Ry. 593, (Chit. j. 1041); post, 211, n. (n); Kay v. Flint, 8 Taunt. 21; Exparte Flint, 1 Swanst. 30; Exparte Frere, 1 Montag. & Macar. 263, (Chit. j. 1451). But see Thorpe v. Thorpe, 3 B. & Ad. 580, infra. note (h). As to the form of action against ngent misapplying proceeds of bill, see Palmer v. Jarmain, 2 M. & W. 282; post, 199, note (r)

(h) Thorpe v. Thorpe, 3 Bar. & Adl. 580.

Brush v. Scribner, 11 Con. 388. Sims v. Lyles, 1 Hill's Rep. 50. Car. 89. }

^{(1) {} Procter v. M'Call, 2 Bai. 298. But where the transfer of a note is taken from a person, not an original party to it, the notes being past due, at the time of the transfer is not equivalent to notice that such person came into possession of it by fraud; unless perhaps inquiry of the payer would necessarily have led to a knowledge of the fraud. Ibid.

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are no suspicious circumstances to inquire into the right of the person making I. Of the Therefore, if indorsed bills be delivered to a person for a Transfer the transfer(i). particular purpose, and he negotiates them to a third person, who does not and Notes. know the trust, and obtains them fairly, he will become beneficially entitled to them, *however fraudulent the conduct of the agent(k). And if the 2dly. Who drawer and payee of a bill after it has become due indorse it to B. on condifer. tion that he will take 'up certain bills discounted by the payee, and B. does [*199] not take up the bills, but transfers the bill so indorsed to him to C., the latter may recover against the acceptor (l). So if A. deposit bills indorsed in blank with B. his banker, to be received when due, and the latter raise money upon them by pledging them with C. another banker, and afterwards become bankrupt, A. cannot maintain trover against C. for the bills(m); and the same doctrine extends to Navy Bills(n), Exchequer Bills(o), and Prussian Bonds(p). And though in general a factor, until the 6 Geo. 4, c. 94, could not pledge the goods of his principal (q), it was always otherwise in the

(i) Grant v. Vaughan, 8 Burr. 1516, (Chit. j. 365). The defendant gave a cash note upon his banker to one Bicknell, payable to ship Fortune, or bearer. Bicknell lost it, and the plaintiff afterwards took it bon? fide in the course of trade, and paid a valuable consideration for it. The banker (in consequence of an order from the defendant) refused to pay it, upon which the plaintiff brought this action. Lord Mansfield left it to the jury to consider, first, whether the plaintiff came to the possession of the bill fairly and bona fide, and, secoudly, whether such draft was in fact and practice negotiable, and the jury found for the defendant; but upon an application for a new trial, and cause shown, the court were of opinion, that the second point ought not to have been left to the jury, because it was clear that such drafts were nogotiable, and if the jury thought the plaintiff took the note fairly and bona fide, of which there appeared to be no doubt, he was entitled to recover. A new trial was accordingly granted, in which the plaintiff recovered.

(k) Bolton v. Puller, 1 Bos. & Pul. 539, (Chit. j. 567); see also Ramsbottom v. Cator, 1 Stark. Rep. 228, (Chit. j. 953); and Paley, 154, 155

(1) Wright v. Hay, 2 Stark. 398.

(m) Collins v. Martin, 1 Bos. & Pul. 648; 2 Esp. R. 520, (Chit. j. 576); cited and approved of in Treuttel v. Barandon, 8 Taunt. 100, (Chit. j. 1002); post, 200, note (s); Wookey v. Pole, 4 B. & Al. 1, (Chit. j. 1086); The plaintiffs sent bills indorsed in blank to Messrs. Nightingules to receive the money upon them; they borrowed money of the defendants, and pledged these bills as a security; they afterwards became bankrupt, and the plaintiff brought trover for the bills; there being no evidence that the defendants knew under what circumstances the bills had been left with Messrs. N., or how the plaintiff's account (he being in cash) stood with them, Eyre, C. J. thought the action would not lie, and nonsuited the plaintiff. On a rule nisi to set aside the nonsuit, it was urged, that though the Messrs. N. might have negotiated the bills, they could not pledge them; but after consideration the

court was unanimous, that they had the power of binding the plaintiff as well by pledging as negotiating the bills, of which they were enabled to hold themselves out to to world as the absolute owners.

See also Bolton v. Puller, 1 Bos. & Pul. 546, (Chit. j. 567); in which Eyre, C. J. said, "it is clear, that if indorsed bills are deposited with a banker, and they are by him negotiated to a third person, though the purpose for which they were deposited should be ever so cruelly disappointed, the original owner can have no claim to recover them in trover against such third person."

Ex parte Pease, in the matter of Boldero, 1 Rose, 238, in which the Lord Chancellor states the law to the same effect; see also Paley, 154, 155; Thompson v. Giles, 2 B. & C. 422; 3

D. & R. 733, (Chit. j. 1190).
(n) Goldsmid v. Gaden, in Chancery, cited in Collins v. Martin, 1 Bos. & Pul. 649, (Chit. j. 571). The plaintiffs, who were brokers, advanced money on three navy bills, and a deposit of scrip, and though it afterwards appeared that both navy bills and scrip were left by the defendant in the hands of the party depositing for a particular purpose, and were not his property, but the property of the defendants; yet, on a bill filed in equity, it was referred to the Master to take an account of what was due to the piaintiffs, and an issue at law was refused by the Chancellor, who thought the question too clear to be disputed. See further as to navy bills, Jones v. Ryde, 1 Marsh. 157, (Chit. j.

(o) Wookey v. Pole, 4 B. & Al. (Chit. j. 1086); and see Clayton's case, 1 Meriv. 572 to 585, from which it also appears that if one of several partners, bankers, improperly dispose of such bills, the firm will be liable for the amount.

(p) Gorgier v. Mieville, 3 B. & C. 45; 4 D. & R. 641, (Chit. j. 1212). Trover lies for India bonds; 13 East, 509; ante, 197, note (s); but see now 51 Geo. 3, c. 64.

(q) Newsome v. Thornton, 6 East, 21; in Martin v. Coles, 1 Maule & S. 140, and Solly v. Rathbone, 2 Maule & S. 298; Guichard v.

I. Of the case of a bill. If a party authorised by the holder of a bill of exchange to get it discounted, and to apply the proceeds in a particular way, does not Bills and get it discounted, but misapplies any part of the proceeds, he cannot be Notes. sued in trover for the bill, but must be sued for money had and received(r).

2dly. Who may transfer. By an Agent in fraud of his Duty(#).

However, it has been decided, that trover lies for bills of exchange indorsed to a person as agent of the plaintiffs, when, by the terms of the indorsement, it appears that the indorsee was a mere agent as "for their account," and deposited by him with the defendant, as a security *for past [*200] and future advances made to him by the defendants(s); and an indorsement in these words, "pay to A. B. for my use," or "pay to A. B. or order, for my use," or "the within must be credited to A. B." sufficiently denote that the indorsee or holder is a mere agent, and prevents him from parting with or charging the proceeds of the bill in fraud of the principal(t). But the merely writing the name of a banker across a check has not that ef-When it is known that the holder of a bill is entitled to it only as an agent, no person should take the same by indorsement or transfer from him without first ascertaining the extent of his authority (x). In order to prevent the fraudulent misapplication of a bill or note by an agent, the above special forms of indorsement should be adopted (y). We shall hereafter, in the Chapter upon Bankruptcy, consider the cases of bills deposited short, and not discounted by bankers or agents (z).

In cases of transfers without title or authority, it is scarcely necessary to refer to authorities to show that a person taking the transfer, with knowledge of the circumstances, cannot sue; but if he have given value without being aware of the facts, he may recover, though prior indorsers were privy to the

fraud(a).

Transfer by an Infant.

We have seen that an indorsement by an infant payee will not pass any interest in the bill as against himself, but that it sufficiently passes the interest as against the acceptor and subsequent indorsers, and they will in general be liable to be sued by the indorsee or holder (b).

Morgan, 4 Moore, 36. See the 6 Geo. 4, c. 94, relative to the rights of the vene'or and vendee and pledgee of goods, &c. in the case of a sale or pledge by an agent.

(r) Palmer v. Jarmain, 2 Mce. & Wels. 282; see Stierneld v. Holden, 4 B. & C. 5; Ry. &

Moo. 219, S. C.

(s) As to the extent of an agent's authority to draw, indorse, and accept bills in the name of his principal, see ante, 28 to 32; and see Foster v. Pearson and Stephens r. Foster, 1 C. M. & R. 849; 5 Tyr. 255, S. C. As to the duty of bill brokers in discounting bills, post, Right of Indorsee.

As to embezzlement by agents of money or securities entrusted to them for a special purpose, see the 7 & 8 Geo. 4, c. 29, s. 49, &c. post, Part III. Ch. II. Embezzlement.

(s) Treuttel v. Barandon, 8 Taunt. 100, (Chit. j 1002).

(t) Id. ibid.; Sigourney v. Lloyd, 8 B. & C. 622; 3 Man. & Ry. 58; 5 Bing. 525; 3 Younge & J. 221, (Chit. j. 1412).

(u) Stewart v. Lee, Mood. & M. 158, (Chit. 1378); and see post, as to Restrictive Indorsements.

(x) Attwood v. Munnings, 7 Bar. & Cres.

278; 1 Man. & Ry. 78, (Chit. j. 1342); ante, 28, note (m).

(y) Treuttel r. Barandon, 8 Taunt. 100, (Chit. j. 1002). As "pay to S. P. or order for account of C. D."

(z) Post, Part II. Ch. VIII.

(a) Haley r. Lane, 2 Atk. 181, (Chit. j.

294).

(b) Ante, 19, 20. Taylor v. Croker, 4 Esp. Rep. 187, (Chit. j. 684); Grey v. Cooper, E. T. 22 Geo. 3, 1 Selw. N. P. 302, 9th edit.; 3 Dougl. 65, S. C. In an action against the acceptor of a bill, drawn by Eversfield and Jones on the defendant and payable to their own order, and indorsed by them to one S. and by him to the plaintiff; it appeared that both the drawers were infants at the time of drawing the bill, but Lord Munsfield held, that though that might have been a good defence, had the action been brought against the drawers themselves, it was no defence in the present action. Verdict for the plaintiff. But quære if the infant afterwards dissent to his indorsement, whether such defective transfer of his interest in the bill would not defeat the plaintiff 's claim. Vide Jones v. Darch, 4 Price, 800, (Chit. j. 997); ante, 19, note (h); semble it would not. 'nn.

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Where a bill or note has been made payable or endorsed to a fine sole I. Of the who afterwards marries, or where it is made during the coverture, the right Transfer of Bills and of transfer vests in her husband, he being by the marriage entitled to all her Notes. personal property (c), and he thereby becomes virtually indorsee, so that he may sue thereon in his own name, without alleging or proving any indorse- 2dly. Who ment(d). If a bill or note be *made payable to a fine covert, it is in legal fer. operation payable to the husband, and an effectual indorsement should in By a Margeneral be in his name(e)(1). But we have seen, that if the husband per-ried Womit his wife to act as his agent or to carry on trade as a fême sole, his authority to indorse may be presumed; and if a promissory note is made payable [*201] to a married woman, and she indorse it for value in her own name, and the maker afterwards promises to pay it, in an action against him by the indorsee, it will be presumed that the nominal payee had authority from her husband to indorse the note in that form, and the indorsement will be considered as vesting a legal title to the note in the plaintiff (f); and even without such promise the indorsee might recover (g); and if the husband indorse a note given to him by his wife, he may be sued as indorser(h).

On the death of the holder, the right of transfer is vested in his executor By Execuor administrator (i) (2). If the executor or administrator indorse the bill or Adminisnote without qualification, he would be personally liable in case the bill should trators. be dishonoured(k). Executors are not personally liable in case of the fail-

See Haleg v. Lane, 2 Atk. 181, (Chit. j. 294); 23, note (1). supra note (a).

(c) Ante, 22, note (n). Conner v. Martin, 1 Stra. 516; Sel. Ca. 96, S. C.; Rawlinson v. Stone, 3 Wils. 5, (Chit. j. 314); Miles v. Williams, 10 Mod. 245; Hatchett v. Baddely, 2 Bla. Rep. 1081; Caudell v. Shaw, 4 T. R. 361; Lavie v. Phillips, 3 Burr. 1776.

Conner v. Martin, 1 Stra. 516, cited in 3 Wils. 5. A bill was made payable to Susan Conner or order while she was sole. She married, and during her coverture indorsed it to the plaintiff, and upon demorrer and argument, the Court of Common Pleas held that the feme covert could not assign the note, because by the marriage, it became the sole property of her husband.

Miles v. Williams, 10 Mod. 245. Per Parker, C. J. If a note be payable to a feme sole or order, and she marries, her busband is the proper person to indorse it.

(d) M'Neilage v. Holloway, 1 B. & Ald. 218; Arnold v. Revoult, 1 Brod. & Bing. 446; 4 Moore, 71, 72, S. C.; ante, 23, note (p).

(e) Barlow v. Bishop, 1 East, 432; 3 Esp. Rep. 266, (Chit. j. 637); ante, 23, note (s); or he may declare on it as payable to himself. Per Richardson, J. in Arnold v. Revoult, 1 Brod. & B. 446; 4 Moore, 71, 72, S. C.

(f) Cotes v. Davis, 1 Campb. 485; ante,

(g) Prestwich v. Marshall, 4 Car. & P. 594; 4 Moore & P. 513, (Chit. j. 1555); ante, 28, 24, note (u).

(h) Haly v. Lane, 2 Atk. 181, (Chit. j. 294). (i) Rawlingon v. Stone, 3 Wils. 1; 2 Stra. 1260; Barnes, 164, (Chit. j. 314). A note was payable to A. B. or order; A. B. died intestate, and his administrator indorsed it to the plaintiff. These facts appearing upon the de-claration, the defendant demurred, and contended that the personal representative of the payee had no power to indorse a note, but the Court of Common Pleas, after three arguments, and the Court of King's Bench, upon error brought, were unanimously of opinion that he had, and each court said it was every day's practice and the constant usage for executors and administrators to indorse bills and notes payable to the order of their testators or intestates; and see Watkins v. Maule, 2 Jac. & W. 243, (Chit. j. 1097).

(k) King v. Thom, 1 T. R. 487, (Chit. j. 435); Gibson v. Minet, 1 Hen. Bla. 622, (Chit. j. 479). The court held, that upon a bill payable to several as executors, they might sue as executors; and per Buller, J. "No inconvenience can arise from their indorsing the bill; for if they indorse, they are liable personally,

(1) A promissory note given to a feme covert for her separate use, for the consideration of her distributive share in an intestate estate, becomes immediately the property of the husband. Commonwealth v. Manley, 12 Pick. Rep. 178.

(2) An administrator appointed abroad, may maintain a suit here in his own name, on a note payable to his intestate or bearer; especially when the question whether or not he be a bona fide holder is submitted to the jury, and there is no pretence of a set-off or other defence as against the payee. Robinson et al. v. Crandall et al., 9 Wend. Rep. 425.

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Bills and Notes.

may trans-

I. Of the ure of a banker, in whose hands they have deposited bills, part of the es-Where they payee and holder of a note appointed the maker there-Transfer of tate (l)(1). of, with others, his executors, this was held to be an extinguishment of the note at law, and that no action could be supported upon the note, even by a 2dly. Who person to whom the executor indorsed it against such executor(m). The inere act of one of two executors indorsing his name to enable the other to receive payment of a note, is not equivalent to his personal receipt of the money, so as to render him liable in case his co-executor should misapply the amount (n).

By Partner. [*202]

If a bill has been made or transferred to several persons not in partnership, the right of transfer is in all collectively, and not in any one individually (0) (2); but where several persons are in partnership, the *transfer may be made by the indorsement of one partner only, in which case the transfer is considered as made by all the persons entitled to make it(p); and one of several partners may authorise a person, as agent, to indorse the name of the firm, and thereby bind the same (q)(3). And it has been held, that though such persons may not be in partnership, and only one has indorsed, yet that if the drawee accepted after the indorsement, he cannot dispute the regularity of the

and not as executors; for their indorsement would not give an action against the effects of the testator."

Where two makers of a promissory note gave it to a creditor of their testator, whereby "as executors they severally and jointly promised to pay on demand with interest," it was held they were personally responsible; Child v. Monins, 2 B. & B. 460; 5 Moore, 282, (Chit. j. 1103); and Ashby v. Ashby, 7 Bar. & C.

446; 1 Man. & Ry. 80, (Chit. j. 1438).
(1) Rowth v. Howell, 3 Ves. 565, 566;
Knight v. Lord Plymouth, 3 Atk. 480, (Chit. j. 819); Robinson v. Ward, 2 Carr. & Pa. C. N. P. 59; ante, 36.

(m) Freakley v. Fox, 9 Bar. & C. 130; 4 (Chit. j. 1450).

Man. & Ry. 18, (Chit. j. 1418). In that case the note having been discharged by the appointment of the maker executor ceased to be negotiable. See 55 Geo. 8, c. 184, s. 19. Bartrum v. Caddy, 1 Perry & Dav. 207, 212, 213; ante, 108 n. (e).

(n) Hovey v. Blukeman, 4 Ves. 608.

(o) Carvick v. Vickery, Dougl. 653, (Chit. j. 410); note, ante, 57, 59; and Jones v. Radford, 1 Camp. 83, (Chit. j. 741); and see Williams. liams v. Thomas, 6 Esp. Rep. 18, (Chit. j. 722); ante, 45; Solw. Ni. Pri. 9th edit. 348, 849.

(p) Ante, 57, 58.
(q) Tenant v. Strachan, Mood. & M. 278,

(1) If a negotiable note be made payable to two executors as such, it cannot be transferred by the indorsement of one of them; both must indorse the note to pass the property by assignment.

Smith v. Whiting, 9 Mass. Rep. 334.

(2) { One of two joint payees cannot endorse a note in his own name or in his own name and that of his co-payee, they are not considered partners, either in a commercial or legal sense of the

rm. Wood v. Wood, 1 Han. 428; Bennett v. M'Gaughy, 3 How. 192. \
(3) One partner may by an indorsement made by himself in the name of the partnership, enti-1 Caines' Rep. 305. And an indorsement to a third person of such a note by one partner by writing the name of the firm on the back of the note, is a valid transfer. Kane v. Scofield, 2 Caines' Rep. 368.

If one of the partners of a firm has been in the habit of indorsing the name of the firm on bills of exchange as security, it is a fact from which the jury may legally infer that he had authority from the other partners; and the bona fide holder of such bill may recover against all the partners notwithstanding the indorsement of the name of the firm was expressly prohibited in the articles of partnership.

les of partnership. Bank of Kentucky v. Brooking, 2 Lit. 45.

As to the powers of one partner to bind the firm by his acceptances, &c. in the partnership name, See Le Roy, Baynard & Co. v. Johnson, 2 Peters, 186, 197, 199. Sutton v. Irvine, 12 Serg. & R. 13. Taylor v. Coryell, Id. 243. Armstrong v. Hussey, Id. 315. Smith v. Lusher, 5 Cowen, 688. Jaques v. Marquand, 6 Cowen, 497. Graves v. Merry, Id. 701. Bank of South Carolina v. Humphreys, 1 M'Cord, 888.

Endorsements made by a partnership, bearing date about three weeks before its dissolution, will be presumed to have been made during the continuance of the partnership. Crosby v. Morton, 13 Louis. Rep. 357. As to the power of a bank to endorse a note after the expiration of its charter. Folger v. Chase, 18 Pick. 68.

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latter(r). In general we have seen that one partner may, without the ex- I. Of the press concurrence of the other partners, make a valid transfer of a bill by Transfer of Bills and an indorsement in the name of the firm, even in fraud of his copartners (8). Notes. And where several partners carry on trade under the name of one of them only, an indorsement in his separate name will bind the firm (t).

In the case of a trustee, where a bill is payable to A. for the use of B. By Trusthe right of transfer is only in A., because B. has only an equitable and not too. a legal interest(u).

If a man become a bankrupt, all his property in which he is beneficially By Bankinterested is vested by the assignment of the commissioners in the assignees, by relation to the act of bankruptcy, so as to defeat all intermediate acts done by him to dispose of his property, (unless within the protection of the bankrupt act, 6 Geo. 4, c. 16, and the recent statute, 2 & 3 Vict. c. 29, presently noticed), and consequently the right of transfer of a bill or note is in general vested in them from the time of the act of bankruptcy(x); and it has been held that after a secret act of bankruptcy committed by one of two co-partners, he could not, by an indersement in the name of the firm, transfer negotiable securities which existed before the act of bankruptcy, so as to pass the beneficial interest in the bill away from his assignees(y); and it has been doubted whether the solvent partner could in such *case, without the con-[*203] currence of the assignees of the bankrupt, indorse the bill(z); and it was

(r) Jones v. Radford, 1 Campb. 93, (Chit. j. 741); cited in notes. Indorsee against acceptor of a bill of exchange, payable to two persons. The bill had been indersed by one in the name of both, and the defendant had accepted it with the indorsement upon it. The defence was, that the payees not being partners, the hill ought to have been indorsed by both. Lord Ellenborough held, that the defendant having accepted the bill after it had been so indorsed could not now dispute the regularity of the indorsement. Sid vide Smith v. Hunter, 1 T. R. 654.

(s) Swann v. Steele, 7 East, 210, (Chit j. 722); ante, 41, note (x); Ridley v. Taylor, 18 East, 175, (Chit. j. 812); ante, 48, note (s). But see as to the necessity, in case of bankruptcy, of proving the assent of the firm, in order to entitle a separate creditor to prove against the joint estate, Ex parte Goulding, 2 Gl. & J. 118; 8 Law J. 19, S. C.; Ex parte Thrope, 8 Mont. & Ayr, 716; post, Part II. Ch. VIII. Bank-

(1) South Carolina Bank v. Case, 8 I'ar. & C. 427; 2 Man. & Ry. 459, S. C. (Chit. j. 1401); ante, 57, 58.

(u) Evans v. Cramlington, Carth. 5; 2 Vent. 807; Skin. 264, (Chit. j. 174); Company of Felt-makers r. Davis, 1 Bos & Pul. 101, note (c); Smith v. Kendal, 6 T. R. 124, (Chit. j. 528); Selw. Ni. Pri. 9th edit. 849, 849. A bill was payable "to Price or order, for the use of Calvert." Price indorsed it to Evans, after which an extent issued against Calvert, and the money due upon it was seized to the use of the king. These facts appearing upon the pleadings, two points were made upon demurrer; the one, whether Calvert had such an interest in the money as might be extended, the other, whether Price had power to inderse the bill, or

whether he had only a bare authority to receive the money for the use of Culvert; and the Court of King's Bench, and afterwards the Exchequer Chamber, held that Calvert had not such an interest as could be extended, and that Price had power to indorse the bill, and judgment was given for the plaintiff.

(x) Pinkerton r. Marshall, 2 Hen. Bla. 835; Thomason v. Frere, 10 East, 418, (Chit. j. 761); Ramshotham r. Lewis, 1 Campb. 279, (Chit. j. 748); anle, 55, note (z).

(y) Ante, 55, note (z); Thomason v. Frere, 10 East, 418, (Chit. j. 761); Lacy v. Woolcott,

2 D. & R. 458, (Chit. j. 1181).

(z) Abel r. Sutton, 8 Esp. Rep. 107, 108, (Chit. j 619); Ramsbotham v. Lewis, 1 Campb. 279, (Chit. j. 748); Ramsbetham v. Cater, 1 Stark. Rep. 225, (Chit. j. 958). From Abel v. Sutton, it should seem, that after the act of bankruptcy of one of several partners, and the commission issued against him, the property in a bill could only be transferred by the respective indorsements of the assignees and the insolvent partner. Lord Kenyon there says, "If a fair bill existed at the time of the partnership, but is not put into circulation till after the dissolution, all the partners must join to make it negotiable; the moment the partnership ceuses, the partners are tenants in common of the partnership property undisposed of from that period; and if they send any securities which belonged to the partnership into the world after such dissolution, all must join in doing so.?" See observations, 1 Campb. 231, n. (b).

In Ramsbotham r. Lewis, 1 Campb. 279, (Chit. j. 748), the declaration stated that both partners drew and indorsed the bill, although one of the partners was then a bankrupt; and Lord Ellenborough held, that under such declaration, the indersee could not recover. His

Bills and Notes.

may trans-

considered that at least a declaration upon such an indorsement should not Transfer of state that the bankrupt joined in the indorsement(a). However, we have seen that after a secret act of bankruptcy committed by a partner, he might accept in the name of the firm, so as to subject his partner to liability(b); 2dly. Who and it should seem there is no sound distinction between an indorsement

and an acceptance (c).

It is also to be observed, that the right and title of the assignees, as to bills and notes and other property acquired after the act of bankruptcy, does not vest in them absolutely; they have a right to interfere, and claim the bill; and if they do, it is effectual against the bankrupt and all the world: but if they do not interfere, then, as between the bankrupt, or one claiming under him, and his debtor, the latter cannot set up their title, and the bankrupt has a right in a court of law to enforce the payment of the debt(d). the defendant made a bill payable to A. B. or his order after, A. B. had become bankrupt, and the latter, without the previous consent of his assignees, indorsed it to a third person, who indorsed it to the plaintiff, it was held, first, that the defendant having given the bankrupt authority to indorse, he was estopped from setting up the rights of the assignees, who had not made any claim; and secondly, that the bankrupt might acquire property subsequently to his bankruptcy, and retain it as against all the world but his assignees(e).

It has been adjudged, that if a trader delivered a bill for a valuable consideration to another previously to an act of bankruptcy, and forgot to indorse, [*204] he might indorse it after his bankruptcy (f); and if he *and his assignees refused they might be compelled to do so by bill in equity or by petition, and the costs of the petition would be ordered to be paid out of the estate of the bankrupt(g); the indorsement to be special, so as to secure the assignees from personal liability (h). So the administrator of the bankrupt might in-

lordship said, "The declaration states that both parties drew and indorsed the bill, but upon this last supposition at the time of the indorsement one partner had no longer any interest in it, and was incapable of exercising any act of ownership over it; the partnership had in fact then ceased to exist, and the solvent partner was to be considered as tenant in common of the bill along with the assignees of the other." However, in general, a transfer of partnership property, made by the solvent member of a firm, after an act of bankruptcy committed by his partner, cannot be invalidated; 12 Mod. 246; Fox v. Hanbury, Cowp. 448; Smith v. Oriel, 1 East, 869; Smith v. Stokes, 1 East, 864; 1 Mont. on Part. 154. And see Ex parte Robinson, 1 Mont. & Ayr. 18; ante, 56;

(a) Ramsbotham v. Lewis, 1 Campb. 279, 281, (Chit. j. 748); supra, note (z).

(b) Lacy v. Woolcott, 2 Dowl. & R. 458, (Chit. j. 1181); ante, 55, 56, note (d).
(c) See Lord Brougham's judgment in Ex

parte Robinson, 1 Mont. & Ayr. 18, ante, 56, note (e); and see 6 Geo. 4, c 16, s. 82, and 2 & 3 Vict. c. 29, post, 206.

(d) Webb v. Fax. 7 T. R. 391; Kitchen r.

Bartsch, 8 Smith, 58; S. C. 7 East, 53; but it is otherwise as to property acquired before the

act of bankruptcy, I. Car. & P. 147.

(e) Drayton v. Dale, 2 B. & C. 293; 3 D.

& R. 534, (Chit. j. 1186).

(f) Smith v. Pickering, Peake's Cases, 50, (Chit. j. 479, 481); Anon. 1 Campb. 492;

Rolleston v. Herbert, 8 T. R. 411; and see also 1 Rose, 14, note (a). Ex parte Greening, 13 Ves. 206; Watkins v. Maule, 2 Jac. & W. 243; Ex parte Rhodes, 3 Mont. & Ayr. 217; 2 Dea. 364, S. C.

Smith v. Pickering, Peake's Cases, 50, (Chit. j. 479, 481). Richardson and Hill drew a bill upon the defendant, payable to their own order, which the defandants accepted; the drawers delivered this bill to the plaintiffs for a valuable consideration, but forgot to indorse it; they afterwards became bankrupts, and then indorsed it. The plaintiffs, as indorsees, now sued the defendant as acceptor; Lord Kenyon was clearly of opinion that the indorsement was good, and the plaintiffs had a verdict.

Anon. 1 Campb. 422, in notes. The bill was delivered to the indorsee, with the intent of transferring the property in it to him, more than two months before the commission, but the indorsement was not in effect written upon it till within two months. Lord Ellenborough held, that the writing of the indorsement had reference to the delivery of the bill, and that the

case was clearly within the statute.

(g) Ex parte Greening, 13 Ves. 206; Cullen, 190; Ex parte Mowbray, 1 Jac. & Walk. 428, (Chit. j. 1099); Watkins v. Maule, 2 Jac. & Walk. 243, (Chit. j. 1097); Ex parte Rhodes, 3 M. & A. 217; but see Ex parte Hall, 1 Rose, 13, 14. As to costs, see Ex parte Brown, 1 Glyn. & Jam. 407, (Chit. j. 1206)

(h) Ex parte Mowbray, 1 Jac. & Walk. 448,

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dorse(i); for the transfer for consideration is the substance, the indorsement I. Of the a mere form, which creates an equitable right, entitling the holder to call for Transfer of the form (k). It should seem, however, that if the holder thought fit he Bills and the form(k). It should seem, however, that if the holder thought fit, he Notes. might always sue in the name of the party transferring (l). And a special action on the case might be supported for not indorsing, but the damages to may transbe recovered being unliquidated, would not constitute a mutual credit under fer. the Bankrupt Act(m).

And as in general property, in which a bankrupt has no beneficial interest, does not pass to his assignees under the assignment, where a bill was in the hands of a bankrupt as an agent or trustee for another, he might, notwithstanding his bankruptcy, indorse the bill in pursuance of his trust(n). So, where a bill had been accepted by another for the accommodation of the bankrupt, he might, after an act of bankruptcy, indorse it, so as to convey a right of action thereon to a third person, who obtained it bona fide, against the accommodation acceptor(o)(1). But in these cases the holder must have obtained the bill fairly, and in the ordinary course of business(p); for where the acceptor of an accommodation bill having delivered it to A. for a special purpose, and the latter, without performing his trust, having quitted the country after committing an act of bankruptcy, was pursued by a creditor, who obtained the bill from him in ignorance of his bankruptcy, and of the circumstances under which the bill was accepted, it was held that the acceptor was not liable upon the bill at the suit of the creditor who had so possessed himself of it(q). If there were an exchange of *acceptances or securities [*205] between the bankrupt and the accommodation acceptor, then the bill would be considered as accepted for value, and the indorsement after the act of bankruptcy would not transfer the property (r). And where a trader, having securities in his banker's hands to a certain amount, after a secret act of bankruptcy, drew on them a bill for a larger amount for his accommodation,

(Chit. j. 1009). Ex parte Rhodes, 3 M. & A. owed Jones nothing, but accepted the bill to en-217.

(i) Watkins v. Maule, 2 Jac. & Walk. 242, (Chit. j. 1097).

(k) Per Sir T. Plumer, in Watkins v. Maule, 2 Jac. & Walk. 243, (Chit. j. 1097).
(l) Pense v. Hirst, 10 Bar. & Cres. 122.

(Chit. j. 1456); Carpenter v. Marnell, 3 Bos. & P. 40, (Chit. j. 646); Chalmers v. Page, 3 Ear. & Ald. 697.

(m) Rose, assignees, v. Sims, 1 B. & Adol. 521, (Chit. j. 1510).

(n) Ramsbottom v. Cater, 1 Stark. Rep. 229, (Chit j. 953).

(0) Arden v. Watkins, 8 East, 317, (Chit. j. 667); Wallace v. Hardacre, 1 Campb. 46, 47, (Chit. j. 140); and Ramsbottom v. Cater, 1

Stark. Rep. 288, (Chit. j. 953).

Arden v. Watkins, 3 East, 317, (Chit. j. 667). On 5th Oct. 1801, Lewis Jones committed an act of bankruptcy, on which a commission issued 31st Dec. 1801. On the 4th Dec. 1801, he drew a bill on Watkins for 1001. Payable to his own order, and indorsed it to the plaintiff, who paid him full value; Watkins

able him to raise money upon it, and Jones deposited a lease with him as an indemnity; the assignees insisted upon a restoration of the lease, and Watkins refused to pay the bill; action on the bill and reference. The arbitrator awarded against Watkins, but stated the facts specially to enable him to take the opinion of the court. After a rule nisi, to set aside the award, cause shown, and time taken to consider, the court were clear that the defendant was liable; that as Jones had no effects in Watkins' hands, no right to indorse devolved upon the assignees. and therefore his indorsement was effectual, and transferred the property to the plaintiff. Rule discharged. See Willis v. Freeman, post, 205, note (s).

(p) Smith r. De Witts, 6 Dowl. & R. 120; R. & M. 212, (Chit. j. 1253).

(q) I.l. Ibid.

(r) 1 Campb. 179, in notes; Buckler v. Buttivant, 3 East, 72, (Chit. j. 659). When not, see Ex parte M'Gae, 2 Rose, 376, (Chit. j. 954); 19 Ves. 607.

⁽¹⁾ The payee of a negotiable note, holding it in trust for another person, may by indorsement, convey the note for the benefit of the cestui que trust, notwithstanding his bankruptcy. Wilson v. Codman, 3 Cranch, 193.

A transfer of a note by a debtor to his creditor in contemplation of bankruptcy, as collateral security for the payment of the debt, is void as a fraud upon the bankrupt law. Locke v. Winning, 3 Mass. Rep. 825.

Transfer of Bills and Notes.

edly. Who may trans-

payable to his own order, which, after acceptance, he indorsed to the plaintiff, (who knew of his partial insolvency, but not of the act of bankruptcy), and a commission of bankrupt having been afterwards taken out, it was held that the plaintiff, who was to make title through the bankrupt's indorsement, after his bankruptcy, though he were entitled to sue the acceptors upon the bill, yet could only recover on it the amount of the sum accepted for the accommodation of the bankrupt, over and above the amount of the bankrupt's effects in the hands of the acceptors at the time of the bankruptcy; for which latter amount alone they were liable to account to the assignees(s). And in equity, where the instrument has been delivered as a security for a debt less than the amount of the note, the order has been, that the creditor should be at liberty to bring an action on the note in the name of the assignees, indemnifying them, and undertaking to account for the surplus recovered (t).

This rule of law invalidating transfers by a bankrupt, after a secret act of bankruptcy, having been found extremely inconvenient to commerce, it was enacted by the 19 Geo. 2, c. 32, that payments by the bankrupt to creditors, in respect of goods really and bon's fide sold to such bankrupt, or in respect of any bills of exchange in the usual or ordinary course of trade or dealing, provided he had not notice of an act of bankruptcy, or that he was in insolvent circumstances, were protected. That act was repealed by the 6

Geo. 4, c. 16.

Transfers. of Bankruptcy, since 6 Geo. 4, c. 16, and 2 & 8 Vict. c. 24. [*206]

The 50th section of this last act allows mutual debis and credits between &c. after secret Act the bankrupt and any other person to be set off, notwithstanding any prior act of bankruptcy; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of any act of bankruptcy(u).

The 81st section makes valid all conveyances, contracts, and other *dealings and transactions by and with any bankrupt bona fide made and entered into more than two calendar months before the date and issuing of the commission against him(x), notwithstanding any prior act of bankrupicy: provided the person so dealing with such bankrupt had not, at the time of such conveyance, contract, dealing, or transaction, notice of any prior act of bank- $\tau uptcy(\eta)$.

The S2d section makes valid all bona fide payments by or to any bankrupt before the date and issuing of the commission, notwithstanding any prior act of bankruptcy; provided such payment by the bankrupt shall not be a fraudulent preference, and the person so dealing with the bankrupt had

(s) Willis v. Freeman, 12 East, 656; (Chit. .j. 802). Action by indorsee of drawer against acceptor. Verdict for plaintiff, subject to opinion of court upon a case, stating that Anderson, the drawer, being indebted to the plaintiff in more than 2000l. and being insolvent, proposed to pay the plaintiff a composition of 13s. 6d. in the pound, together with the costs of an action which had been brought by the plaintiff against him, by a bill upon the defendants. This proposal being acceded to, Anderson applied to the defendants to accept a bill for 1400/. for his accommodation. The defendants accepted the bill, drawn 5th of July, and payable 10th November, 1809, having in their hands effects of Anderson to the amount of 8881. 16s. 84. Anderson had committed a secret act of bankruptcy on 7th of Murch, 1809, upon which a commis-sion issued 25th of July. The court held, that to the extent of S881. 16s. Sd. the defendants had a right to resist payment, on the ground of their being answerable for that amount to the

assignees, to whom these funds devolved upon the act of bankruptcy; and that therefore the indorsement by Anderson to that extent was inoperative; but as to the surplus (5111. 3s. 8d.) for which the acceptance was accommodation, the case of Arden v. Watkins was in point, 10 show that the indorsement was valid. And they held the law in this respect had not been altered by the 49 Geo. 3, c. 121, s. 8, and therefore ordered a verdict to be entered for this reduced sum of 571l. 3s. 4d. See observations, Bayl. on Bills, 5th edit. 141, 142.

(1) Ex parte Brown, 1 Glynn & Jam. 407, (Chit. j. 1209).

(u) See this and the following enactments, post, Part II. Ch. VIII. Bankruptcy.

(x) The 2 & 3 Vict. c. 11, s. 12, takes away this restriction as to conreyances, and the 2 & 3 Vict. c. 29, as to contracts, &c. (y) See Bevan v. Nunn, 2 Moore & S. 182; 9 Bing. 207, S. C.

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not, at the time of such payment by or to such bankrupt, notice of any act I. Of the of bankruptcy.

The 84th section also protects payments made to a bankrupt by persons Notes.

having money of the bankrupt in their possession.

And now by the 2 & 3 Vict. c. 29, intituled "An Act for the better Pro- 2dly. Who tection of Parties dealing with Persons liable to the Bankrupt Laws," after fer. reciting 6 Geo. 4, c. 16, s. 82, and 2 & 3 Vict. c. 11, s. 12, (the latter All Conrelating to conveyances executed by the bankrupt before the date and issuing tracts, &c. of the fiat), it is enacted "That all contracts, dealings and transactions by bona fide and with any bankrupt really and bona fide made and entered into before the made by date and issuing of the fiat against him, and all executions and attachments any Bankagainst the lands and tenements or goods and chattels of such bankrupt, bona rupt previfide executed or levied before the date and issuing of the fiat, shall be deemed ous to the Date and to be valid, notwithstanding any prior act of bankruptcy by such bankrupt issuing of committed; provided the person or persons so dealing with such bankrupt, or any First to at whose suit or on whose account such execution or attachment shall have be valid, issued, had not at the time of such contract, dealing or transaction, or at the Notice had time of executing or levying such execution or attachment, notice of any prior of prior act of bankruptcy by him committed; provided also that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference"(1).

The principal difference between the statute 19 Geo. 2, c. 32, and the 6 Decisions Geo. 4, c. 16, is, that the latter does not contain, as the former did, the 4, c. 16, words " or notice that he was in insolvent circumstances." On the 50th section of 6 Geo. 4, c. 16, it has been decided, in an action brought by the assignees of certain bankers, that a party has a right to set off notes of such bankers, taken by him after he knew that they had stopped payment, but before he knew that they had committed an act of bankruptcy (z).

In another case (a) it was holden, in an action brought by the assignees of certain bankers, that although a party has a right to set off notes of such bankers taken by him after he knew that they had stopped payment, but before he knew that any of the partners constituting the banking-house had committed an act of bankruptcy, yet that he had no right to set off notes of such bankers taken by him after he knew *that three or indeed any one of the [*207] four partners constituting the banking-house had committed acts of bankruptcy(b).

It will be observed, that the 6 Geo. 4, c. 16, s. 82, did away with numerous questions which used to arise on the prior act, as to what was a payment in the course of trade(c), and as to what was a notice of a person being in insolvent, circumstances(d). That act also protected bon î fide payments

(z) Hawkins v. Whitten, 10 B. & C. 217, (Chit. j. 1462).

(a) Dickson v. Cass, 1 B. & Adol. 343, (Chit. j 1502).

(b) Dickson v. Cass, 1 B. & Adol. 343, (Chit. j. 1502).

(c) Pinkerton v. Marshall, 2 H. Bla. 334; Southey v. Butler, 3 Bos. & Pul. 237; Vernon v. Lomas, 11 East, 127; Bayley v. Schofield, 1 Maole & S. 338.

See the cases upon this part of the provision in the old act, 1 Mont. 318, &c. and see Eden, 247, & c.

(d) As to the meaning of the term insolvent circumstances in the old act, it has been held to mean that a person is not in condition to pay v. Hall, 2 T. R. 648, (Chit. j. 446); Harwood his debts in the ordinary course, as persons

⁽¹⁾ See post, 820, (26).

I. Of the of all descriptions of bona fide debts, and thereby set at rest the contested transfer of questions, whether promissory notes (e), or checks on bankers (f), were Bills and within the former enactment. Notes.

2diy. Who may transfer.

What a payment under 6 Geo. 4, c. 16, s. 82.

With respect to the term "payment," as used in the 6 Geo. 4, c. 16, s. 82, it should seem that an indorsement of a bill would operate as a payment; and that, therefore, if a person, after an act of bankruptcy, unknown to the indorsee, indorsed a bill, it would transfer the interest to such indorsee. It was held, that if a trader, after he had committed a secret act of bankruptcy, indorsed a bill of exchange to a creditor in payment of a debt, who received the money due upon the bill before a commission issued against the trader, such payment would be protected (g). And if a bill of exchange were indorsed by a trader after a secret act of bankruptcy, in payment of a debt for goods sold, it should seem that such transfer would be valid with reference to the construction of the old stat. 1 Jac. 1, c. 15, s. 14, although the bill were not paid until after the issuing of the commission, because the indorsement of a bill of exchange is deemed a payment in satisfaction, provided the bill be paid when due(h); and therefore it should seem, that although in general a partner who has committed a secret act of bankruptcy cannot indorse a bill in existence, and belonging to the partnership before the act of bankruptcy, so as to affect the firm(i); yet it seems that such an indorsement by the solvent partner would be valid(k), even though the solvent partner had notice of his co-partner's [*208] having committed *an act of bankruptcy(1). But where a partner had an interest in the profits, without any interest in the property, it was holden that he could not, after an act of bankruptcy by the proprietor, transfer the property as against that proprietor's assignees (m). And a payment by a partner who had committed an act of bankruptcy, of a partnership debt to a creditor who had notice of his act of bankruptcy, was not protected, and might be recovered back by the assignees and the solvent partner (n). The act of the bankrupt must also, under this statute, have been equivalent to a payment, and not a delivery by wayof indemnity or set-off(o).

> carrying on trade usually do, for the object of the statute was to protect those persons only who receive money under circumstances not calculated to raise suspicion; but if any such circumstances occur, then they receive the money or bills at their peril, and are liable to refund; as where a bankrupt, before his transfer of bills, proposed to pay his creditors by instalments. Per Lord Ellenborough, Le Blanc, J. and Bayley, J. in Bayly v. Schofield, I Maule & S. 350, 353, 354. But the insolvency mentioned in this and the stat. 46 Geo. 3, c. 135, meant a general inability in the bankrupt to answer his engagements, and which is not to be inferred merely from his renewing bills of exchange in a particular instance; Anon. 1 Campb. 492, in notes. Sittings in Trin. Vac. 1808.

(e) See Harwood v. Lomas, 11 East, 127. (f) Holroyd v. Whitehead, 5 Taunt. 444;

1 Marsh. 129, (Chit. j. 905).
(g) Hawkins r. Penfold, 2 Ves. sen. 550, (Chit. j. 335). Per Lord Chancellor, "There is no difference between an actual payment of money in satisfaction of a debt and indorsing bills of exchange, provided the money was received on them before the commission of bankruptcy issued, for I should take that only as a

medium of payment and no more; otherwise it would be very hard." See also Eden, Bank Law, 252, 253; 1 Mont. 311, note (h). And see Shaw v. Batley, 4 B. & Ad. 801; 1 N. & M. 751, S. C.

(h) Wilkins v. Casey, 7 T. R. 711.

(i) Ante, 55, note (z); Burt v. Moult, 1 C. & M. 525. In Thomason v. Frere, 10 East, 418, (Chit. j. 761); and in Willis v. Freeman, 12 East, 656, (Chit. j. 802); the bills were not indersed for goods sold; and in the last case Lord Ellenborough expressly alluded to the exceptions introduced by the statutes.

(k) Fox r. Hanbury, Cowp. 449; Smith c. Stokes, 1 East, 263; Smith r. Oriel, id. 369; Ramsbotham r. Cater, 1 Stark. Rep. 228, (Chit. j. 953); and see Woodbridge r. Swan, 4 B. & Ad. 633; 1 N. & M. 724, S. C.; and Ex parte Robinson, 1 Mont. & Ayr. 18; ante, 56, note (e).

(1) Harvey v. Cricket, 5 Maule & S. 336, (Chit. j. 969).

(m) Meyer v. Sharpe, 5 Taunt. 74.

(n) Craven v. Edmondson, 6 Bingh. 734; 4 Moore & P. 622, S. C.
(o) Carter v. Breton, 6 Bingh. 617; 4

Moore & P. 424, S. C.; post, 213, note (e).

But whatever doubts may have been entertained with respect to the va-I. Of the lidity of a transfer or indorsement of a bill or note by a bankrupt after a se-transfer of cret act of bankruptcy, as amounting to a payment within the 6 Geo. 4, those Notes. doubts are now removed by the 2 & 3 Vict. c. 29, which protects all contracts, dealings and transactions by and with any bankrupt bona fide made may transand entered into before the date and issuing of the fiat, notwithstanding any fer. prior act of bankruptcy, provided the party so dealing with the bankrupt had Transfers no notice of such act of bankruptcy. And under this latter act it is clear, and Inthat any indorsement or transfer of a bill or note, made after a secret act dorsements of bankruptcy before the date of the fiat, although not as a payment, will be before Date of valid, provided the party in whose favour it were made had no notice of fiat, though such act of bankruptcy. And such was previously the case under the 81st not as Paysection of 6 Geo. 4, c. 16, where the transfer or indorsement took place ment, valid. more than two months before the date of the commission.

So a payment to a person surrendering a lien even with notice of an act of bankrupicy was protected(p); and upon a principle of law (independent of any of the provisions by statute) a payment to a landlord about to distrain after an act of bankruptcy was not recoverable by the assignees (q); nor was a payment enforced by coercion of law(r).

With respect to what shall be deemed a constructive notice of a prior act What is of bankruptcy, the 83d sect. of the 6 Geo. 4, c. 16, enacts, that the issuand Act of ing of a commission shall be deemed notice of a prior act of bankruptcy (if Bankruptan act of bankruptcy had been actually committed before the issuing the com-cy. mission) if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be effected by such notice may reasonably be presumed to have seen the same. Notice of a docket struck is not absolutely and necessarily notice of an act of bankruptcy, but with other circumstances it is. S5th section enacts, "that if any accredited agent of any body corporate, or public company, shall have had notice of any act of bankruptcy, such body corporate or company shall be thereby deemed to have had such notice."

We have seen that both the 6 Geo. 4, c. 16, s. 82, and 2 and 3 Vict. Transfers c. 29, except payments by way of fraudulent preference, and therefore a fraudulent transfer or indorsement after an act of bankruptcy, in order *to effect such Preference. preserence, is invalid(s). Before the 6 Geo. 4, and under the prior acts, ence void. it was settled, that if a bill were indorsed by a bankrupt to a particular cre- [*209] ditor by way of fraudulent preference, even before an act of bankruptcy, it would be invalid. The rule upon this subject was, that if the preference was not the mere voluntary act of the party, but only consequential, as it is called, (as where the act is done in the ordinary course of business, and upon the application of the creditor, or in pursuance of some prior agreement, which was not made in contemplation of bankruptcy, or was done to deliver the party from legal process, or from the threat and apprehension of it, or even from the pressure or importunity of the creditor,) then it would not be void, though made the very moment before an act of bankruptcy committed. And where the preference was consequential merely, the creditor's or bankrupt's own knowledge or apprehension of his insolvency was considered im-

⁽p) Thomson v. Beatson, 1 Bingh. 145; 7 tained. See 6 Geo. 4, c. 16, s. 74. Moore, 548, S. C.

⁽q) Stephenson v. Wood, 5 Esp. Rep. 200; Mavor v. Croome, 1 Bingh. 261; 8 Moore, 171, S. C. But only a year's rent can be ob-

⁽r) Eden, B. L. 253.

⁽s) Bagnall v. Andrew, 7 Bingh. 217; 4 Moore & P. 889, (Chit. j. 1514).

Bills and Notes.

2dly. Who may trans-

material, that being frequently the very reason of the creditor's taking such Transfer of measures against the bankrupt as are precisely the ground of justifying the act done by the bankrupt in consequence of it. But a trader could not, in contemplation of bankruptcy, indorse a bill or note to his creditor of his own accord, and without any application. However, it was deemed not sufficient to avoid the transaction, that the indorsement was made voluntarily, and that an act of bankruptcy ensued, it must also appear that he had the act of bankruptcy in contemplation at the time when the indorsement was So it must appear that the transfer was made in contemplation of bankruptcy, and not merely that the trader was insolvent at the time it was Nor was it ever held, that if a creditor press for payment of his made(u). debt, and thereby obtain a transfer of a bill or note to him, that the intention of the bankrupt shall be called in aid to set it aside. If it were transferred through the urgency of the demand, or through the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding. Nor would the transaction, if bona fide, and not colourable, be impeached by the secrecy adopted in the transaction by the trader, to save his own credit in the view of the world(x). And where a trader, in contemplation of bankruptcy, and without solicitation, put three checks into the hands of his clerk, to be delivered to a creditor, at the counting-house of the latter, but before they were delivered, the creditor called at the trader's and demanded payment of his debt, upon which the checks were delivered to him; it was held, that the intention to give a voluntary preference not being consummated, the delivery of the check was valid(y). So where a creditor obtained a preference in contemplation of an intended deed of composition, and which preference would have been void as against the creditors under that deed, yet as the composition went off, it was decided that the creditor might hold his securities against the assignees under a commission of bankrupt subsequently issued, but not contemplated at the time of [*210] the preference(z). *These several rules and decisions as to fraudulent preferences are still applicable. But the act 6 Geo. 4, c. 16, s. 3, further declares, that a fraudulent preference, by delivering goods and chattels, shall be deemed an act of bankruptcy, and bills are chattels for this purpose(a). And upon this ground it has been decided that the voluntary transfer or delivery of bills by a trader in contemplation of bankruptcy, in satisfaction of a bona fide debt, is not within the protection of the 81st section of that statute though made more than two months before the issuing of a commission against such trader, though this section contains no proviso against fraudulent Where bills of exchange were delivered by a trader, in preferences (b). contemplation of bankruptcy, to a creditor, with a view of giving him the preference, and the amount due on the bills was received by him after the bankruptcy; it was held in an action of trover by the assignees to recover the bills, that the receipt of the money by the creditor was not a conversion, and therefore that it was necessary for them to prove a demand and refusal

all, 2 Scott, 369, infra.
(u) Morgan v. Brundrett, 5 B. & Ad. 289;
2 N. & M. 280; Atkinson v. Brindall, 2 Scott,

⁽¹⁾ See the rule and cases upon this subject in Smith r. Payne, 6 T. R. 152; Hartshorn v. Slodder, 2 Bos. & Pul. 589; Crosby v. Crouch, 11 East, 256; Wheelwright v. Jackson, 5 Taunt. 109, 633; Gilbins v. Philips, 7 B. & C. 529; Fidgen v. Sharp, 1 Marsh. 196; Poland v. Glyn, 2 Dow. & Ry. 310; Cullen, 280, 281; Eden, Bank. Law, 31. And see Morgan v. Brundrett, 5 B. & Ad. 289; Atkinson v. Brind-

^{369;} S. C. 2 Bing. N. C. 225; 1 Hodges, 335.
(x) Crosby v. Crouch, 11 East, 256.
(y) Bayley v. Ballard, 1 Campb. 416.
(z) Wheelwright v. Jackson, 5 Taunt. 109,

⁽a) Cumming v. Baily, 6 Bingh. 368; 4 M. & P. 36, (Chit. j. 1485); post, Part II. Ch.

VIII. Bankrupicy.
(b) Bevan v. Nunn, 2 Moore & S. 132; 9
Bing. 107, S. C., (Chit. j. 1435). See Harman
v. Figher, Cowp. 117; Lofft, 472, S. C.

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before the bills became due, or the action should have been for money had I. Of the and received(c). And where the defendants, B.'s bankers, had discounted Transfer of for B. a bill payable January 10, drawn by B. and guaranteed by L., and Notes, on the 3d January B. being in embarrassed circumstances, gave L. a check on the defendants for the amount of the bill, who on receiving the check 2dly. Who handed the bill over to L., and B. became bankrupt January 9; it was held, fer. that his assignees could not sue the defendants as having received the amount of the check by way of fraudulent preference, the preference, if any, being given to L.(d).

So there are cases in which a trader in insolvent circumstances may return bills of exchange to the party from whom he has received them, though they would otherwise become the property of his assignees; as where he has obtained them by fraudulent representation(e), or where they have been delivered to him for a special purpose which has failed (f).

The 6 Geo. 4, c. 16, gives to the assignees all property which may accrue in any way to the bankrupt before he obtains his certificate, and therefore, if a promissory note be given to an uncertificated bankrupt, after the commission issued, and the assignees require the maker *to pay them, the [*211] right to the note is thereby vested in the assignees, and an action cannot be supported by the bankrupt(g), unless indeed he acquired the note in respect of a contract made in his favour by the assignees, or with their concur-And it seems a bankrupt is not only capable of acquiring property and retaining it against any person except his assignees (i), but also of maintaining actions for it(k).

In case of the bankruptcy of a banker, bills deposited with him as agent, Bankruptto obtain payment (usually termed short bills, because not discounted nor cy of a carried out as money in their books), do not pass to the assignees, unless the banker has, at the request of his customer, discounted them, or advanced money upon the credit of them, in which case the assignces acquire the en-

R. 547, (Chit. j. 1445).
(d) Abbott v. Pomfret, 1 Bing. N. C. 462;

1 Scott, 470; 1 Hodges, 24, S. C.

(e) Graff, assignee, &c. v. Greffulke, 1 Campb. 89. If a trader, on receiving bills of exchange from one of his creditors abroad, to whom he is indebted beyond the amount of them, after becoming insolvent, but before committing an act of bankruptcy, deliver these bills with the consent of his other creditors to an agent of the person who had remitted them for the use of the latter, if he should be ultimately entitled to them; this is a legal and valid transaction, and if a commission of bankrupt afterwards issue against the trader, his assignees cannot maintain an action against the trustee to recover the produce of the bills.

Gladstone r. Hadwen, 1 Maule & S. 517, (Chit. j. 886). Where S. obtained bills of exchange from the defendant upon a fraudulent representation that a security given by him to the defendant (which was void) was an ample security, and on the next day, having resolved to stop payment, informed the defendant that he had repented of what he had done, and had sent express to stop the bills, and would return them, and three days afterwards committed an act of bankruptcy, after which he returned to

(c) Jones v. Fort, 9 B. & C. 764; 4 M. & the defendant all the bills (except one which had been discounted) and also two bank-notes. part of the proceeds of such discount; and the defendant delivered back the security, and afterwards a commission of bankruptcy issued against S., and the assignees under such commission brought trover against the defendant for the bills and bank-notes: it was held, that the defendant was entitled to retain them; see Eden. Bank. Law, 308.

(f) Toovey v. Milne, 2 Bar. & Ald. 683. (g) Kitchen v. Bartsch, 7 East Rep. 53; Smith's Rep. 58; S. C. Niss v. Adamson, 3 Barn. & Ald. 225; Drayton v. Dale, 2 Barn. & Cress. 293; 3 D. & R. 534, (Chit. j. 1186); Hull v. Pickersgill, 1 B. & B. 282; Smith r. De Witts, 6 Dow. & Ry. 120; R. & M. 212, (Chit. j. 1253).

(h) Coles v. Barrow, 4 Taunt. 754; Holt, C. N. P. 174.

(i) Ante, 203; Webb r. Γox, 7 T. R. 391; Fowler v. Down, 1 B. & P. 41; Evans v. Brown, 1 Esp. C. N. P. 170; Cumming v. Roebuck, 4 Holt, C. N. P. 172; Clark v. Calvert, 3 Moore, 96.

(k) Ante, 203; Anonymous, 2 Taunt. 61. See further I Chitty on Pleading, €th edit. 25,

1. Of the tire property in them if discounted, or have a lien on them pro tanto in case Transfer of of a partial advance (l). Bills and

Notes. may trans-

Bills remitted by a Bankrupt for a parti-cular Purpose.

Where A., a merchant at Liverpool, remitted bills to B., a merchant in 2dly. Who London, with directions to get them discounted and apply the proceeds in a particular way, and B. did not get them discounted, but received the money when they became due, but before that time A. had stopped payment, and desired to have the bills returned, and a commission issued against him before the money on the bill was received, it was held that B. was liable to be sued by the assignee of A. for money had and received to his use, and that B. could not set off a debt due to him from A.(m), because the bills were remitted to B. on a specific account; they were to be discounted, and the proceeds were to be appropriated in a particular mode, and under such circumstances the defendant had no right to them; the property in the bills sent, until discounted, remained in the senders, and that the defendant could not insist that this was a case of mutual credit; for in all cases of mutual credit the transaction must be such as will terminate in a cross debt; but this transaction could not have so terminated, because the bills were remitted with directions to apply the whole of the proceeds to particular purposes(n). [*212] where by the terms of an agreement between F. and Co. *and their bankers S. and Co. the permission to discount indorsed bills of exchange was limited to the amount necessary to meet such acceptances of F. and Co. as were in the course of immediate payment at the house of S. and Co.; and to cover certain acceptances becoming due, F. and Co. remitted to S. and Co. an indorsed bill of exchange, but the latter dishonoured their acceptances, and soon afterwards stopped payment, and then procured the bill so remitted by F. and Co. to be accepted, and made an entry in their books of their having discounted it; and thereupon a commission of bankrupt having issued against S. and Co., it was held that S. and Co. had no right to discount the bill without exe-

> cuting the trust reposed in them, and that their assignees were bound to deliver up the bill to F. and Co.(o). But the effect of bankruptcy upon the property in bills in the hands of the trader will be more fully considered in the chapter relating to Bankruptcy(p). If short bills be delivered by a banker, on the eve of his bankruptcy, to a third person, who merely receives the payment and pays over the money to the assignees, instead of the customer, he can sue such third person only for money had and received,

(1) Per Lord Ellenborough, in Giles v. Perkins, 9 East, 14, (Chit. j. 737); Carstairs v. Bates, 3 Campb. 301, (Chit. j. 877); Parr v. Eliason, 1 East, 544, (Chit. j. 632), and cases there cited; Lingham v. Biggs, 1 B. & P. 83, note (α); and 1 Mont. 354, 355, &c.; Ex parte Waring. 19 Ves. 345. (Chit. j. 929); Thomp-Waring, 19 Ves. 345, (Chit. j. 929); Thompson v. Giles, 2 B. & C. 422; 3 D. & Ry. 733, (Chit. j. 1190); Eden, B. L. 261, 262; see post, Part II. Ch. VIII. Bankruptcy.

and not in trover(q).

(m) Buchanan, assignee, r. Findlay, 9 B. & C. 738; 4 Man. & Ry. 593, (Chit. j. 1441). (n) Buchanan, assignee, v. Findlay, 9 B. & C. 738; 4 M. & R. 593, S. C.; Key v. Flint, 8 Taunt. 21, (Chit. j. 1000); 1 Moore, 451, S. C.; Ex parte Flint, 1 Swanst. 30. And in Buchanan v. Findlay, Lord Tenterden observed. "If in the present case the defendants had procured these bills to be discounted as directed, and paid over the 900l. to Ransom and Co. they would have been entitled to the benefit of

the difference, and to apply it to the account of Duff, Findlay, and Co. But as they did not procure the bills to be discounted, nor pay the 9001 the bankrupt had a right to a return of the bills, and the defendants cannot have the benefit of that partial application of their value to which they would have been entitled if they had followed the directions of the bankrupts in other respects. If they could be permitted to do this, they would receive the benefit without performing the consideration for it, which would be very unreasonable. For these reasons we think the verdict is to stand for the whole sum." See observations upon this case in Thorpe v. Thorpe, 8 B. & Ad. 580; ante, 198.

(o) Ex parte Frere, 1 Mont. & Mac. 263,

(Chit. j. 1451).
(p) Post, Part II. Ch. VIII.
(q) Tennant v. Strachan, Mood. & Mal. 378, (Chit. j. 1450).

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The Insolvent Act, 7 Geo. 4, c. 57, s. 32, (re-enacted 1 & 2 Vict. c. I. Of the 110, s. 59), invalidates all voluntary transfers and delivery of bills, notes Transfer of and money, by a person in insolvent circumstances, to any creditor or other Notes. person for the benefit of a creditor, and who, within three months after is imprisoned, and petitions and obtains his discharge under the act; and this 2dly. Who provision therefore invalidates a voluntary indersement of a bill, or a pay-for. ment made by an insolvent within three months before his imprisonment(r). By an In-And it has recently been decided that this section is not confined to such solvent. transfers as are made within three months before the commencement of the imprisonment, or during the continuance of such imprisonment, but extends to transfers made at any time, even a year previous to the imprisonment, if made with the view or intention of petitioning the court for the insolvent's discharge(s). It is not, however, necessary, in order to support a transfer by an insolvent debtor to his creditor, to show that it was made in consequence of pressure on the part of the creditor; in order to invalidate it, it must appear to have originated in the voluntary act of the debtor, not in a bona fide application by the creditor(t). And where the transfer is not the mere spontaneous act of the debtor, and the consideration for the transfer is in itself sufficiently strong to induce the debtor to make it, such transfer will not be voluntary within the act, though part of the consideration consists of a pre-existing debt(u).

A bill of exchange ought not to be transferred to an alien enemy (x), saly. To though under circumstances he might, after return of peace, sue *thereon(y). whom the If made to a married woman, it enures to the benefit of her husband, though may be we have seen an indorsement in her own name will sometimes suffice (z). It made. should not be made to a known bankrupt(a). We have seen what pay- [*213] ments and deliveries of property to a bankrupt, after a secret act of bankruptcy, are protected, when before the date of the commission (b); and if a bill be indorsed to or drawn or accepted in favour of a hankrupt, in payment of a debt due to him at any time before the date of the commission, though after a secret act of bankruptcy unknown to the debtor, it will, as well under the 6 Geo. 4, c. 16, s. 82, as since the recent act 2 & 3 Vict. c. 29, no doubt be a sufficient discharge of the debt so as to preclude the assignees from suing for it(c).

And where, before the late act, there had been a bona fide payment to a bankrupt, the court had gone so far to give effect to such payment as to hold that a person who had hona fide purchased and paid the price of goods bought of a trader after a secret act of bankruptcy, and within two months of the commission, had a right to retain such goods until repaid the money, although the sale was void, and passed no other interest in the goods than merely a lien(d). But the 6 Geo. 4, c. 16, only protected payments strictly and pro-

(r) Herbert v. Wilcox, 6 Bing. 203; 8 M. & P. 515, S. C.; post, Ch. IX. s. ii. Payment-By Whom.

(s) Beck v. Smith, 2 M. & W. 191; and see Wainwright v. Miles, 3 Moore & S. 211. See also Binns v. Towsey, 3 Nev. & P. 88; 7 Ad. & El. 867, S. C.

(t) Doe d. Boydell v. Gillett, 2 C. M. & R. 579; 1 Tyr. & G. 114, S. C. See Stuckey v. Drewe, 2 Mylne & Keen, 190; Reynard v. Robinson, 3 Moore & Si. 127; 9 Bing. 717, S. C.; Davies v. Acocks, 2 C. M. & R. 461; 1 Gale, 251, S. C.

(u) Margareson v. Saxton, 1 Younge & Col. 525; Arnell v. Bean, 1 Moore & S. 151; 3 Bing. 87, S. C. See Mogg v. Baker, 3 M. & W. 195. See also Troup v. Brooks, 4 C. & P. 821; Tibbitts v. George, 5 Ad. & El. 107; Smith v. Smith, 2 C. M. & R. 281.

(x) Anke, 18.

(y) Ante, 13. (2) Ante, 22, 28, 201.

(a) Ante, 202 to 212. (b) Anle, 205, 206.

(c) See Wilkins v. Casey, 7 T. R. 711; Hawkins v. Penfold, 2 Ves. sen. 550, (Chit. j. 385); and other cases, ante, 207, notes (g) and

(d) Hill v. Farnell, 9 B. & C. 45.

1. Of the Bills and Notes.

3dly. To who m Transfer may be ınade.

perly so termed, and did not extend to give effect to contracts of indemnity or set-off; and therefore where, after a secret act of bankruptcy committed by A., the defen lant accepted a bill for him for 981. at three months, which A. transferred to a creditor, and afterwards on the same day A. agreed to sell the defendant four horses as security for part of the 93l. and the horses were subsequently delivered to the defendant, who paid the 981, when it fell due; it was held, that the transaction was not protected by the 82d section of that act; this not being a sale of goods with payment of the price, but a sale of goods with an agreement to set off the price against a liability on the part of the bankrupt(ϵ).

A bill cannot regularly be indorsed to a prior party, at least so as to enable him to sue any indorser of the bill whose name was upon it subsequent to his own, either on the bill or specially, unless under very particular circumstances (f); however, if there were any prior indorsement in blank, a subsequent holder might sue thereon(g). So if one partner in a firm draw or indorse a bill in his own name only, but on account of the firm, and another member of the firm afterwards become the holder for a debt due from the

firm to himself, he cannot sue the first party (h)(1).

When there is a contention between separate claimants, which of them is entitled to the bills or the proceeds in a third person's hand-, as agent or otherwise, the latter may file a bill of interpleader(i); or may apply to the court under the recent act(k).

4thly. The Time when a transfer may be made (l).

Indorsements of bills are most usually made after acceptance and before payment; but though the term "transfer," like the term "acceptance," supposes a pre-existing bill, a transfer may be made previously *to the bill being completed. Thus it has been adjudged, that if a man indorse his name on a [*214] blank stamped piece of paper, such an indorsement will operate as a carte blanche, or letter of credit, for an indefinite sum consistent with the stamp, and will bind the indorser for any sum to be paid at any time, which the per-When may son to whom he entrusts the instrument may insert therein(m), and such paper shall be considered a bill by a relation from the time of signing and indorsing(n) (2). And it has been held no objection to the validity of a bill

be before Bill complete.

> (e) Carter v. Breton, 6 Bing. 617; 4 Moore & P. 424, S. C.

> (f) Bishop r. Hayward, 4 T. R. 470, (Chite (1) Disnop r. Hayward, 4 1 R. 470, (Chir.) 3 492); Britten v. Webb, 2 Bar. & Cres. 483; 3 D. & Ry. 650, (Chit. j. 1198); ante, 26, note (o). But see Penny v. Innes, 1 C., M. & R. 439; post, Liability of Indorser.

> (g) Id. ibid. (h) Tengue v. Hubbard, S. B. & C. 345; 2 Man. & Rv. 369, (Chit. j. 1396); ante, 60, note (s).

(i) Stevenson r. Anderson, 2 Ves. & B. 407.

(k) 1 & 2 Will 4, c. 58.

(/) In France a bill must properly be indorsed before it is due, and not after, and it must be dated; 1 Pardess. 365, 368. See post, 225.

(m) Russell v. Langstaff, Dougl. 514, (Chit. j. 415). Newsome r. Thornton, 6 East, 21, 22; Collis v. Emmett, 1 Hen. Bla. 313, 316, 319, (Chit. j. 461); ante, 29, note (s).

(a) Per curtam, in Snaith c. Mingay, 1 Maule & S. S7; Crutchley c. Clarence, 2 Maule & S. 90; 1 Marsh. 29, (Chit. j. 895); and Usher v. Dauncey and others, 4 Camp, 98, (Chit. j. 919). See ante, 29, 156, notes (1) and (m).

(1) { A bill payable to the drawer's order, and endorsed to his agent is a virtual endorsement to himself. Rice v. Hogan, 8 Dana, 136. }

⁽²⁾ The same doctrine has been asserted in the United States. Violet v. Patton, 5 Cranch, 142. Putnam v. Sullivan, 4 Mass. Rep. 45. Mitchell v. Culver, 7 Cowen, 336. Mechanica' and Farmers' Bank v. Schuyler, Id. 337, in note. So where A. made a note with a blank for the sum, and sent it to the payer, and requested him to fill it up, it was held that the payer might lawfully fill up the blank and recover upon the note. Jordan v. Neilson, 2 Wash. Rep. 164.

A. wrote his name on a blank paper and gave it to B. who made a note on the other side payable to C. or order, with interest, and signed it as a promissor; C. afterwards received part payment of the note from B., and indorsed the amount on the note, and afterwards brough an action on non-payment of the residue against A. and wrote over his name "in consideration of the subsisting connexion between me and my son-in-law B., I promise and engage to guarantee the pay-

of exchange, that the acceptance and indorsement were written before the 1. Of the bill was drawn, notwithstanding the indorsement was made by a stranger to Transfer of Bills the acceptor(o). So where in an action brought by the indorsee of a post- and Notes. dated bill, drawn by the defendant, and indorsed by the payce before the 4thly. day on which it hore date, and the payce died before such date, the defend-Time of ant contended that the bill did not acquire the character of a negotiable bill Transfer. within the custom of merchants, till the time it bore date, and that the payce who indorsed it having died before that time, such indorsement conveyed no title to the plaintiff, and that the defendant as drawer was not liable: upon a special case reserved the Court of King's Bench were of opinion that such an indorsement before the date of the bill was legal and valid, and that notwithstanding such death of the indorser the plaintiff was entitled to recover(p). But there is an express provision in 17 Geo. 3, c. 30, s. 1, that bills and notes for the payment of a less sum than five pounds shall not be indorsed before the date thereof(q)(1).

Although if a bill of exchange, payable at a certain time after date, be After refupresented for acceptance and refused, and the holder thereof neglect to give sal of Acdue notice of such dishonour to the drawer or indorsers, they are discharged ceptance. from liability to such holder, yet if before the specified time of payment he indorse the bill to a party, ignorant of the laches, for valuable consideration, such indorsee will not be thereby affected, and may enforce payment from the drawer or prior inderser(r). But if *such indersee, at the time he receiv- [*215]

(o) Schultz v. Astley, 2 Bing. N. C. 544; S. C. 2 Scott, 815; 1 Hodges, 525; 7 C. & P. 99.

(p) Pasmore v. North, 13 East, 517, (Chit. j. 829). Defendant, 4th May, 1810, drew a bill for 2001. on Brook & Co. dated 11th May, 1810, payable to Totty or order sixty-five days after date. On 5th May Totty indorsed this bill to the plaintiff for a valuable consideration, and on the same day died. After 4th and before 11th of May, the defendant received effects of Totty's to the amount of about 1301. to answer this bill. On 12th of May, defendant advised the drawees of the bill having been drawn, and of Totty's death, and desired them not to accept or pay the bill. Acceptance and payment were accordingly refused, and this action was brought against the drawer. A verdict was found for the plaintiff, subject to the opinion of the court of King's Bench on a case reserved. The court, after adverting to 17 Geo. 3, c. 30, as to bills for less than 51. and to

48 Geo. 3, c. 149, as to post-duting drafts upon bankers, held clearly that the plaintiff was entitled to recover for the whole amount of the bill, and he had judgment accordingly.

(q) See observations on this statute in Pasmore v. North, 18 East, 517, (Chit. j. 829). The statute was made perpetual by 27 Geo. 3, c. 16, and by 7 Geo. 4, c. 6, is still in force.

(r) O'Keefe v. Dunn, 1 Marsh 613; Taunt. 305, (Chit. j. 937); per Gibbs, C. J. Heath and Dallas, Js.; dissentiente Chambre, J.; but athrmed in error, 5 Maule & S. 282. The payee of a bill of exchange presented it for acceptance, which was refused, but no notice of such dishonour was given to the drawer, and the payee afterwards indorsed over the bill without notice to the indorsee of such refusal to accept, and the latter again presented the bill for acceptance, which was again refused; and it was held, that the indorsee might recover on the bill against the drawer notwithstanding the laches of the pavee, hy three judges, Chambre, J. con-

ment of the contents of the within note on demand." It was held that C. had a right to fill up the indorsement so as to make A responsible as a common indorser, or a guarantor, warrantor or surety, liable in the first instance, and in all events as a joint and several promissor would be. S. J. Court of Massachusetts, Prec. Declar. 113, note. S. C. cited 3 Mass. Rep. 275. See and consult Herrick v. Carman, 12 John. Rep. 159. And see Beckwith v. Angel, 6 Conn. Rep. 315. Sumner v. Gay, 4 Pick, 311. Tenney v. Prince, Id. 385.

So the holder of a bill of exchange, with several indorsements in blank, has a right to strike out the names of the indorsers subsequent to the first, and to write over the name of the first indorser an assignment to himself; or the bill without such assignment will be considered as his property by his having it in his power to make it. Ritchie & Wales r. Moore, 5 Munf. Rep. 388.

⁽¹⁾ The indorsement of a note in presumption of law is cotemporaneous with the making of it, or at all events, antecedent to its becoming due: if the defendant in a suit by the indorsee, wishes to avail himself of payment to the original holder, it is incumbent upon him to show the indorsement to have been made subsequent to the time when the note became due. Pinkerton v. Bailey, 8 Wend. 600.

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Bills and Notes.

4thly. Time of Transfer.

1. Of the ed the bill, knew of the dishonour, or took the bill after it was due, he will Transfer of be affected by such laches, and will not be entitled to recover(s). Noting, however, on the face of the bill for non-acceptance, though formerly considered sufficient notice(t), will not now, of itself, be sufficient to divest a holder for value of his right to recover, because it must further appear that the holder has acted mala fide, and not merely that he has been guilty of gross negligence(u). Where the holder of a bill, before it was due, having tendered it for acceptance, which was refused, kept it till due, when it was presented for payment and refused, and then returned to an indorser, who, not knowing of the laches, paid it; it was held, that his ignorance of such laches, when he paid the bill, did not entitle him to recover, either against the drawer or prior indorsers, who had thus been discharged by the laches of the holder(x). But if the drawer of a bill, retaining it after he has released the acceptor, indorse it to a bona fide holder before it is due, the latter may recover from the acceptor (y).

Conse-In this country there is no legal objection to the validity of a transfer of a quences of Transfers till made after it became due(z). In this case it is said that the *indorsement after bill or

Note due. trà. Per Gibbs, C. J. "He who takes a bill [***2**16] after it has arrived at maturity takes it subject to all the defences which could have been made by

any previous holder; for the bill being unpaid, its date is notice to him sufficient to put him on inquiry; but if he takes the bill before it is due, he takes it not subject to the same infirmity of title, because he then takes it without notice of any suspicious circumstances that may break in upon his remedy against any former holder. This is the general law; but there may be circumstances that may make it otherwise. A holder is not bound to present a bill for acceptance; there is nothing, therefore, on the face of an unaccepted bill to awaken a suspicion that it has been presented for acceptance and refused. But it is said the general law is, that where notice is requisite, if notice be not given, the drawer, and all persons claiming to be entitled to have notice of the dishonour, are discharged. I think that is a begging of the question. If a holder comes to the knowledge that the drawee will not accept or will not pay the bill when it becomes due, and omits to give notice, he shall never sue the drawer, because his neglect prevents the drawer from using dilligence in withdrawing from the drawee the effects which were destined to satisfy the bill. But I am of opinion, that if the bill is passed for a valuable consideration, without notice of that defect of title, he who so innocently takes the bill is not guilty of any breach of duty towards the drawer, and is therefore not affected by the omission; Roscoe v. Hardy, 12 East, 434, is mainly distinguishable from the present case, in respect that the bill there continued, up to the time of its maturity, in the hands of a holder who had neglected to give that notice at the time when the bill was first refused acceptance; and the holder, I agree, had thereby, as to his own claim, discharged the drawer. I am of opinion, that the circumstance of the bill continuing in the same hand materially differs that case from the present. I therefore think that the present plaintiff not having had notice that the bill had been presented for acceptance and dishonoured. before she took it, is entitled to recover." See further the case in error, 5 Maule & S. 282.

(s) Crossly v. Ham, 13 East, 498, (Chit.) 827); Brown v. Davis, 8 T. R. 80, post, 216, n. (h). See observations in the preceding note.

(t) Per Dallas, J. 6 Taunt. 309; and see per Bayley, J. in Crossly v. Ham, 13 East, 502; 5 Maule & S. 289.

(u) Goodman v. Harvey, 4 Ad. & El. 87; 6 N. & M. 372, S. C., post, 216, note (g). (x) Roscoe v. Hardy, 12 East, 434; 2 Campb. 480, (Chit. j. 801). Acceptance of a bill was refused; of this, however, the holders gave no notice, but when the bill became due again presented it for payment, and that being refused, they called upon the plaintiff, an indorser, for payment, and he being ignorant of their laches paid it. He now sued the defendant as his indorser, who set up the laches of the said holders as a defence, and the plaintiff was nonsuited. On motion to set aside this nonsuit, it was urged that the plaintiff ought not to be pre-judiced by the laches of subsequent holders, of which he was ignorant, without the means of information. But the court held, that his ignorance, which had prevented his availing himself of this laches as a defence, could not alter or revive the liability of the defendant, who had been discharged by the same laches. See the observations on this case by Gibbs, C. J. in O'Keefe v. Dunn, 1 Marsh. 622, and 6 Taunt.

805, (Chit. j. 937); ante, 214, note (r).
(y) Dod r. Edwards, 2 Car. & P. 602, (Chit. j. 1334).

(z) Mitford v. Walcot, 1 Ld. Raym. 575, (Chit. j 214); Dehers r. Harriott, 1 Show. 163, (Chit. j. 485); Boehm r. Stirling, 7 T. R. 430, (Chit. j. 593); Dehers v. Harriott. ! Show. 163. A bill was indersed to the plaintiff after it was due, and he had judgment, without any objection on this ground.

Mitford v. Walcot, 1 Ld. Raym. 575, (Chit. j. 214). Holt, C. J. said, "he remembered a case where a bill was negotiated after the day of payment, and he had all the eminent merchants in London with him at his chambers, and they all held it to be very common and usual, and a very good practice." In France an indorsement must be dated and made before the bill is due, but if made afterwards it · . \ :

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is equivalent to the act of drawing a bill payable at sight(a). But bills under 1. Of the five pounds cannot be indorsed after they are due(b). Where a note given Transfer for the accommodation of A. was transferred by him to B. and C. before it and Notes. was due, but not indorsed, it was held that B., on obtaining administration to A.'s effects several years after the note was due, might, although A. had been the of a bankrupt, indorse the bill to himself and C.(c). And where A., the drawer Transfer. of a bill of exchange, gave it to ${f B.},$ unindorsed, to present it for payment; and etaB. did so and got it noted; and afterwards A. indorsed the bill and gave it to B. to obtain payment; it was held, that this indorsement was sufficient to enable B. to recover in an action against the acceptor, not with standing A. said upon the trial that B. was indebted to him, and that he did not give him any authority to bring the action (d).

There is a material distinction in the effect of a transfer made before a bill is due, and one made after that time; in the first case the transfer carries no suspicion on the face of it, and the assignee receives it on its own intrinsic credit, nor is he bound to inquire into any circumstances existing between the assignor and any of the previous parties to the bill, as he will not be affected by them(e); and although at one time it was considered that if the circumstances under which the transfer takes place be such as would naturally have excited the suspicion of a prudent and careful man, the holder cannot recover(f), a contrary doctrine now prevails, and it is not enough to deprive a holder for value of his remedy on the bill to show that he was guilty even of gross negligence, unless it also appear that he acted mali fide(g)(1). when a transfer of a bill is made after it is due, whether by indorsement or mere delivery, it has been long settled(h), that at least it is to be left to the

is valid for some purposes; 1 Pardess. 365, 868, 369; see Trimbey v. Vignier, 6 C. & P. 25, 27, 30, 31.

(a) Dehers c. Harriott, 1 Show. 164, (Chit. j. 415).

(b) 17 Geo. 3, c. 30, s. 1.

(c) Watkins v. Maule, 2 Jac. & W. 243, (Chit. j. 1097).

(d) Adams r. Oakes, 6 Car. & P. 70.

(e) Per Buller, J. in Brown v. Davis, 3 T. R. 82, (Chit. j. 452); per Gibbs, C. J. in O'-Keefe r. Dunn, 1 Marsh. 621, 622; 6 Taunt. 305, (Chit. j. 937); ante, 214, note (r); Grant r. Vaughan, 3 Burr. 1516, (Chit. j. 865); Peacock r. Rhodes, Dougl. 683, (Chit. j. 408); Miller v. Race, 1 Burr. 452, (Chit. j. 346); Lee v. Newsam, 1 Dow. & R. C. N. P. 50.

(f) Gill r. Cubitt. 3 B. & C. 466; 5 Dow. & Ry. 324, (Chit. j. 1827); 1 Car. & P. 168, 487, S. C.; Down v. Halling, 4 B. & C. 380; 6 D. & R. 455; 2 Car. & P. 11, (Chit. j. 1262).

(g) Goodman v. Harvey, 4 Ad. & El. 970; 6 N. & M. 372, S. C. See post, section iii. as to Lost Bills.

(h) Brown v. Davis, 3 T. R. 80, (Chit. j. 452); Roberts v. Eden, 1 Bos. & Pul. 399, (Chit. j. 615); Tinson v. Francis, 1 Campb. 19, (Chit. j. 739); Mac Clure v. Pringle, 13 Price, 8, (Chit. j. 1202); Amory v. Merewea-ther, 2 B. & C. 573; 4 D. & Ry. 86, (Chit. j.

Brown r. Davis, 3 T. R. 80, (Chit. j. 452). Davis drew a note payable to Sandall or order.

Sandall indorsed it to Tuddy, and he had it presented and noted for non-payment. Davis then paid the money to Sundull, and he took up the note from Taddy, but, instead of returning the note to Davis, indorsed it to Brown. Brown thereupon sued Davis, and on Davis's offering to prove these facts, Lord Kenyon thought they would not amount to a defence, unless it could be proved that Brown knew them when he took the note; and he rejected the evidence; but upon a rule nisi for a new trial and cause shown, Lord Kenyon said he thought there ought to be further inquiry; it did not strike him at the trial that the note had been noted before Brown took it, and that that circumstance ought to have awakened Brown's Ashburst and Buller, Justices, suspicion. thought that the party taking a note after it was due was to be considered as taking it on the credit of the person from whom he received it; and that whatever would be a defence against the giver would be a defence against the receiver. Upon which Lord Kenyon said he agreed with that, if the note appeared on the face of it to have been disbonoured, or if knowledge could be brought home to the indorsee that it had been so, but otherwise he was not prepared to go that length. Grose, J. said, "if collusion could be proved between the defendant and Sandall, the defendant would not be entitled to insist on the objection, but as the cause then stood he thought there ought to be a new trial." Rule abso-

I. Of the Transfer of Bills and Notes.

4thly, Time of Transfer. jury upon the slightest circumstance *to presume that the indorsee was acquainted with the fraud, or had notice of the circumstances which would have affected the validity of the bill, had it been in the hands of the person who was holder thereof at the time it became due; and though the indorsee may have been ignorant of the fraud, yet any objection which might have been taken against the bill when in the hands of the indorser may be taken against him, if the bill or note, when he took it, appeared upon the face of it to have been dishonoured(i); and Buller, J. said, "It has never been determined that a bill or note is not negotiable after it is due, but if there are any circumstances of fraud in the transaction, and it is indorsed to the plaintiff after it is due, I have always left it to the jury upon the slightest circumstance to presume that the indorsee was acquainted with the fraud(k)." But it was not formerly fully settled that the mere circumstance of a bill being over due is sufficient to affect the indorsee(1): Lord Kenyon thought not; but Buller, J. and Ashhurst, J. were of opinion "that it was, and that when a note is over due, it being out of the common course of dealing, is alone such a suspicious circumstance as makes it incumbent on the party receiving it to satisfy himself that it is a good one; and that if he omit to do so, he takes it on the credit of the indorser, and must stand in the situation of the person who was holder at the time it was due;" and this latter opinion is now the law(m).

(i) Id. ibid. But see Goodman v. Harvey, 4 Ad. & El. 870, ante, 216, note (g), as to bill noted for non-acceptance.

(k) Taylor v. Mather, K. B. Fast, Term, 27 Geo. 3, 3 T. R. 83, in notes, (Chit. j. 439).

(1) Lord Kenyon, C. J. in Brown v. Davis, 3 T. R. 80, (Chit. j. 452); appears to have considered that the mere circumstance of a note being over-due is not sufficient to prejudice a subsequent indorsee. In Columbier v. Slim, K. B. Trin. T. 12 Geo. 3, vol. xviii. MS. Paper Books of Mr. Justice Ashhurst, 62, (Chit. j. 745), the court held, that an indorsement even after action brought on a note over-due would nevertheless give the indorsee a right of action, unless he had actual notice of such action. See post, 219, n. (a), 224, n. (r).

(m) Per Littledale, J. in Rothschild r. Corney, 9 B. & C. 391, (Chit. j. 1430); Lee v. Zagury, S Taunt. 114, (Chit. j. 1603); Banks r. Colwell, cited 3 T. R. 81; Frown v. Turner, T. R. 630, (Chit. j. 611); Tinson r. Francis, 1 Campb. 19, (Chit. j. 739); Boehm v Stirling, 7 T. R. 427, (Chit. j. 593); Good v. Coe, cited

7 T. R. 427, 429.

Banks v. Colwell, cited 3 T. R. 81. Indorsee of a note payable on dem val against the maker. The note was given for smuggled goods, part of it was paid, and it was not in lorse let the plaintiff till a year and a half after it was given, no privity was brought home to the plaintiff, but Buller, J. was clearly of opinion he ought to be nonsuited, and said it had been repeatedly ruled at Guildhall, "that if a hill or note was indorsed over after it was doe, the indorsee took it on the credit of the indorser, and stood in his situation." But all the circumstances of this case of Banks v. Colwell do not appear, and quære if payment of the note was not demanded before, the indorsement to plaintiff. See Barough v. White, 4 B. & C. 325; 6 Dow. & Ry. 379, (Chit. j. 1261).

Brown r. Turner, 7 T. R. 630, (Chit. j. 611). Pritchard paid some stock-jobbing differences

for the defendant, and drew on him for the amount: defendant accepted the bill, and after it became due Pritchard indorsed it to the plaintiff for a prior debt. A question was made, whether the illegality of the original transaction vitiated the bill, the plaintiff having taken it after it became due, and consequently not being entitled to recover on it, if Pritchard could not. Lord Kenyon being of opinion that Pritchard could not have recovered on the bill, directed a verdiet for the defendant, and the court being of opinion that the direction was right, refused a rule nisi for a new trial.

Tinson v. Francis, 1 Campb. 19, (Chitj. 789). Indorsee against the maker of a promisory note; the defendant proved that it was given for the accommodation of one T. the payee, and dishonoured, and that the plaintiff had received it from a Mr. Stevens, to whom it was given to be returned to the defendant. Plaintiff offered to prove that he had given a valuable consideration for the note. Land Elienborough suid, "after a hill or note is due, it comes disgraced to the indorsee, and it is his daty to make inquiries concerning it, if he takes it. Though he give a full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be incumbered." But see Attwood v. Crowdie, 1 Stark, R. 483, (Chitj. 795.)

Boshan e. Stirling, 7 T. R. 423, (Chit. j. 593). Maiban lent the defendant his acceptance for 24441. 14:, at three months, and the defendant gave Maibanan a check upon his banker for the amount, dated 17th February, 1756 (the year was, perhaps, intended for 1797). On the 20th of January Muilman gave this check to the plaintiff in payment of an old debt; Muilman ded before his acceptance became due, and the defendant was obliged to take it up. In an action upon the check the defendant urged that Muilman could not have sued him upon this check, and that therefore the plaintiff could not, because he took it so many months after it was dated.

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*In other words, the rule is, that a person who takes a bill or note after it is I. Of the due takes it subject to all objections in respect of want of consideration or il- Transfer of legality, and all other objections and equities affecting the instrument itself, Notes. and to which it was liable in the hands of the person from whom he takes and to which it was hable in the nands of the person from whom he takes it(a). Therefore, if a bill or note, founded on a smuggling or stock-jobbing time of transaction, be indorsed after the same became due, to a person ignorant of Transfer. the illegality, and for full value paid by him, he cannot recover(p). where the drawer of a bill payable to his own order, after the bill became due settled with the acceptor, and gave him a receipt in full of all demands, and the drawer being afterwards in possession of such bill, indorsed the same to the plaintiff, it was held that he could not sue the acceptor(q); and although it was held in one case, that a bill accepted for the accommodation of the drawer might be indorsed for full value after it was due, so as to enable the indorsee to sue the acceptor(r), yet the contrary was decided in a subsequent case(s); and it seems that the distinction is, that if the holder knew that after the accommodation bill was due it was not intended to be applied as a security for subsequent transactions, he cannot apply the same accordingly, but that otherwise he may(r); and it also seems that when a note payable several months *after date is given as a guarantee, it is to be presumed that it [*219] was not, after due, to be a continuing guarantee for subsequent claims (t); and

Lord Kenyon left it to the jury whether the plaintiff took it bon's fide, and without knowing the circumstances under which Muilman held it; they found for the plaintiff; and on a rule aisi for a new trial and cause shown, Lord Kenyon admitted that it was to be considered as a rule, that the person who takes a bill after it is due is: subject to the same equity as the party from whom he took it, though the bill did not appear upon the face of it to have been dishonoured; and he thought there was no distinction in this respect between checks upon bankers and hills of exchange; but as the defendant himself had not issued this check until nine months after it was dated, he thought it was not competent to him to object to the time when the plaintiff took The other Judges agreed that the rule mentioned by Lord Kenyon was to be considered as settled, but for the reasons given by Lord Kenyon, that it did not bear upon that case. Rule

discharged.
(o) Taylor r. Mather, 3 T. R. 83; (Chit. j. (Chit. j. 452); ante, 216, note (h); Brown r. Turner, 7 T. R. 630; Tinson r. Francis, 1 Campb. 619, (Chit. j. 739); Lee r. Zagury, 8 Taunt. 114, (Chit. j. 1003); per Littledale, J. in Rothschild v. Corney, 9 Bar. & C. 391, (Chit. j. 1430); Burrough v. Moss, 10 Bar. & C. 55%, (Chit. j. 1481).

(p) Banks v. Colwell, cited 3 T. R. 81, and Brown v. Turner, 7 T. R. 630, (Chit. j. 611), ante, 217, note (m).

(9) Thoroughgood v. Clark, 2 Stark. R. 251,

(Chit. j. 1008); see ante, 80, 81. (r) Charles r. Marsden, 1 Taunt. 224, (Chit. j. 750). Indorsee of a drawer of a bill against the acceptor. The defendant pleaded that he had accepted the bill for the accommodation of the drawer, and without any consideration; and that it was indorsed to the plaintiff after it was due, and that plaintiff knew the circumstance. On special demurrer to the replication, the argument turned on the validity of the plea;

the court held, that as there was no averment of fraud in the plea, nor that the plaintiff had not given a valuable consideration for the bill, the plea was bad, and gave judgment for the plaintiff. Sed vide Tinson v. Francis, 1 Campb. 19; ante, 217. See observations on the case of Charles v. Marsden, and Tinson v. Francis, in Bayl. 5th edit. 504, where a sed guære is added to the former; and see Roscoe, 112, 386, note 19; and anle, 80, S!. Possibly the court decided Charles v. Marsden on the ground that a drawee, who accepts to accommodate the drawer, does not limit such accommodation to any particular time, and by suffering it to remain in the drawer's possession impliedly authorizes the drawer to make use of the bill at any time till he rescinds the authority, and consequently that he cannot refuse to pay a holder for value, on the ground of the bill having been transferred after it was nominally payable. The cases of Bosanquet r. Dadman, I Stark. Rep 1, (Chit. j. 904); Attwood v Crowdie, 1 Stark. 483, (Chit. j. 979); and Watkins v. Maule, 2 Jac. & Walk. 244, (Chit. j. 1007), seem to suggest that in that view of the case, the decision in Charles v. Marsden may have been correct, for in Attwood v Crowdie the court said, " the acceptors not withdrawing their bills, or demanding them back, showed that they considered themselves to be sureties;" see jost, Chap. VII. s. ii Liability of Acceptor; and Bosanquet r. Dudman probably turned on the same ground. In Marsh v. Houlditch, (rost, Ch. IX. s. ii. as to the Application of Payments), in which it was held, that after an accommodation bill has fallen due, and the drawer has once paid to the holder enough to cover the amount, the latter cannot afterwards retain the same as a security for subsequent advances; such holder had declared that he should look only to the drawer, which evinced that he knew it was no longer to be kept on foot against the acceptor. (s) See observations in the last note.

(t) Bloxsome and another r. Ncale and an-

Bills and Notes. 4thly. Time of Transfer.

1. Of the if a bill given for a supposed balance of accounts, to be afterwards settled on Transfer of a day appointed, be dishonoured by the acceptor (the defendant), and after it is due be indorsed by the drawer to the plaintiff, the relative situation of debtor and creditor not being created between the drawer and acceptor, the plaintiff cannot maintain an action on it as indorsee (u). So if the party transferring the bill after it was due was only an agent for the purpose of receiving the money for his principal, or received the same for a particular purpose, the person to whom he transfers it will be accountable to the principal for whatever money or bills he may obtain upon it(x); and a party who knows that a bill of exchange is accepted for a particular purpose cannot afterwards, when that purpose has failed, sue on the bill in consequence of an indorsement of it to him(y). If a bill of exchange be not presented by an indorsee for payment until a year after it is due, the law will raise a presumption that it was indorsed after it became due, and the indorsee will be affected by the same liabilities as the drawer(z); and where an over due bill or note is indorsed after action brought, the indorser, with notice of the action, cannot sue thereon(a).

[*220] X * A party, however, to whom an over-due bill has been indorsed is clothed with all the advantages of the party from whom he received it, and therefore it has been decided, that in an action by the second indorsee against

> other, K. B. 1832. This was an action by Messrs. Bloxsome and Co. bankers, at Dursley, in Gloucestershire, against two ladies, upon a note of hand which they had given to secure the balance of an account kept with the plaintiffs by Porter and Clarke, timber merchants, at Dursley, who subsequently failed. It appeared upon the trial, which took place at the Sittings at Middlesex some time ago, that Porter was the nephew of the defendants, the Misses Neale (one of whom was upwards of eighty years of age, and the other very far advanced in life), and there being a cash balance of 1000l. against him, the plaintiffs refused to continue the account without security, and the note in question, payable at nine months, was consequently given. At the time of its becoming due, the balance was reduced to 600l., and it was not presented for payment, but the bankers con-tinued to hold it, and went on discounting bills for Porter and Clarke, and receiving bills from them, which they put to their credit as cash. Some time afterwards they required fresh security, and Porter proposed that Miss Neale's note should continue as a guarantee for future advances. A clerk of the bankers stated that it was originally intended that the note should be a continuing guarantee; but the plaintiffs in some of their letters, asked Porter whether they were to present it for payment when it became due, or whether he would provide for it. It was also stated that the defendants, on being applied to after the failure of Porter and Clarke admitted their liability, but referred to their attorney, who promised to settle it if time were given. Porter, who was called as a witness, stated that the note had been given as a security for the 1000l then due, and which was to be paid off by bills paid in upon the running ac-count, and that when it became due, the balance against them was reduced, and was ultimately turned in their favour. In the course of the subsequent transactions, however, the bal-

ance was against them, and the bankers refusing to go on, he (Porter) proposed that the note should continue as a general guarantee, but he did so without the authority of the defendants. Under these circumstances, the questions left to the jury were, first, whether the note was given to secure the specific balance due at that time; for, if so, it was admitted that the balance had been reduced by bills, supposing the agreement to have been to treat them as cash; and secondly, whether it was intended to be paid in cash, or given up when due, or was to be a continuing guarantee. In directing the ju-ry, Lord Tenterden observed, that the fact of the bill being made payable at nine months raisel a presumption that it was to be paid or giren up when due; and even if Porter had agreed with the bankers that it should be a continuing guarantee, it did not appear that he had any authority from the defendants to do so, and if he had not, they would not be liable. The jary found for the defendants. A rule nisi for a new trial having teen obtained, the case came on to be argued. After hearing Mr. F. Pollock and Mr. Follett against the rule, and Sir J. Scarlett, Mr. Cambell, and Mr. Talfourd, in support of it, the court were of opinion, that there ought to be a new trial, as it was not clear, upon Porter's own evidence, that the balance was in favour of himself and Clark at the time the note became due. Rule absolute.

(u) Verley v. Saunders, 2 Chit. 127.

(x) Lee r Zagnry, 8 Tannt, 114; 1 Moore, 556, (Chit. j 1003). (y) Lloyd c. Davis, 3 Law J. 38, K. B. 8th

Nov. 1824. (z) Ib.; and see Counsall v. Harrison, 1 M. & W. 611, as to what is evidence to go to a

jury of a bill having been transferred after due. (a) Jones v. Lane, Exch. Cham. 1939, 3 Jurist. 265; Marsh v. Newell, 1 Taunt. 109; post, 224, note (r); aliter, where no such notice, Columbier v. Slim, ante, 217, note (1).

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the acceptor of a bill of exchange, if the person who indorsed to the plaintiff I. Of the could himself have maintained an action upon it, the defendant cannot give Transfer of in evidence that it was accounted for a debt contracted in available and in evidence that it was accepted for a debt contracted in smuggling, although Notes. it was indorsed to the plaintiff after it had become due(b) \bigcirc And it has been held, that where a bill, accepted for the accommodation of the drawer, 4thly. has been transferred to a person for value before it was due, and he after- Transfer wards hands it back to the drawer, who after it is due returns it to him, he may sue the acceptor, being remitted to his former right(c). So if an accommodation acceptance be suffered to remain with bankers, they may apply the same as a security for an account which became due to them since the bill became due(d); for in both the last cases, the acceptor, by not withdrawing or demanding back the bill, evinced that he considered himself still as a surety to some third party for the amount of the bill(e).

The rule that a party taking an over-due bill takes it subject to the equi- But the ties to which the party delivering the bill to him was subject, is qualified and confined to restrained to all equities arising out of the note or bill transaction itself, and Objections he is not subject to a set-off in respect of a debt due from the indorser to to the Bill the inches of the note activity out of collection matters (f). The independent itself, and The indorsee, does not the maker of the note arising out of collateral matters (f). however, of a promissory note, not over-due, but the amount of which is extend to a exceeded by a cross demand of the maker on the payee, having notice of Set-off. such demand at the time of the indorsement, cannot recover against the maker advances made to the payee on the note subsequent to such notice, although the note is a distinct transaction between the original parties (g).

With respect to promissory notes payable to order or bearer on demand, Notes payable on (especially when with interest), as the parties contemplated *that payment Demand.

how fat within the

(b) Chalmers v. Lanion, 1 Campb. 383, (Chit. j. 754). To an action by the indorsees against the acceptor of a bill, one ground of defence was, that the bill had been accepted for a debt contracted in a snuggling transaction, and that though it had been indorsed for value before it became due to a bona fide holder, yet that it had been indorsed by him to the plaintiffs after it was due, and it was contended, that having been so indorsed to the plaintiffs, it was competent to the defendant to set up the illegality of the consideration as a defence, in like manner as if the action had been brought by the payee; but Lord Ellenborough held, that if the plaintiff's indorser might have maintained an action upon the bill, the circumstance of the indorsement to them having been made after the bill had become due, was insufficient to let in the proposed defence, and the court of King's Bench concurred in opinion with his lordship.

(c) Per Lord Ellenborough, in Bosanquet v. Dudinan, 1 Stark. Rep. 1, (Chit. j. 904); and see Watkins v. Maule, 2 Jac. & Walk. 244, (Chit. j. 1097); ante, 218, note (r).

(d) Attwood v. Crowdie, 1 Stark. R. 483, (Chit. j. 979); but see Bloxsome v. Neale, MS. ante, 219, n. (t); and Marsh v. Houlditch, MS.; post, Ch. IX. s. ii. as to the Application

of Payments. Semble, contra.

(c) See ante, 218, note (r).

(f) Burrough v. Moss, 10 B. & C. 558; 5 [*221]

M. & R. 296; S. Law J. 287, K. B. (Chit. j. 1481). The judgment of the court was delivered by Bayley, J. "This was an action on a promissory note, made by the defendant, payable to one Fearn, and by him indorsed to the plaintiff after it became due; for the defendant it was insisted, that he had a right to set off against the plaintiff's claim a debt due to him from Fearn, who held the note at the time when it became due. On the other hand it was contended, that this right of set-off, which rested on the statute of set-off, did not apply. pression on my mind was, that the defendant was entitled to the set-off, but on discussion of the matter with my Lord Tenterden, and my learned Brothers, I agree with them in thinking that the indorsee of an over-due bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters; the consequence is, that the rule for reducing the damages in this case must be discharged."

(g) Goodall v. Ray, 4 Dowl. 76; 1 Har. & W. 333, S. C.; per Coleridge, J., Bail Court.

⁽¹⁾ An indorser of a note for the accommodation of the maker, and without consideration, is liable to the indorsee, notwithstanding the facts were known to the latter, when he took the bill. Brown v. Mott, 7 Johns. Rep. 361. And the same rule is said to apply, even if the indorses took the note after it was due. Ibid.

Bills and Notes.

4thly. Time of Transfer.

would not be immediately required, and that the note would for some time be Transfer of in negotiation, they are not strictly within the rule applicable to over-due bills(h); and they are not to be considered as over-due without some evidence of payment having been demanded and refused(i). And where a promissory note, pavable on demand with interest until paid, was given in part consideration for the share of a ship, purchased by the maker from the payer, without an observance of the provisions of the Ship Registry Acts, and was indorsed by the payee, first to J. L., who, on presentment and refusal of payment, obliterated his name and returned it, and afterwards to J. G. P., who indorsed it upwards of two years and a half after its date, with the name obliterated, to the plaintiff, for a full and valuable consideration, without notice, it was holden that although the contract of sale was void, vet as the maker had recognised it by paying one year's interest on the note and otherwise, and as there was a presumption that he had received the subsequent earnings of the share in question, and therefore of a consideration pro tanto, the plaintiff, notwithstanding he had taken the note without inquiry, was entitled to recover its amount in an action against the maker; and it was doubted whether the circumstance affecting the note placed the innocent indorsee in the same situation with the payee as against the maker, but it was considered that a note payable on demand, with interest until paid, is not to be considered as payable instantly, or as over-due(k). And in one case, an action by an indorsee for value of the note dated nine years before was sustained, although the maker had been swindled out of it(l). But we have seen that in another case, where a note payable on demand was indorsed to the plaintiff a year and a half after its date, the indorsee was considered as affected by all objections that could be advanced against the title of the inderser(m). Perhaps a distinction may be made between notes payable on demand made by a private individual, and those of bankers, re-issuable and intended to be many years in circulation (n).

Checks on Bankers (0). [*222 1

With respect to checks on bankers, they ought regularly to be presented or forwarded for payment on the day after they have been drawn, and they are not usually intended to be kept in circulation for *any considerable time, and, therefore, it should seem that the rule respecting over-due bills is in general more strongly applicable to checks than to notes payable on de-

(h) Barough v. White, 4 Bar. & C. 325; 6 Dowl. & R. 379; 2 Car. & P. 8, (Chit. j. 1261). Action by indorsee against maker of a promissory note, payable with interest on demand. Bayley, J. " Neither does it appear to me that this note could be considered as overdue." See post, Part H. Ch. V. Eridence; and see per Park, J in Heywood v. Watson, 4 Bing 560, 561, (Chit. j. 1374), as to the onus probandi in case of over-due bill, see Lewis r. Parker, 4 Ad. & El. 838; S. C. 6 N. & M. 291; 2 Har. & Woll. 46.

(i) Id. ibid.; rer Bayley, Holroyd, and Littledale, Justices; and see Roberts r. Eden, 1 Bos. & P. 308, (Chit j. 615).

(k) Gascovne r. Smith, M'Clel. & Y. 339,

(Chit. j 1256).
(1) Morris v. Lee, cited in Auonymous, 1 Com. Rep. 43; and Bayl. 233, 5th edit. note 16. (m) Banks v. Colwell, 3 T. R. 81, ante, 217, note (m).

(n) In the American edition of Bayley on Bills, 84, it is laid down, that the rule established in that country is, that "where a promissory note, payable on demand, is indorsed

within a reasonable time after its date, the indorser has all the rights of an indorsee receiving a negotiable instrument before it becomes due; but if it be not indorsed within a reasonable time, it will be considered as over-due, and dishonoured, and the indorser will be subject to any defence which would have been available against his indorsers. What is such a reasonable time is not precisely settled, though it is clear that a note is to be considered overdue and dishonoured a year, or even eight or nine months, from the date, but not over-due a few days from the date. What is a reasonable time is a question of law where the facts are settled." The following are the American cases on this subject.—See Ayer v. Hutchins, 4 Mass. R. 368; Freeman v. Hoskins, 2 Cain. Rep. 368; Loomit v. Pulver, 9 Johns. R. 214; Loosee v. Dunkin, 7 Johns. R. 70; Sandford c. Mickles, 4 Johns. R. 224; Thurston v. M'Kown, 6 Mass. R. 76; Hendricks r. Judah, 1 Johns. R. 319.

(o) See further as to checks, post, Chapter

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mand(p); and, therefore, where the owner of a check drawn upon a banker I. Of the for 50l. had lost it by accident, and it was tendered five days after the date Transfer of Bills and to a shopkeeper, in payment of goods purchased to the value of 61. 10s., Notes. and he gave the purchaser the amount of the check, after deducting the value of the goods purchased, and the shopkeeper the next day presented 4thly. the check at the banker's, and received the amount, it was held, in an ac-Transfer. tion for money had and received, brought by the person who lost the check against the shopkeeper, to recover the money paid to him upon it, that the jury were properly directed to find for the plaintiff, if they thought the defendant had taken the check under circumstances which ought to have excited the suspicion of a prudent man(q). But in a subsequent case(r) Lord Tenterden said, "it cannot be laid down as a matter of law, that a party taking a check after any fixed time from its date does so at his peril, and, therefore, the mere fact of a party taking them six days after they bore date, from a person who had not given value for them, will not necessarily invalidate his title. It is, indeed, a circumstance to be taken into consideration by a jury, in determining whether the party took the checks under circumstances which ought to have excited the suspicion of a prudent man." We have seen, however, that this doctrine as to taking a negotiable instrument under circumstances which ought to have excited the suspicion of a prudent man, is now exploded, and that nothing short of mala fides will oust a party, who has given value for such instrument, of his title thereto(s).

A party to a bill or check, who has himself transferred it to another after Who preit was due, or long after the date of the check, will not be at liberty to ob- cluded ject, on the ground of fraud, to the payment of it, when in the hands of a jecting. third person, who must necessarily have also received itafter it was due; for it is obvious payment could not have been demanded when the bill was due, as it was not then issued; and the difficulty was occasioned by the party himself, who so gave to it an improper circulation(t). Where a note payable on demand, with interest, drawn by A. in favour of B. as a security for a debt, was by him indorsed to C. for the same purpose, and after the indorsement it passed backwards and forwards between B. and C. several times, and previous to its being ultimately deposited with C. he received an intimation from B. not to negotiate it, as he should want it when he settled accounts with A., it was held that C. could not, after a settlement of accounts between A. and B., without a re-delivery of the note, recover on it against Where a bill has been improperly indorsed after due, a party interested in having it delivered up, whether drawer, indorser or accommodation acceptor, may file a bill in equity (x), or support an action of trover, though, in truth, the bill is of no value(y); and this *sometimes even without a pre- [*223] vious demand, as where it has been discounted after notice of the circumstance(z)(1). But the holder of a promissory note, delivered to him with-

⁽p) Boehm v. Stirling, 7 T. R. 423, (Chit. j. 598); ante, 217, in note.

⁽q) Down v. Halling, 4 Bar. & Cres. 330; 6 Dow. & R. 455; 2 Cur. & P. 11, (Chit. j. 1262); it was there also held that the shopkeeper having taken the check five days after it was dated, it was sufficient for the plaintiff to shew he once had property in it, without shewing how he lost it. See Lee v. Newsam, 1. Dow. & Ry. C. N. P. 50.

⁽r) Rothschild v. Corney, 9 B. & C. 390; 4 M. & Ry. 411; Dans. & L. 825, (Chit. j. 1430).

⁽s) Goodman v. Harvey, 4 Ad. & El. 870; ante, 216, note (g).

⁽t) Boehm v. Stirling, 7 T. R. 423, (Chit. j. 593); ante, 217, in note.

⁽u) Roberts v. Eden, 1 Bos. & Pul. 898, (Chit. j. 615).

⁽x) Ante, 97, 98.
(y) Goggerly v. Cuthbert, 2 New Rep 170; Evans v. Kymer, 1 Bar. & Adol. 528, S. P. (Chit. j. 1512); ante, 97, note (m).
(z) Beckwith v. Corrall, 2 Car. & P. 261;

³ Bing. 444; 11 Moore, 385, (Chit. j. 1291 /

⁽¹⁾ Where a note is negotiated after it becomes due, the indorsee takes it, subject to every

Of the out indorsement, after it became due, and noted for non-payment, will not Transfer of be stayed by injunction from enforcing a judgment at law obtained by default, Bills and because such defendant ought to have tried his defence at law(a).

4thly. Time of transfer. (a) Dunbar v. Wilson, 6 Bro. P. C. 231.

defence that existed in favor of the maker of the note before it was indersed. Johnson v. Bloodgood, 1 John. Cas. 51. S. C. 2 Caines' Cas. in Err. 302. M'Cullongh v. Houston, 1 Dall. Rep. 441. Humphrey v. Blight's assignees, 4 Dall. 370. Sebring v. Rathbun, 1 John. Cas. 331. Prior v. Jacocks, 1 John. Cas. 169. Jones v. Caswell, 3 John. Cas. 29. Farman v. Haskin, 2 Caines' Rep. 369. Payne v. Eden, 3 Caines' Rep. 213. Hendricks v. Judah, 1 John. Rep. 319. Lansing v. Gaine, 2 John. Rep. 300. O'Callaghan v. Sawyer, 5 John Rep. 118. Losee v. Dunkin, 7 John. Rep. 70. Lansing v. Lansing, 8 John. Rep. 454. Gold v. Eddy, 1 Mass. Rep. 1. Wilson v. Clements, 3 Mass. Rep. 1. Thurston v. M'Kown, 6 Mass. Rep. 428. Ayer v. Hutchins, 4 Mass. Rep. 370. Thompson v. Hale, 6 Pick. 259. Braynard v. Fisher, Id. 355. Sargent v. Southgate, 5 Pick. 312.

Robinson v. Lyman, 10 Conn. 30; Stedman v. Jillson, Idem, 55; M'Neill v. M'Donald, 1 Hill, 1; Hays v. May, Wright, 80; Proctor v. M'Call, 2 Bai 298. But in order thus to affect the note in the hands of the indorsee, the infirmity, equity, or defence relied on for that purpose must have existed against and attached to the note itself, before the transfer, and not have sisen out of subsequent or collateral matters. Robinson v. Lyman, supra. The indorsee in such a case is not liable to a set-off of debts due from the payee to the maker, having no connection with the subject matter of the note. Stedman v. Jillson, supra. Robertson v. Breedlove, 7 Port, 541.

Where the transfer of a note is taken from a person not an original party to it, the note's being past due at the time of the transfer, is not equivalent to notice that such person came to the possession of it by fraud; unless perhaps inquiry of the payee would necessarily have led to a knowledge of the fraud. Proctor v. M'Call, 2 Bai. 298.

In the case of notes transferred after due and guarantied by indorser, demand of payment from the maker, and notice to the indorser, within a reasonable time must be proved. Benton r. Gibson, 1 Hill, 56. Alwood v. Haseldon, 2 Bai. 457. See also Rice c. Goddard, 14 Pick. 293; Bonnsall v. Harrison, 1 Mec. & We's. 611; Colt v. Barnard, 18 Pick. 261.

The right of the maker of a promissory note negotiated out of time, to set up against the indorsee, transactions between himself and the payee, before its transfer, is not restricted to equitable grounds of defence only, as payment or failure of consideration; but extends to every thing which would have been a good defence against the payee; such as fraud between the puties in the original concoction of the security, &c. Tucker v. Smith, 4 Greenl. 415. { Sylvester v.

Crapo, 15 Pick. 92. >

A note payable to bearer, and passed out of time, does not carry along with it all the equities which may subsist between any intermediate bearer and the maker; it is subject only in the hands of a bona fite holder without notice, to the equities subsisting between the original parties Nixon v. English, 3 M'Cord, 549. And where a bill is not taken in the usual course of trade, it is subject to all the equities that subsisted between the original parties. Evans v. Smith, 4 Binney's Rep. 366. And where a party to a bill cannot maintain an action against another party to the bill, no person claiming subsequently, by a derivative title under the former, and having knowledge of all the facts, can recover against the latter. Herrick v. Carman, 12 John Rep. 189. So where a tote is indorsed over in trust for the indorser, it is open to the same equities if the suit was in favor of the indorser himself. Payne v. Eden.

And a note purchased after it has become due, and after an assignment under a statute upon the maker's insolvency, cannot be set off against a debt due to the insolvent's estate in an action brought by his assignees for the recovery of it. Johnson v. Bloodgood, 1 John. Cas. 51. 2 Caines' Cas. Err. 303, and see Anderson v. Van Alen, 12 John. Rep. 343. So a note purchased after knowledge of the issuing of a commission of bankruptey, although not then due, is subject to all the equities between the original parties; and therefore if proved under the commission, it is liable to the right to set-off of the bankrupt against the original payee. Humphreys v. Blight's

assignees, 4 Dall 370.

But the court will not set aside a judgment on confession to let in an equitable defence, especially where the parties are in in part delicto. Sebring v. Rathbun, 1 John Cas. 331.

Where a negotiable note is paid before it becomes due, and is afterwards indersed by the payer with notice to the indersee of such payment, the latter takes the note subject to that defence, and therefore cannot recover against the maker. White r. Kibling, 11 John. Rep. 128.

If the maker of a note when sued by an indorsee, relies upon payment before indorsement or any other legal defence as against the payee, the burthen of proof of the time of the indorsement rests upon him. Webster v. Lee, 5 Mass. Rep. 334. See Stewart v. Greenleaf, 3 Day's Rep. 311.

Where a note is payable on demand, it must be presented within a reasonable time for payment, or it will be considered as out of time and dishonoured; and if it be afterwards negotiated, it will, in the hands of the indorsee, be liable to all the equities which subsisted between the original parties. Furman v. Haskins, 2 Caines, 369. Such a note, negotiated eighteen months of two years after its date, will be considered as out of time. Ibid. Loomis v. Pulver, 9 John.

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If, out of the usual course of business, a bill or note be paid before it is I. Of the due by any other party than the acceptor or the maker, and be re-issued be- Transfer of fore it is at maturity, even in fraud of some of the parties, yet an innocent Notes. indorsee may recover upon it; the party paying, therefore, ought to state the payment on the face of the bill(b). And a bill of exchange is negotiable ad \mathbb{R}^{lthy} . infinitum until it has been paid by the acceptor, and therefore if the drawer Transfer. pay it after it is due, he may, even a year and a half afterwards, indorse it to a fresh party, who may sue the acceptor thereon(c); and in such case the After payment. latter cannot inquire into the state of the accounts between the indorsee and the drawer, nor will the state thereof furnish him with any defence (d). when a bill has been ence paid by the acceptor, it is functus officio at common law, and by the express legislative provision of the Stamp Laws no longer reissuable(e); and a bill or note cannot be negotiated after it has been

(b) Burbridge r. Manners, 3 Campb. 194,

(c) Callow v. Lawrence, 3 Maule & S. 97, (Chit. j. 911); Hubbard v. Jackson, 4 Bing. 890; 1 Moore & P. 11; 3 Car. & P. 134, (Chit. j. 1363); Gomeserra v. Berkely, 1 Wils. 46, (Chit. j. 307).

(d) Hubbard v. Jackson, 3 Car. & P. 134; 4 Bing. 390; 1 M. & P. 11, (Chit. j 1363). (e) Supra, note (c); Holroyd v. Whitehead, 1 Marsh. 130, (Chit. j. 905); and 55 Geo 3, c. 184, s. 19; Thoroughgood v. Clark, 2 Stark.

Rep. 251, (Chit. j. 1008); Bartrum v. Caddy, 1 Perry & Day. 207; anle, 108, note (e).

Rep. 224. So, a note of this description, dated the 3d of Se_l tember, 18:7, and negotiated on the 25th of May, 1818, was held to be out of time. Nevens v. Townsend, 6 Conn. Rep. 5. There is no precise time in which a note payable on demand is to be deemed dishonored; but it must depend upon the circumstances of the case. Loose v. Duncan, 7 John. Rep. 70. no particular circumstances are disclosed, and a transfer be made two months and a half after the date, it will be deemed out of season, and let in the defence of payment by the maker. Ibid. See also Hendricks r. Judah, 1 John. Rep. 319. Sandford r. Mickles, 4 John. Rep. 224. Thurston r. M'Kown, 6 Mass. Rep. 428.

Wherever the holder of a negotiable note has notice either constructively or positively at the time of the transfer to him of an equity subsisting between the original parties, he takes it subject to trial and equity. Humphreys v. Blight's assignees, 4 Dall. Rep. 371. White v. Kibling, 11 John. Rep. 128. Wilson v. Holmes, 5 Mass. Rep. 543. But the mere knowledge that the note was made and indorsed for the accommodation of the maker, will not entitle the indorser to set up that defence against a bona fide holder. Brown v. Mott, 7 John. Rep. 361, ante, 143, note. And if the consideration for a note be specially indersed on the back of it, it operates as notice to all subsequent holders. Saunders v. Bacon, S John. Rep. 485. And if there be a memorandum on the back of the note, stating its actual execution to have been on an anterior day to the date, it is sufficient notice to put the party upon inquiry into the circumstances. Wiggin r. Bush, 12 John. Rep. 306.

Where a note not negotiable is assigned, explicit notice must be given to the maker, or he will

be justified in paying the amount to the payee. Meghan r. Mills, 9 John. Rep. 92.

Notice of nonpayment must be given as well to one who indorses a note after it becomes due, as to an indorser of a note before it becomes due. Stockman v. Riley, 2 M'Cord, 398.

Where a promissory note payable on demand was indorsed eight months after its date, it was held that in order to charge the indorser, a demand on the drawer and notice to the indorser must be proved. M'Kenney v. Crawford, 8 Serg. & Rawle, 351. See also Poole v. Tolleson, 1 M'-

The defendant indersed to the plaintiff a negotiable note after it had been over-due eight or ten months; the parties living in the same village, and the maker about two miles off. In an action hy the indorsee against the indorser, held, that the circumstance of the note having been long over-due, could nake no difference, and the same ought to be treated as a note indorsed on the day it fell due. Nash v. Harrington, 2 Aiken's Rep. 9.

Where the day of payment of a note is past, at the time of its transfer, it is a sufficient warning to whoever receives it, that the maker may have some just reason to withhold payment, as he has a right to any equitable defence after the transfer, which he might have successfully urg-

ed before. Burroughs r. Nettles, 7 Louis. Rep. 113.

Where a note over-due is transferred, the maker is not entitled to set off a demand against the payee, if at the time of the transfer, the payee has other demands against the maker to an amount sufficient to exhaust the demands sought to be set off. Collins and Winslow v. Allen, 12 Wend.

Where two notes are held against a party who has a demand sufficient in amount to extinguish one of the notes, but not both, and one of the notes is transferred after due, leaving the other in the hands of the payee to an amount sufficient to meet the demands of the maker, and subsequently the second note is transferred, it seems that the demands of the maker cannot be set off against the note first transferred, but must be set off against that which is last transferred. Ib.

once paid if such negotiation would make any of the parties liable who would otherwise be discharged (f)(1), nor can it be negotiated so as to I. Of the Transfer of Bills and

charge even the indorser (g).

4thly. Time of Transfer.

Notes.

The Stamp Laws contain an exception in favour of promissory notes payable to bearer on demand of a sum not exceeding 1001. which, if duly stamped for that purpose, may be re-issued after payment by the maker(h). Thus the 55 Geo. 3, c. 184, s. 14 enacts, "that it shall be lawful for any banker or other person, who shall have made and issued any promis ory notes for the payment to the bearer on demand, of any sum not exceeding 1001. each, duly stamped according to the direction of that act(i), to re-issue the same from time to time after payment thereof, as often as he, she or they, shall think fit, without being liable to pay any further duty in respect thereof; and that all promissory notes so to be re-issued shall be valid, and as available as upon the first issuing thereof(2)." And the fifteenth section provides, "that such *notes shall not be liable to further duty, though reissued by certain persons not strictly the original makers, nor re-issued at the same place." The twenty-fourth section requires bankers and others, issuing re-issuable notes, to take out a licence for that purpose, and contains several regulations respecting such re-issuable notes, and the licences. 7 Geo. 4, c. 46, and 9 Geo. 4, c. 23, contain further regulations connected with this subject (k). It has been observed that the very terms of the act 55 Geo. 3, c. 184, s. 14, enable other persons basides bankers to take out a licence to re-issue notes (l).

A person not originally party to a bill, by paying it for the honour of the parties to it, acquires a right of action against all those parties (m). And after a payment of a part, a bill may be indorsed over for the residue(n). It was formerly supposed, that if the holder of a bill were indebted to a prior party, and doubted his solvency, it was not advisable to transfer the bill, because, if he retained it, he might treat it as a mutual credit, and set off the amount against his own debt; but that if he transferred it, and after the act of bankruptcy was obliged to take it up, he could only prove under the com-

(f) Beck v. Robley, cited 1 Hen. Bla. 89, note, (Chit. j. 890, 450, note). Brown drew a bill upon Robley, which Robley accepted, payable to Hodgson or order; Robley did not pay it when in was presented, upon which Brown took it up; Brown afterwards indorsed it to Beck, and Beck brought an action upon it against Robley, but the jury thought that when Brown took up the bill its negotiability censed. and found for the defendant; and on a rule nisi for a new trial, the Court thought the jury right, and Lord Mansfield said, " when a draft is given, payable to A. or order, the purpose is, that it shall be paid to A. or order, and when it comes back unpaid, and is taken up by the drawer, it ceases to be a bill; if it were negotiable here, Hodgson would be liable, for which there is no colour." See observations on this case in Callow e. Lawrence, 3 Maule & S. 97, 98, (Chit. j 911); The King e. Burn, 5 Price,

174, (Chit. j. 1005); and see Hubbard r. Jackson, 4 Bing. 3:90; 1 Moore & P. 11; 3 Car. & P. 134, (Chit. j. 13:63); Bartrum v. Caddy, 1 Perry & Day. 207; ante, 108, note (e).

(g) Frenkely v. Fox, 9 B. & C. 130; 4 M. & Ry. 18, S. C.; Bartrum v Caddy, 1 Perry & Dav. 207, 212, 213; ante, 201, note (m).

(h) 55 Geo. 3, c. 184, s. 14, &c.

(i) See antc, 107, 108.

(k) See ante, 112, 113 (1) Per Bayley, J., in Keates v. Wheildon,

8 B. & C. 9, (Chit. j. 1379); ante, 116.
(m) Mertens v. Winnington. 1 Esp. Rep. 112, (Chit. j. 523); et post, Ch. X. s. ii. Of Payment supra Protest.

(a) Hawkins v. Cardy, Lord Raym. 360; Carth. 416; 1 Salk. 65, (Chit. j. 208); llawkins r. Gardner, 12 Mod. 213; Johnson r. Kennion, 2 Wils. 262, (Chit. j. 371).

(2) { A promissory note may be re-issued by an endorsce after it is due, and after it was discounted in bank and paid by him at its maturity with his own funds. Kirbrey c. Bates, I Ala-Rep. (New Scries) 303. }

⁽¹⁾ A bill endorsed after due, is equivalent to drawing a new bill, payable at sight. Bishop r. Dexter, 2 Conn. Rep. 419. M'Kinney v. Crawford, S Serg. & Rawle, 351. Berry v. Robinson, 9 Johns. Rep. 121. Dwight v. Emerson, 2 New Hamp. Rep. 159. Rugely v. Davidson, 3 S. Car. Coust. Rep. 33.

mission, and receive a dividend, and must have paid the whole of his own I. Of the But it is now settled that he may set off the amount of such bill, Transfer of Bills and though not returned to him till after the bankruptcy (p).

If a party, whether before or after a bill or note be due, become the in- 4thly. dorsee or holder by delivery, with notice that the party from whom he re-Transfer. ceives it had no right to make the transfer, he will acquire no better right than such party, and a person who discounts a bill for the full value, after he knows that it has been lost by the owner, will not only be precluded from recovering thereon, but will be liable to an action of trover, even without any previous demand(q); nor can a person who receives a bill with notice that an action has been commenced thereon and still depending sustain another action against the same party (r)(1).

5thly. Modes of

Transfer.

Modes or Forms of Indorsements and Transfers.

1. First indorsement by drawer or payee in blank.

"James Atkins."

2. The like by a partner. "Atkins & Co."

"For self and Thompson,
"James Atkins."

3. The like by an agent.

" Per procuration James Atkins, " John Adams."

or, " As agent for James Atkins. " John Adams."

(o) Ex parte Hale, 3 Ven. 304, (Chit. j. 574); 3 T. R. 509; 6 T. R. 57; 1 Mont. 543. See post, Part II. Ch. VIII. Bankruptcy.
(p) Bolland v. Nash, 8 B. & C. 105; 2 M.

& R. 189, (Chit. j. 1381.)
(q) Lovell v. Martin, 4 Taunt. 799, (Chit.

(r) Marsh v. Newell, 1 Taunt. 109, (Chit. 745). This was a rule nisi to cancel the bail bond given herein under the following circumstances:-Plaintiff had arrested defendant on a promissory note payable to plaintiff or bearer; plaintiff afterwards paid the note to one

Frost, who likewise arrested the defendant upon the same instrument. The court held, that as the transfer of the note to Frost was accompanied with a notice of the action which was pending, Frost could not, after such notice, be permitted to bring a second action against the defendant. And the same point was ruled by Alderson, B. in a late case in the Exchequer Chamber; . ones v. Lane, 1839, 3 Jurist, 265; ante, 219, n. (a). But it is otherwise where the indorser has not received such notice, Columbier v. Slim, ante, 217, note (1).

(1) If after the holder of a promissory note obtains a judgment on it against the maker, the indorser pays the note, and then indorses it to a third person, such third person cannot maintain an action upon the note against the maker in the ordinary form of indorsee against drawer. Prest v. Vanarsdalen, 6 Halsted's Rep. 194.

A note once paid, ceases to be negotiable, and remedies lie only between the then existing parties. Therefore, if an indorsce pay a note on its being dishonoured by the maker, he cannot by a subsequent transfer enable a subsequent indorsee to maintain an action on it against a prior indorser. Blake v. Sewall, 3 Mass. Rep. 556. Cochran v. Wheeler, 7 N. Hamp. 202. Boylton t. Greene, 8 Mass. Rep. 465. But such assignee may maintain an action upon it in the name of the indorsee who transferred the note to him. Boylton v. Greene. See Robertson & Co. v. Williams, 5 Munf. Rep. 381.

A bill of exchange does not lose its negotiable character by being protested; but after protest, may be assigned, or transferred without assignment. 5 Munf. Rep. 388.

And where A. and B. indorsed a promissory note for the accommodation of the defendant, and on its being dishonoured by the defendant, paid, and took it up, and then delivered the note to B. alone, with the original indorsement thereon; it was held, that B. might maintain an action in his

own name alone, as indorsee. Havens v. Huntington, 1 Cowen, 387.

A. purchased a note of B., who indorsed it in blank before it became due. A. sold it to C. before due, who charged the indorser by demand and notice, &c., and after it was due, A. repurchased it, and sold it to D. Held, that D might maintain an action on the note against the

indorser in his own name. Williams v. Matthews, 3 Cowen, 252. And the case of Boylton v. Greenc, was afterwards overruled in Massachusetts, and it was held, that when a promissory note has been paid, or taken up by the last indorser, its negotiability is not destroyed, but it may be transferred by him to another, and the new indersee may maintain an action in his own name against any of the prior parties. Guild v. Eager, 17 Mass. 615. See Mead v. Small, 2 Greenl. 207.

1. Of the Bills and Notes.

44. Qualified indorsement to avoid personal I. Of the Transfer of liability. "James Atkins,

" sans recours."

5thly. Modes of Transfer.

- or, "James Atkins, with intent only to transfer my interest, and not to be subject to any liability in case of non-acceptance or non-pay-
 - 5. Indorsement in full or special. " Pay John Holloway, or order.
 " James Atkins."
- 6. Restrictive indorsement in favour of indorser.
 - " Pay John Holloway for my use(s). " James Atkins."
 - " Pay John Holloway for my account. " James Atkins."

- 7. Restrictive indorsement in favour of indorsee or a particular person only. " Pay to I. S. only.
 - "James Atkins."

" James Atkins."

- or, "The within must be credited to A. B. " James Atkins."
- 8. Indorsement of a foreign bill, dated, stating name of indorsee, and valid, and an besoin, and sans prot(t.
- " Payee La Fayette freres, ou ordre, valeur recue en argent, (or 'en merchandises, or 'en compte.')
 - " A Londre,
- " 18 Jain, A. D, 1831.
 - "Au besoin chez Messrs. -, Paris "Rue -
 - "Retour same Protet."

The forms or modes of indorsing a bill or note depend on the law of the place where such indorsement is made; and the foreign law as to the forms of indorsement prevails here (t). In France an indorsement must be in writing on the bill or note itself(u), or an annexed paper called un allonge, it should be DATED(x), and not ante-dated(y); should state the name of the indorsee(z); and an indorsement in blank is insufficient(a), though it may be

- a son ordre; Pothier, pl. 89.
- (t) Trimbey v. Vignier, 1 Bing. N. C. 151, infra, note (a).
 - (u) 1 Pardess. 364.
- (x) Id. 349, 350, 365; Pailliet Man. 848; see infra, note (a).
 - (y) 1 Pardess. 366; Pailliet Man. 848.
- (z) Id. ibid. See infra, next note. (a) 1 Pardess. 367; Pailliet Man. 848; and
- in the late case of Trimbey v. Vignier, 1 Bing. N. C. 151; S. C. 4 Moore & S. 695; 6 C. & P. 25, which was an action by the holder (an Englishman resident in England at the time of receiving the notes) against the maker of two promissory notes made in France, and indorsed there in blank, it was stated in evidence by a French advocate of twenty years' practice, that the indorsement to the plaintiff being in blank, and not according to the formalities required by the Code de Commerce, Articles 186, 137, 138, was invalid and passed no interest to the holder. These articles declare—

Article 136. "La propriété d'une lettre de change se transmet par la voie de l'endossement."

Article 137. "L'endossement est dats. Il exprime la valeur fournie. Il enounce le nom

de celni à l'ordre de qui il est passe.''
Article 138. "Si l'endossement n'est pas conforme aux dispositions de l'article precedent, il n'op\re pas le transport; il n'est qu'une procuration.

A verdict was thereupon taken for the defendant, and leave given to move to enter a verdict for the plaintiff. A rule nisi was accordingly obtained, and the court directed that, before cause was shown, the opinion of French

(s) Pour moi paierez à un tel, omitting ou advocates should be taken upon this point, and also upon certain other points which, however, afterwards became unnecessary.

The opinion procured by the plaintiff, as far as it related to the indorsement in blank, was as follows:-

This circumstance was no obstacle to Mr. Trimbey's right of action; for the 138th Article of the Code of Commerce thus expressed: "If the indorsement is not conformable to the requisition of the preceding article, it does not operate as a transfer of interest, but only as a procuration," is only available on behalf of the party making the indorsement in blank against the immediate indorser under such indorsement. If, however, the holder under an indorsement in blank does not proceed against the party immediately indorsing to him, but against the maker of the note, or against the parties who have made regular indorsements, neither the maker nor such parties can avail themselves of the provision of the 138th Article of the Code. Upon this point the jury has been completely led into error.

"BLANCHET." Paris, 21 May, 1833.

The opinion procured by the defendant upon

the same point was as follows:-

There is no doubt that, according to the French law, an indorsement in blank is insufficient to transmit regularly the property in a bill of exchange or promissory note. The Code de Commerce is precise on this point. Article 187 says "The indorsement is dated: it expresses the value given for it and states the name of him to whose order it is passed." The Article 188 adds, "If the indorsement is not

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filled up by any one(b); and it should "state the value received(c), and be I. Of the signed by the party himself, or by a person under a power of attorney(d). Transfer of It is said that an indorsement in any other form does not transfer the interest in the bill, but operates merely as an authority to receive payment(e), and that an indorsement in blank may be disputed or countermanded by the prior indorsers, though not by the acceptor. But it is considered by some, that such an irregular indorsement gives the indorsee the power of making an indorsement sufficient to pass the principal right of action against the acceptor, though not other collateral advantages(f). But other authors insist that it merely creates an agency to receive(g).

In Great Britain and Ireland there is no legislative provision as to the form or requisites of an indorsement, (except in the case of bills under 5l. presently noticed,) and the modes of transfer depend on the terms of the instrument, as whether it be payable to the bearer, or the order of the drawee or payee; in the former case it is transferable by delivery, and in the latter by indorsement, which may be made either in blank, in full, conditional, or restrictive(h). It has been considered, that in all cases, in order to complete for all purposes the legal transfer, and so to operate against an extent of the crown, a delivery of the instrument to the person for whose benefit it is transferred, or to some person on his behalf, is essential(i). But in general be-

conformable to the preceding article, it does not operate as a transfer; it is only a procuration."
"VERYOOT."

Paris, 21 Oct. 1933.

After argument and time taken to consider, the court gave judgment for the defendant. Tindal, C. J. in delivering the judgment of the court said, "The promissory note was made by the defendant in France; and it was indorsed in blank by the payee in that country, each of the parties, the maker and the payee, being at the respective times of making and indorsing the note domiciled in that country. The first inquiry therefore is, whether this action could have been maintained by the plaintiff against the defendant in the courts of law in France. Upon this point of French law the opinions of the foreign advocates, which have been taken by consent since the trial of the cause, appear to be contradictory; but as each of them founds his opinion on the Codo de Commerce, Articles, 136, 137, and 138, we feel ourselves at liberty to refer to the text of that Code, in order to form our own judgment on that point; and upon reference thereto, we think the language of the Code is clear and express, that an indorsement in blank, that is, without containing the date, the consideration paid, or the name of the party to whose order it is passed, does not operate as a transfer of the note; it is but a procuration. And the language of the Code being general, and unrestricted by any expressions which confine its operation to questions between the indorsee and the indorser of the note, we think, that if an action had been brought in any of the courts of law in France against the maker of the note, it would have been held not to be maintainable in the name of the plaintiff, but that he should have sued in the name of the last indorser by procuration."

His Lordship then went into the law relative to the construction of foreign contracts, as to which see ante, 167 to 169.

It was said by counsel in the course of the argument for the defendant, that by the laws of every European state except England, an indursement in blank is prohibited.

(b) 1 Pardess. 367.

(c) 1 Pardess. 866; Pailliet Man. 843.

(d) 1 Pardess. 335.(e) Id. Ibid.; see ante, 225, note (a).

(f) See the opinion of Blancket, ante, 225, note (a).

(g) Pailliet Man. 848, note 3. See Pothier, Traiti du Contrat de Change, Chapter 3, No. 41; see ante, 228, note (a).

No. 41; see sate, 225, note (a).

(a) Per Eyre, C. J. in Gibson v. Minet, 1
Hen. Bla. 605, (Chit. j. 479). "Bills of exchange being of several kinds, the title to sue upon any one bill of exchange in particular will depend upon what kind of bill it is, and whether the holder claims title to it as the original payee, or as deriving from the original payee or from the drawer; in the case of a bill drawn payable to the drawer's own order, who is in the nature of an original payee, the title of an original payee is immediate and apparent on the face of the bill. The derivative title is a title by assignment, a title which the common law does not acknowledge, but which exists only by the custom of merchants as it is by force of the custom of merchants, that a bill of exchange is assignable at all of necessity; the custom must direct how it shall be assigned, and in respect of bills payable to order, the custom has directed that the assignment should be made by a writing on the bill, called an indorsement, appointing the contents of that bill to be paid to some third person, and in respect of bills drawn payable to bearer, that the assignment should be constituted by delivery only." And see post, 227, note (x).

(i) The King v. Lampton, 5 Price, 428, (Chit. j. 1016). Therefore, if after the indorsement and before delivery to a partner or other

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I. Of the Transfer of Bills and Notes.

tween private parties, if an indorsement has been completely made with intent to part with the interest, the mere circumstance of the instrument having been left in *possession of the transferrer would not invalidate the transfer, and, therefore, the allegation in pleading, that a person indersed a bill to another, sufficiently imports a transfer of the entire legal and beneficial interest, without any allegation of delivery(k).

Modes of Transfer. *227] W hen transfera-

livery.

When a bill or note is by the terms of it payable to a certain person or bearer, it is transferrable by mere delivery (l)(1); and where a bill is payable ble by Deto the order of a fictitious person, it will operate against all parties aware of the circumstances as a bill payable to bearer, and will be transferable by delivery (m), in favour of any bona fide holder ignorant of the facts, but not otherwise (n).

When transfere ble only by Indorsement

A bill payable to order of a certain person, or to that person or order, or assigns, or to the drawer's order, is transferable in the first instance only by indorsement(o); and if the beneficial interest be transferred, but there has been no indorsement, the action must be brought in the name of the pay-

It has been decided that an indorsement written in pencil is sufficient(q); and if a bill or note be vested in the king he may transfer it by his sign man-

Indorsement how made.

No particular form of words is essential to an indorsement, the mere signature of the party making it is in general sufficient(s); it is the most concise mode of transferring an interest, or creating a contract, that could possibly be invented (t); and although the very term indersement seems to import a writing on the back of the bill or note itself, yet it is clearly established that it may be made on the face of the bill (u), and numerous indorsements may be made on a separate paper called an allonge(3).

agent for the indorsee, the bill be taken under an extent against the indorser, the crown is

entitled to the same. Id. ibid.
(k) Churchill v. Gardiner, 7 T. R. 596, (Chit. j. 605); Smith v. M'Clure, 5 East, 476, (Chit. j. 699); post, 236, note (o).
(l) Ante, 226, note (h).

(m) Gibson v. Minet, 1 H. Bla. 600, (Chit. j. 479); Ex parte Royal Burgh of Scotland, 19 Ves 811, (Chit. j. 927); ante, 226, n. (h).

(n) Hunter v. Jeffery, Peake Rep. Addenda, 146, (Chit. j. 587); ante, 158, note (a).
(o) Ante, 226, note (h).

(p) Pearse r. Hirst, 10 Bar. & C. 122; 5 Man. & Ry. 88, (Chit j. 1456); 3 B. & P. 46. (q) Geary v. Physic, 5 B. & C. 334; 7 D.

& R. 653, (Chit. j. 1279).

(r) Lambert v. Taylor, 4 Bar. & C. 188; 6

D. & R. 188, (Chit. j. 1248).
(8) Hill r. Lewis, Holt, 117, (Chit. j. 187); Pinckney v. Hall, Lord Raym. 176, (Chit.) 194); East v. Essington, Ld. Raym. 810. (Chit. j. 222); 12 Mod. 194; Lambert v. Oakes, 12 Mod. 244, (Chit. j. 211); Hodges v. Stewart, 1 Salk. 125, (Chit. j. 184); Lambert v. Pack, 1 Salk. 128, (Chit. j. 211); Lacas r. Haynes, 1 Salk. 130, (Chit. j. 220).

(t) 1 Pardess. 363, 364.
(u) Per cur. in Yarborough v. Bank of England, 16 East, 12, (Chit. j. 961); Rex v.

Bigg, 1 Stra. 18, (Chit. j. 236).

But the mere assignment of an attorney's receipt of a note for collection, pending a suit by the

^{(1) {} See Horton v. Blair, 2 Bai. 545; Myers v. James, Idem, 547; Jackson v. Heath, 1 Bai. 355. }

⁽²⁾ A suit brought upon a note which is not negotiable, must be in the name of the payee, and not of the assignee. Matlack v. Hendrickson, 1 Green's Rep. 263.

So of a note payable to order and transferred by mere delivery, Marion v. M'Rac, Rice's Law Rep. 171. Davis v. Lane. 8 N. Hamp. Rep. 224. }

^{(3) \(\)} An indorsement in these words: "I indorse the within note to J. R. unconditionally," means nothing more than that there should be no restriction, enlargement, or qualification of the endorser's liability, beyond what was to be inferred from the mere fact of endorsement, and does not dispense with the necessity of proving due diligence by demand, and notice. Dowd r. Aaron, 2 Hill, 531.

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An indorsement which mentions the name of the person, in whose favour I. Of the it is made, is called an indorsement in full, and an indorsement which does Transfer not, is called an indorsement in blank. After an indorsement in full, the in- and Notes. dorser can only transfer his interest in the bill or note by his own indorse
sthly.

ment in writing, but after an indorsement in blank, he may transfer by deliv
Modes of ery only, and so long as the indorsement continues in blank it makes the bill Transfer. or note in effect payable to bearer(x); and if the first indorsement on a bill In Full or or note be made in blank, *it will be assignable afterwards by mere delivery, in Blank. notwithstanding subsequent indorsements in full having been made thereon(y), [*228] unless in the cases presently noticed of restrictive indorsements (z).

When a bill or note is payable to the order of the drawer, or of a third Name of person as payee therein named, the name of such drawer or payee must ap-dorser must pear in the first indorsement, whether such indorsement be intended to con-appear in vey to the indorsee the absolute property in the bill or note, or merely to Indorseenable him to receive payment thereof, as agent of such indorser(a)(1).

An indorsement made upon a bill or note thus, "I give this note to A." is a testamentary indorsement, and may be proved (b). But the mere circumstance of the payee putting a number or any private mark on a bill or note will not be equivalent to an indorsement(c). So where a party promised to indorse a bill, and upon the faith of such promise a stranger wrote an indorsement in the name of party, it was considered that such indorsement was invalid (d).

An indorsement by one of several partners in the partnership name will By Partbe sufficient, if the partnership be proved, whereupon an authority may be ner. implied(e); and a transfer in the name of one partner alone will pass the partnership interest, and also charge all the partners, if it be proved that it has been the practice of the firm to indorse for them in the name of one only (f), So if one partner transfer in the name formerly used by the partnership (g).

(x) Peacock v. Rhodes, Doug. 633, (Chit. j. 408). A bill was drawn by the defendant, payable to Ingham or order. Ingham indorsed it in blank, after which it was stolen; the plaintiff took it bonû fide, and paid a valuable consideration for it, and acceptance and payment being refused, gave notice to the defendant, and brought this action. A case was reserved for the opinion of the court, and it was contended that this bill was not to be considered as payable to the bearer, and the plaintiff had no better right upon it than the person of whom he took it; but the court said there was no difference between a note indorsed in blank, and one payable to bearer, and the plaintiff had judgment. Francis v. Mott, at N. P. before Lord Mansfield, cited Doug. 612, was a similar case, and the Attorney General, who was for the defendant, after attempting unsuccessfully to show that the plaintiff knew the

bill was obtained unfairly, gave up the cause.

(y) Smith v. Clarke, Peake, 225, (Chit. j.

529); post, 230, note (a).
(z) Post, 232.
(a) Barlow v. Bishop, 1 East, 432; 3 Esp. 266, (Chit. j. 637).

(b) Per Lord Chancellor, in Chaworth v. Beech, 4 Ves. 585, (Chit. j. 616); but see ante, 74, as to Gifts.

(c) Fenn v. Harrison, 3 T. R. 757, (Chit. j. 463, 467); Ex parte Shuttleworth, 8 Ves. 368, (Chit. j. 583).

(d) Moxon v. Pulling, 4 Campb. 51, (Chit. j. 914).

(e) Ante, 57.

(f) South Carolina Bank v. Case, 8 Bar. & Cres. 436; ante, 57, 58.

(g) Williamson v. Johnson, 1 B. & C. 146;
2 D. & R. 281, (Chit. j. 1163). See post, 220 (29).

indorsee against the maker, does not operate as an endorsement of the note to bearer. Dickson v. Cunningham, 1 Martin & Yerg. 203.

A note transferred by the payce to a bank and endorsed by the cushier, thus: "P. H. F., Cashier," was held well endorsed; and, it seems, that in an action by the second indorsees against the payee, the plaintiffs may in such case, if the endorsement is not sufficiently certain, prefix the name of the bank thereto. Folger v. Chase, 18 Pick. 63. An indorsement on a slip of paper attached to the note, held sufficient. Id. }

(1) Where the maker of a note promises to pay A. to the order of B. & C., and B. & C. indorse the note, an action may be maintained against them by A. upon such indorsement. Willis v. Green, 10 Wend. Rep. 516.

1. Of the When the instrument is payable to the order of several persons not in part-Transfer of nership, all must separately sign their names as indorsers (h)(1). Bills and

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We have already seen that a bill of exchange may be drawn by an agent, so also it may be indorsed by a person acting in that capacity; in which case he should expressly indorse as agent, as "A. B. agent for E. F." or "E. F. per proc. A. B." or write the name of his principal, otherwise the indorsement would be inoperative (i)(2). In the negotiation of bills, it frequently happens that parties who are employed merely as agents are obliged to indorse them for the purpose of transmitting them to their principals(3), and if such indorsement be written unconditionally, the agent, though he have no interest whatever in the transaction, may be liable to pay the amount of the bill(k); and, therefore, to exempt themselves from responsibility, it is necessary in such case to specify in the indorsement, that he makes it without intending to incur personal responsibility for the payment, which may be effected by adding the words, "sans recours" or, "without recourse to me," or, "I indorse this bill to pass the interest, but I will not be liable to any as a qualified indorsement, and gives notice to subsequent parties taking the

[*229] proceeding against me as indorser," either of which expressions *will operate bill that the indorser is acting only as an agent, or at least is not to be sued(l)(4). It seems that an agent indorsing a bill, without showing on the face of it he acted as such, would be personally liable to the indorsee, though the latter knew the indorsement was made in the character of agent(m).

410); ante, 57, 59.

(i) Barlow v. Bishop, 1 East, 432; 3 Esp.

266, (Chit. j. 637); ante, 32, 33.
(k) Le Feuvre v. Lloyd, 5 Taunt. 749, (Chit. j. 915); ante, 33, 34; but see ante, 35,

(1) Goupy v. Harden, 7 Taunt. 159, 162,

(h) Carvick v. Vickery, Doug. 653, (Chit j. 163, (Chit j. 971); post, 235, p. (a); see Eaton v. Bell, 5 Barn. & Ald. 84, (Chit. j. 1115); ante, 34; see forms, ante, 225; 1 Pardess. 372.

(m) Leadbitter v. Farrow, 5 Maule & S. 345, (Chit. j. 970); ante, 83, note (a); and see Sowerby r. Butcher, 2 C. & M. 368; 4 Tyr. 320, S. C.; but see ante, 85, note (i).

One of several joint holders of a bill of exchange may transfer the whole interest by his indorsement. Snelling v. Boyd, 5 Monroe's Rep. 173.

(2) The directors of a bank have power to authorise one of their number to transfer any notes given to the bank; and a blank indorsement by the person so authorized, signed with his name as attorney, will be a good transfer of such notes. Northampton Bank v. Pepoon, 11 Mass. Rep. 289.

Where the maker of a promissory note indorsed the same for his own benefit in the payer.

name, by virtue of a parol authority for that purpose communicated to him by the payee, it was held to be well indorsed, and that the payee was liable upon such indorsement, in the same manner as if it had been made by himself, with his own hand. Turnbull, &c. v. Trout, I Hall's Rep. 336.

It is not necessary that the authority by which one person executes a written agreement for another and in his name, should be in writing also; although such written agreement may not be for the benefit of the party bound by it. Ibid.

The subsequent assent of the defendant to the indorsement, is a waiver, it seems, of any exception which might otherwise be taken to the sufficiency of the authority by which the note was indorsed. Ibid. 347.

An executor appointed under the laws of another state, cannot indorse a promissory note payable to his testator by a citizen of this state, so as to give the indorsee a right of action here in his own name. Steams v. Burnham, 5 Greenleaf's Rep. 261.

And this objection, though in disability of the plaintiff, may be taken under the general issue, in an action by the indorsee against the maker of the note. Ibid.

(3) { Where a bill is sent to an agent, for collection, and merely for that purpose is endorsed in full, on the bill being returned to the owner protested, he may strike out the indersement and bring an action in his own name. A re-indorsement from the agent is not necessary in such a case. Cautauque Co. Bank. v. Davis, 21 Wend. 584. \

(4) Assumpsit lies by assignee of note, assigned without recourse. if assignor made fraudulent representations as to solvency of maker. Harton v. Seales, 1 Minor's Alabama Rep. 166.

 ^{(1) \(\}begin{align*} A negotiable note payable to three persons may be legally transferred by an indorsement. by two of them to the third payee and a stranger; and if this were doubtful, the further indorsement by the third payee to the stranger will cleary pass the property to him. Goddard r. Lyman,

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In the case of bills under five pounds, the indorsement must be attested I. Of the by a subscribing witness, and must mention the name and place of abode of Transfer of Bills and the indorsee, and bear date at or before the making thereof; in short, it Notes. must be made in the form prescribed in the schedule to the statute 17 Geo. 3, c. 30, s. 1, which regulates these indorsements (n).

Modes of

visable to state Resi-

Where the residence of the indorser of a bill is not well known in the When Incommercial world, it would be advisable for him in all cases to mention in dorsement his indorsement the name of the place where he resides, so that the holder witnessed, may without delay be enabled to give him notice of the dishonour of the When adbill(o).

An indorsement in blank is by far the most common, and is made by the Indorser. mere writing of the indorser's name on the back of the bill, without any Indorsemention of the name of the person in whose favour the indorsement is made, ment in and is sufficient to transfer the right of action to any bona fide holder, and blank. so long as it continues in blank makes the bill or note payable to bearer (p) Its effect. (1), and it conveys a joint right of action to as many as agree in jointly suing on the bill, whether they be or not in partnership (q). It has been said that such an indorsement does not transfer the property and interest in the bill to the indorsee without some further act(r); but that it gives him, as well as any other person to whom it is afterwards transferred, the power of constituting himself assignee of the beneficial interest in the bill by filling it up payable to himself, (as by writing over the indorser's name, "pay the contents,") which he may do even at the time of trial(s), and this seems to be still the French law(t). But in this country it is now settled that such an indorsement in itself constitutes a complete and perfect transfer of the interest in the bill, and *without the addition of any other words will vest the [*230] right of action and all other rights in the transferree and subsequent holders, though if the transferree were a mere agent his principal may interfere:

(n) See the general law in France, Poth. Traite du Contrat de Change, part i chap. 8, num. 130; and see Pardessus, 1 toin. 364 to 379, to the same effect.

(o) Bul. Ni. Pri. 276; see Walter v. Haynes, Ry. & Mood. 149, (Chit. j. 1227); and Mann v. Moors, id. 249, (Chit. j. 1260); Clarke v. Sharpe, 3 M. & W. 166; ante, 147, 148; and post, Ch. X s. i. as to the Mode of giving Notice of Non-Payment.

(p) Peacock v. Rhodes, Dougl. 633, (Chit. 408); ante, 227, note (x); Newsome v.

Thornton, 6 East, 21, 22. (q) Per Lord Ellenborough, in Ord v. Portal, 3 Campb. 240, (Chit. j. 861); and see Attwood v. Rattenbury, 6 Moore, 579, (Chit. j. 1131); Rordanz v. Leuch, 1 Stark. R. 446, (Chit. j. 907); post, 241.

(r) Clark v. Pigot, 1 Salk. 126; 12 Mod. 192, (Chit. j. 206); Lambert v. Pack, 1 Salk. 128, (Chit. j. 211); Lucas v. Haynes, id. 130, (Chit. j. 220); Lambert v. Oakes, 12 Mod. 244; Ld. Raym. 448, (Chit. j. 211); Vin. Ab. tit. Bills of Exchange, H. 6; Bul. N. P. 275.
(2) Theed v. Lovel, 2 Stra. 1108, (Chit. j.

209); Lambert v. Oakes, 12 Mod. 244; Ld. Raym. 443, (Chit. j. 211); Lambert v. Pack, 1 Salk. 127, (Chit. j. 211); Lucas v. Haynes, id. 180, (Chit. j. 220); Dehers v. Harriot, 1 Show. 163, (Chit. j. 485); Moore v. Manning, Comyna, 811, (Chit. j. 243); Lucas v. Marsh, Barnes, 453, (Chit. j. 317); Vin. Ab. tit. Bills of Exchange, H. 8; Bul. N. P. 275, 278.

(1) Ante, 225; and see Pardess. 875; Trimbey v. Vignier, 1 Bing. N. C. 151; ante, 225, note (a).

(1) Where a note is payable to bearer, or indorsed in blank, an action on it may be maintained in the name of any person, without the plaintiff's being required to show that he has an interest in it, unless he possesses the note under suspicious circumstances. If any question as to mala fide possessio arise, that is a matter of fact to be raised by the defendant and submitted to a jury.

Ogilby v. Wallace, 2 Hall's Rep. 553.

Where therefore in an action upon a promissory note, payable to order and indorsed in blank, the plaintiff upon the record was a fictitious person, and the judge for that reason nonsuited him at the trial, although the note appeared to be the property of a real party whose name was disclosed; the court directed the nonsuit to be set aside, that the questions of fact connected with the possession and prosecution of the note, might be submitted to a jury. Ibid.

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and a blank indorsement is now considered as prima facie a transfer of the in-Transfer of interest until the contrary be established by showing that it was a mere A blank indorsement may be converted into a special one deposit(u)(1). by the holder's inserting above it the words, "pay the contents to A. B.;" but such holder by writing those words, and transferring the bill to the party named in the indorsement, without writing his own name as an indorser, will not be liable on the bill(x). If the indorsee fill up the blank indorsement, and make it payable to himself, it is said that the action cannot be brought in the name of the indorser, which otherwise it may be(y).

(u) Ex parte Twogood, 19 Ves. 229, 232,

(Chit. j. 871).
(x) Vincent and others v. Horlock and others, 1 Campb. 442, (Chit. j. 757). Declaration against defendants as indorsers of bill drawn by Jacks payable to his own order, indorsed by him to defendants, and by them to plaintiffs. The fact was, that Jacks, the drawer and payee of the bill, indorsed it in blank to Horlock and Co., and that Caleb Jones, one of the partners in that house, wrote over Jacks' signature " pay the contents to Vincent and Co." without signing his own name or that of his firm. Lord Ellenborough-" I am clearly of opinion, that this is not an indorsement by the defendants, for such a purpose the name of the party must appear written, with intent to indorse. We see these words, 'pay the contents to such a one, We see written over a blank indorsement every day, without any thought of contracting an obligation, and no obligation is thereby contracted. When a bill is indorsed by the payee in blank, a power is given to the indorsee of specially appointing the payment to be made to a particular individual, and what he does in the exercise of this power is only expressio corum quæ tacile insunt. This is a sufficient indorsement to the plaintiffs, but not by the defendants." Plaintiffs nonsuited. See also Ex parte Isbester, 1 Rose,

(y) A full or special indorsement contains in itself a transfer of the interest in the bill to the person named in such indorsement, Poth. Traite du Contrat de Change, part 1, chap. 2, s. 23, 24. But a bare indorsement, without other words purporting an assignment, does not work an alteration of the property. Per cur. Lucas

v. Haynes, Salk. 130, (Chit. j. 220). Clark v. Pigot, 12 Mod. 193; 1 Salk. 126, (Chit. j. 206). Clark having a bill of exchange payable to him or order, put his name upon it,

leaving a vacant space above, and sent it to J. S. his friend, who got it accepted; but the money not being paid, Clark brought assumpsit against the acceptor; and it was objected that the action should have been brought by J. S. But per Holt, C. J .- " J. S. had it in his power to act either as servant or assignee. If he had filled up the blank space, making the bill payable to him, as he might have done if he would, that would have witnessed his election to have received it as indorsec. The property of the bill would have been transferred to him, and he only could have maintained this action against the acceptor; but since he has not filled up the blank space, his intention is presumed to act as servant only to Clark, whose name was put there; that on payment thereof, a receipt for the money might be written over his name, and therefore the action is maintainable by Clark."

From the foregoing case it appears that a blank indorsement is an equivocal act, and that it is in the power of the party to whom the bill is delivered to make what use of it he please of such an indorsement. He may either use it as an acquittance to discharge the bill, or as an assignment to charge the indorser; Selw. Ni. Pri 9th edit. 342, 343.

" Promissory notes and bills of exchange are frequently indorsed in this manuer 'pay the money to my use,' in order to prevent their being filled up with such an indorsement as passes the interest." Per Lord Hardwicke, Chan.

in Snee v. Prescott, 1 Atk. 249.

"A bill, though once negotiable, is certainly capable of being restrained. I remember this being determined on argument. A blank indorsement makes the bill payable to bearer; but by a special indorsement the holder may stop the negotiability." Per Lord Mansfield, C. J. Archer r. Bank of England, Dougl. 659.

(1) The holder of a negotiable note by blank indorsement, may maintain a suit on it without filling up the same to himself. Grifforn v. Jacobs, 2 Miller's Louis. Rep. 192.

A blank indersement by A., of the promissory note of B., payable to C. or order, does not imply a valuable consideration from C. to A., and an engagement by A., that B. was of ability to

pay, and should pay such note. Wylie v. Lewis, 7 Conn. Rep. 301.

A blank indorsement of a bill passes all the interest therein to the indorsees in succession, discharged of all obligations which do not appear on the face of the bill. Wilkinson v. Nicklin, 2 Dall. Rep. 296. Where a negotiable note is indorsed in blank, the holder may fill it up with any name he pleases, and the person whose name is inserted will be deemed rightfully intitled to sue. Tyler v. Binney, 7 Mass. Rep. 479. Lovell r. Everton, 11 John. Rep. 52. See Norris v. Badger, 6 Cowen, 449. Dugan v. United States, 3 Wheat. 173, 183.

A bill of exchange payable to the order of the drawer, and not endorsed, may be assigned for value, by delivery only; and an action will lie against the acceptor for the benefit of the assignee, in the name of the drawer, as on a bill payable to himself. Titcomb r. Thomas, 5 Greenl 282. And if in fact the indorsee has no interest, he will be deemed a trustee for the benefit of parties A.C

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A blank indorsement makes a bill transferable by the indorsee and every 1. Of the subsequent holder by mere delivery (z); and when the first indorsement has Transfer of Bills and been in blank, the bill or note, as against the payee, the drawer, and acceptor, Notes. is afterwards assignable by mere delivery, notwithstanding it may have upon it subsequent indorsements in full, because a holder, by delivery, may declare Modes of and recover as the indorsee of the payee, and strike out all the subsequent Transfer. indorsements, whether special or not(a)(1). Nor will an irregularity in the indorsement subsequent *to that of the plaintiff, as by mis-spelling the name [*231] of one of the parties to whom the plaintiff as indorsee had specially indorsed the bill, prevent the plaintiff, as such indorsee, from suing his immediate indorser, provided the bill has been regularly presented and due notice of disbonour given (b). But it should seem, that if there be a subsequent restrictive indorsement upon the instrument, any person taking it receives it subject to its terms(c).

Such being the effect of a first indorsement in blank, it has been observed,

(z) Peacock v. Rhodes, Dougl. 633, (Chit. j. 408); Bayl. 5th ed. 123, n. 12, ante, 227, $\mathbf{n}.(x).$

(a) Smith v. Clarke, Peake R. 225; 1 Esp. R. 180, (Chit. j. 529); Anonymous, 12 Mod. 345, S. P. (Chit. j. 212). A bill was indorsed in blank by the payee, and after some other in-dorsements was indorsed to Jackson or order. Jackson sent it to Muir and Atkinson, but did not indorse it, and Muir and Atkinson discounted it with the plaintiffs; the plaintiffs struck out all the indorsements except the first, which con-tinued in blank. This was an action against the acceptor, and it was objected that the plaintiffs could not recover, without an indorsement by Jackson, but Lord Kenyon held otherwise, and the plaintiffs recovered. The plaintiffs afterwards proved that Jackson desired Muir and Atkinson to discount this bill, but Lord Kenyon thought the plaintiff's case made out without this evidence. Quære, why is not such special indorsement to be considered as notice to any

holder that the bill has been appropriated to the use of the special indorsees only?

Chaters v. Bell, 4 Esp. Rep. 120, (Chit. j. 636). The declaration stated that a bill was drawn payable to Curry, by him indorsed to de-fendant, and by the defendant to the plaintiff. There were in fact several intermediate indorsoments between Curry and the defendant, which were omitted in the declaration, and it was contended that the plaintiff should have either declared as the immediate indorsee of the payee, or have stated all the indorsements. But Lord Ellenborough overruled the objection. See also Waynham v. Bend, 1 Camp. 175, (Chit. j. 746); and Critchlow v. Parry, 2 Camp. 182, (Chit. j. 774).
(b) Leonard v. Wilson, 2 C. & M. 589; 4

Tyr. 415, S. C. post, 236, note (i).

(c) See Sigourney v. Lloyd, S Bar. & C. 622; 5 Bing. 525; 3 Younge & J. 220, (Chit. j. 1412); post, 232, note (n), and 233, note (p).

having the logal interest. The interest of one of several joint assignees of such bill may be transferred to the others by delivery of the bill, and payment by them of his share of the money due upon it. Id. Ibid. And where a person fairly and without fraud becomes possessed of a negotiable note indorsed in blank, it has been held that he may maintain an action thereon, although it has not been legally transferred to him. Little v. O'Brien, 9 Muss. Rep. 423. Bowman v. Wood, 15 Mass. Rep. 534.

And the right to strike out a special as well as a general indorsement on a note has been recognized in Pennsylvania. Morris v. Foreman, 1 Dall. Rep. 193; and see Thomson v. Robertson, 4 John. Rep. 27.

Where a bill is indorsed and sent to an agent to collect, although the indorsement be general, yet the principal may at any time countermand the authority, and thereby prevent the agent from a recovery against the acceptor. Barker v. Prentiss, 6 Mass. Rep. 430. But it will be otherwise if the agent has a lien. Ibid.

Where the holder of a note indorsed in blank fills up the blank by directing payment to be made to another merely for collection, and the agent returns the note unpaid to the holder, be may strike out the transfer and make the note payable to himself. Bank of Utica v. Smith, 18 Johns. 230.

A bill with an endorsement in blank, becomes the property of any one to whom it is transferred by delivery, and the party to whom the bill is delivered and each subsequent bolder may unite an assignment to himself or any other person over the signature of the indorser in blank. And the holder of any bill so endorsed in blank may sue the same in his own name. Cope s. Daniel, 9 Dans, 415. See also U. S. Bank v. Hammond, 2 Rev. 415; M'Donald v. Bailey, 14 Maine, 101. Denton v. Duplessis, 12 Louis. Rep. 83; Mourain v. Devall, id. 93; Kennon v. M'Rea, 7 Port. 175. And the words "eventually accountable" immediately preceding the name of the endorser, do not restrict or qualify the transfer. M'Donald v. Bailey, ut supra. }
(1) { Gorden v. Nelson, 16 Louis. Rep. 321; Haie v. Bailey, Id. 213; Bullock v. Nally, 12

Id. 619; Wood v. M'Claurin, 2 Rev. 377; Banks v. Rander, 13 Louis. Rep. 274 }

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I. Of the Bills and Notes.

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that it is advisable for the indorsee in some cases to fill it up so as to make it an indorsement in full, or to insert restrictive words, in order to avoid the risk which he may run, in case the bill be lost, of its getting into the hands of a bond fide holder(d)(1); or of its being fraudulently pledged or disposed of (e). When bills, &c. are deposited in a banker's hands, and entered short in his books, or are in his possession, in case he becomes bankrupt, his assignees will not be entitled thereto, though such deposit enables the banker to pass the interest to a third person taking it bona fide for a valuable consideration (f).

An indorsement in full, or special indorsement, is so called because the Special or indorser not only writes his name, or that of his firm, but expresses therein in Full. in whose favour the indorsement is made, as, " pay the contents to Mr. A. B." This indorsement, it is said, contains in itself a complete, regular, and legal transfer of the interest in the bill to the person named in the indorsement(g), and makes the bill transferrable in the next instance only by the indorsement of A. B. (h); though afterwards, if A. B. make a blank indorsement(i), it is transferrable by delivery as well as by indorsement. As the negotiability of a bill, originally transferrable, can only be restrained by

> express restrictive words, the words "or order" need not be inserted in a full or any indorsement, to give the bill a subsequent negotiable quality(k).

(d) Beawes, pl. 179.

(e) Treuttel v. Barandon, 8 Taunt. 100.

(f) Zinck v. Walker, 2 Bla. Rep. 1156; Bolton v. Puller, 1 Bos. & Pul. 547; Hallie v. Smith, id. 566; Collins v. Martin, id. 648; Giles v. Perkins, 9 East, 12; Carstairs v. Bates, 3 Campb. 301; Treuttel v. Barandon, 8 Taunt. 100; 1 Moore, 543, (Chit. j. 1002); Thompson r. Giles, 2 Bar. & Cress. 422); 8 Dow. & Ry. 733, (Chit. j. 1190); and see post, Part II. Ch. VIII. s. vi.—Bankruptcy.

(g) Poth. pl. 22, 23, 24. The French law

is so; ante, 225.

(h) Potts v. Reed, 6 Esp. Rep. 57, (Chit. j. 731); post, 233, note (q); and see the cases

infra, note (k).

(i) In France there can be no blank indorsement, at least such indorsement will only operate as a procuration; ante, 225, note (a)

(k) Moor v. Manning, Com. Rep. 311, (Chit. j. 243); 1 Selw. 344, 9th Edit. A note was drawn by the defendant, payable to Statham or order, Statham indorsed it to Witherhead, but did not add " or to his order," Witherhead indorsed it to the plaintiff. The defendant contended that there was no express words to authorize Witherhead to assign it, he had no such power; but the whole court resolved that as the bill was at first assignable by Statham, as being payable to him or order, and all Statham's in-terest was transferred to Witherhead, the right of assigning it was transferred also, and the plaintiff had judgment.

Acheson v. Fountain, 1 Stra. 557; Select Cases, 126, (Chit. j. 252). Upon a case made at Niei Prius, coram Pratt, C. J. it appeared that the plaintiff had declared on an indorsement made by A. whereby he appointed the

payment to be to B. or order, and upon producing the bill in evidence, it appeared to be payable to A. or order, but the indorsement was in these words, "Pay the contents to B." and therefore it was objected that the indorsement not being to order did not agree with the plaintiff's declaration; but upon consideration the whole court were of opinion that it was well enough, that being the legal import of the in-dorsement, and that the plaintiff might upon this have indorsed it over to another, who would be the proper order of the first indorser.

Edie v. East India Company, 2 Burr. 1216; and 1 Bla. R. 295, (Chit. j. 359). Where a foreign bill of exchange was drawn by A. on B. payable to C. or order, and accepted by B., and C. indorsed it to D. without adding the words "or order," and D. afterwards indorsed it to E. who brought an action against B. the acceptor, for non-payment, evidence having been adducted at the trial, of the usage of merchants with respect to indorsements of bills payable to se-der, where the words " or order" were omitted in the indersement, which evidence was contradictory, some merchants declaring that the omission did not make any difference, others that it restrained the negotiability of the bill, and made it payable to the indorsee only, the jury found a verdict for the defendant. On a motion for a new trial, on the ground that evidence of the usage ought not to have been allowed, that the custom of merchants was part of the law of England, and that the law of England was fully settled on this point, the court were unanimous that a new trial ought to be granted, and Lord Mansfield, C. J. said he was clear the evidence ought not to have been admitted, for the law was fully settled in the

^{(1) {} It seems that a bona fide holder may, in all cases, write a bill of exchange over the name of the indorser, or fill up the blank in any form consistent with the intent of the parties. Deen v. Hall, 17 Wend. 214. }

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If a bill be indorsed "pay to the order of A. B." he *may himself sue upon I. Of the it, and this without averring that he made no order (l)(1).

The payee or indorsee having the absolute property in the bill, and the 5thly. right of disposing thereof, has the power of limiting the payment to whom he Modes of pleases(m); and consequently he may make a restrictive indorsement; thus Transfer. he may stop the currency of the bill, by giving a bare authority to receive Restrictive the money, as by an indorsement requesting the drawee to " pay to A. for Indorsemy use," or "to A. B. or order, for my use," or "to I. S. only," or for the use of "my account," or "the within must be credited to A. B." which modes pre- a particular vent a blank indorsement from being filled up by the indorsee, so as to con- Party only. vey any interest in the bill to himself (n), and from making a transfer of the

Bills and Notes.

case of Moor v. Manning, and Acheson v. Fountain, (supra). The other judges concurred, and Denison, J. said that there was not any instance of a restrictive limitation, where a bill was originally made payable to A. or or-der; that he had never heard of an indorsement to A. only, and that in general the indorse-ment followed the nature of the thing indorsed. And see per Tindal, C. J. in Cunliffe v. Whitehead, 8 Bing. N. C. 828; 5 Scott, 31, S. C.

(1) Fisher v. Pomfret, Carth. 403, (Chit. j. 203).

(m) Edie v. East India Company, 2 Burr.

1218, supra, note (k).

(n) Sigourney v. Lloyd, 8 B. & C. 622; 2 M. & Ry. 58, S. C., affirmed on error in Exchequer Chamber, 5 Bingh. 525; 3 Younge & J. 220, (Chit. j. 1412); post, 233, note (p). Per Wilmot, J. in Edie v. East India Company, 2 Burr. 1227; Bla. Rep. 299, (Chit. j. 358); Treuttel c. Barandon, 8 Taunt. 100; 1 Moor, e 543, (Chit. j. 1002); and per Lord Hardwicke, in Snee v. Prescott, 1 Atk. 249: "Bills and notes are frequently indorsed in this manner, 'pray pay the money to my use,' in order to prevent their being filled up with such an indorsement as passes the interest." And see Poth. pl. 89, 90.

Archer v. Bank of England, Dougl. 615, 637. A bill was drawn by the plaintiffs upon Claus

Heide and Co. payable to Jens Mæstue or Mæstue indorsed it to this effect, the within must be credited to Captain M. L. Dahl, value in account, Christiana, 17th Jan. 1778, Jens Mæstue," and sent it to Claus Heide and Co. who credited Dabl for the amount, and gave notice to Dahl and the plaintiffs that they had done so; an indorsement by Dahl was afterwards forged upon the bill, and the Bank discounted it. Claus Heide and Co. having become insolvent, Fulgberg paid it for the bonour of the plaintiffs, and upon the ground that the indorsement had restrained the negotiability of the bill, they brought an action for money had and received against the Bank; Lord Mansfield directed a nonsuit, but upon a rule to show cause why there should not be a new trial, and cause shown, Lord Mansfield, Willes and Ashhurst, Justices, thought the indorsement restrictive, and that Dahl himself could not have indorsed it, and that the plaintiffs were entitled to recover; but Buller, J. thought otherwise; upon which Lord Mansfield said, the whole turned on the question, whether the bill continued negotiable, and if they altered their opinion they would mention the case again; but it never was mentioned afterwards, and upon a new trial, Lord Mansfield directed the jury to find for the plaintiffs, which they did.

Where the payee of a bill indorsed on it " should the within exchange not be accepted and paid agreeably to its contents, I hereby engage to pay the holder in addition to the principal 20 per cent. damages," it was held that a bona fide holder might insert above such stipulation, a direction to pay the contents to his order for the value received, for the indorsement was to be considered as general. Blakeley v. Grant, 6 Mass Rep. 386. But where the payee of a negotiable note payable in six months, indorsed on it "I guarantee the payment of the within note in 18 months, if it cannot be collected of the promissor before that time;" it was held that no person could entitle himself as holder to maintain an action on the guaranty, except the original

⁽¹⁾ The same doctrines have been recognized in the United States. A negotiable note indorsed in blank, or by a direction to pay the contents to A., omitting the words " or order," is further negotiable by the holder under such indorsement, but an indorsement "pay the contents to my wee," or " to the use of a third person," or " carry this bill to the credit of a third person," is not an assignment of the security, but is only an authority to pay the money agreeably to the direction of the indorsement. But as to an indorsement "pay the contents to A. B. only," whether it is only an authority to A. B. to receive the money for the use of the indorser or for his own use, if made for value received, or whether in this last case the restriction is not void, and A. B. may further negotiate it, seems not to be settled. If the property be vested in A. B. perhaps he will hold it with its negotiable quality notwithstanding the restriction. Per curiam. Rice v. Stearnes, 3 Mass. Rep. 225. Wilson v. Holmes, 5 Mass. Rep. 543. But an indorsement "to pay to A. or order at his own risk," does not restrain the negotiability of the note. Ibid. Russell v. Ball, 2 John. Rep. 50. Nor an indorsement "We assign this note to A. B. Wilson v. Codman's Executors, 3 Cranch, 193. Barker v. Prentiss, 6 without recourse.'' Mass. Rep. 430.

Bills and Notes.

5thly. Modes of Transfer.

bill, &c.; and when *made for the use of the indorser, is revocable in its na-Transfer of ture by him, like a power of attorney (o). All the cases on this subject were examined and considered in the Court of King's Beuch in a late case, and the judgment of that court was affirmed in the Exchequer Chamber. A bill of exchange drawn in America on a house in London, payable to order, was indorsed by the payee generally (technically called in blank) to the plaintiff, and by him in these words, "Pay Samuel Williams, Esquire, of London, or his order for my use." Williams applied to his bankers to discount the bill, and they, without making any inquiry, did so, and applied the proceeds to the use of Williams: and it was decided, that the indorsement was restrictive, that the property in the bill remained in the plaintiff, and that he was entitled to recover the amount of the bill from the bankers(p). But an indorsement of a bill of exchange in these words, " Pay the contents on the bill to A. B., being part of the consideration in a certain deed of assignment executed by the said A. B. to the indorsers and others," is not a restrictive indorsement (q).

> (o) Poth. pl. 168; Mar. 72, acc.; Beawes, pl. 219, contra. See post, as to the Liability

of Indorser.

(p) Sigourney v. Lloyd and others, 8 B. & C. 622; 3 M. & Ry. 58, (Chit j. 1412); where the court examined all the cases. The case was turned into a special verdict, and on writ of error in the Exchequer Chamber, 3 Younge & J. 229; 5 Bing. 525; 3 Moore & P. 229, S. C.; the judgment of the Court of King's Bench was affirmed, and Best, C. J. delivered the judgment of the court as follows; "The indorsement upon this bill of exchange is special, and restricts its negotiability. The object of the indorser was to prevent the money received in respect of the bill being applied to the use of any person other than himself. Whoever, therefore, received the money, received it for the use of the indorser; and as the plaintiffs in error took it upon the indorsement of Williams, and upon his account, it being indorsed to him for a special purpose, to receive the money merely, and hold it to the use of indorser, he could not confer a greater interest than the indorser had given him, which was a mere trust, and they paid the money in their own wrong. The trust was apparent upon the face of the instrument itself. No inconvenience can arise to the commercial interests of the country, by limiting the operation of an indorsement so expressed; the only effect will be, to make individuals more cautious in their transactions in future. Unless the words 'for my use' have no meaning, it is obvious, upon looking at the indorsement, that some inquiry was necessary; and if a meaning can be found for them, the court must apply them in a manner in which they were intended to operate. It is said, that by holding the indorsement to be restrictive, we shall render the words 'or order' inoperative.

But they are not useless, for had they not been inserted, Williams must have attended personally to receive the money; and being inserted, they obviate that inconvenience, and enable him to appoint an agent to receive and give a discharge for the amount. It was, notwithstanding, the intention of the indorser, that the agent appointed under that authority should receive the money for his use. This intention has been defeated by the plaintiffs in error, who have received the money for the money ceived the money, but have not paid it over according to the directions of the indorse-ment. We are therefore of opinion, that the defendant in error is entitled to recover, and that the judgment of the court below should be affirmed.

In France also, the holder may, by a restrictive indorsement, prevent the indorsee from transferring the bills, as thus:—" Pourmei paierez à un tel," omitting the words "ou à son ordre." Poth. pl. 89.

(q) Potts v. Reed, 6 Esp. Rep. 57, (Chit. j. 731). Per Lord Ellenborough, "This is not a restrictive indorsement, and as to the other words, they are surplusage, and could not affect the subsequent negotiability of the bill. If the bill was payable out of a particular fand, it would affect the negotiability of the bill, but what was here mentioned was not the fund out of which the bill was to be paid, but the consideration for which the bill was given, which the holder had nothing to do with. Mr. Gamon, the defendant, was here personally liable, though the liability might have been created by the fund mentioned in the indorsement, as arising from the fund so designated by the indorsement; and whenever a party is personally liable, a bill is negotiable. It is, however, necessary to prove Pugh's indorsement, as his name is mentioned in the indorsement, but

party to the guaranty, or a person claiming with the subsequent privity and assent of the payer. It seems to have been the opinion of the court that even admitting that the indorsement was a transfer of the note, yet it did not make the guaranty negotiable. Tyler v. Binney, 7 Mass. Rep. 479. See also Williams v. Granger, 4 Day's Rep. 444.

The indorsement of a promissory note to A. B. or order, for value received, transfers the legal title in the note to the indorsee, which cannot be divested, except by cancelling the indorsement, or indorsing it again. Burdick v. Green, 15 Johns. Rep. 247.

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*So the merely writing the name of a banker across a check does not I. Of the necessarily denote that the check or money belongs to the payee, so as to Transfer of entitle him alone to receive the amount, but is according to the custom of Notes. trade merely to denote and secure that the payment shall be made to some banker, and the holder may substitute any banker he pleases(r).

Modes of

It was once thought, that although the indorser might make a restrictive Transfer. indorsement, when he intended only to give a bare authority to his agent to receive payment, yet that he could not, when the indorsement was intended to transfer the interest in the bill to the indorsee, by any act preclude him from assigning it over to another person, because, as it was said, the assignee purchases it for a valuable consideration, and therefore takes it with all its privileges, qualities and advantages, the chief of which is its negotia-In a case(t) before Lord Kenyon, he doubted whether a bill indorsed in blank by A. to B. can be restrained in its negotiability by B.'s writing over A.'s indorsement "Pay the contents to C. or order." In a note, the Reporter has collected the cases showing that in general a restrictive indorsement may be made by a subsequent holder after an indorsement in blank; but observes, that the recent cases do not establish the right of an indorsee in blank to write over the indorser's name, but only that a restrictive indorsement may be made below an indorsement. But the case of Clark v. Pigot(u) seems to be an authority to prove that this may be done. It has long been settled on the above principle, that any indorser may restrain the negotiability of a bill by using express words to that effect, as by indorsing it, "payable to J. S. only;" or by indorsing it "the within must be credited to J. S. (x)" or by any other words clearly demonstrating his intention to make a restrictive and limited indorsement. But a mere omission in the indorsement of the words "or order," will not, in any case, prevent a bill from being negotiable ad infinitum(y)(1).

though so made payable to him by name, there is nothing to restrain its future negotiability: in the case cited, the bill was to be credited to Dahl's account; no such restriction or direction was here." See also Haussoulier v. Hartsink, 7 T. R. 783, S. P., (Chit. j. 613).

(r) Stewart v. Lee, Mood. & M. 158, (Chit. . 1378). In that case C. drew a check on his banker, payable to A. and B. assignees of C. or bearer, and wrote the name of their banker across it; and B. who had another private account with the banker, delivered the check into that separate account: it was held, that the bankers were justified in applying it to that separate account, the drawer's writing the name of the bankers of the joint payees of the check across it not being, according to the custom of trade, information to the bankers that the money was that of the payees jointly; and it seems to have been the opinion of the court,

that the custom of writing the name of a banker across a check is only for the purpose of securing that the payment shall be made to some banker, not to the banker originally named; and that the holder may substitute another for him, and this even when the name of the particular banker is originally written, not by himself, but by the drawer. Id. ibid.

(s) Edie v. East India Company, 2 Burr. 1226; 1 Bla. Rep. 295, (Chit. j. 358).

(t) Bland v. Ryan, Peake Addend. 39, (Chit. j. 547).

(u) Clark v. Pigot, Salk. 126; 12 Mod. 192, (Chit. j. 206).

(x) Archer v. Bank of England, Dougl. 637; ante, 232, note (n).

(y) See ante, 231, note (k); Cunliffe v. Whitehead, 3 Bing. N. C. 828: 5 Scott, 31, S.

The indorsee has no right to fill a blank indorsement with any special contract or warranty, but only with an order to pay the contents to him for value received. Adis & al. v. Johnson, I Verm. Rep. 136.

⁽¹⁾ The bank, as the holder of a note indorsed in blank, having the legal interest in it, may sue to the use of the last indorser in blank, who is entitled to the equitable interest, and recover the amount from the payee or any of the previous indorsers. Louisiana Bank v. Roberts, 4 Miller's Louis. Rep. 530.

A bona fide holder of a bill or a promissory note in which the name of the payee has not been inserted, has a right to fill up the blank left for the payee's name with that of an indorser, or he may subject the inderser in a count upon his indersement, or as the drawer of a bill of exchange upon the maker. Lawrence v. Mabry, 2 Devoreux's Rep. 478.

I. Of the Bills and Notes.

5thly. Modes of Transfer.

It is competent also to an indorser to make only a conditional transfer of Transfer of the bill; and therefore if the payee of a bill annexes a condition to his indorsement before acceptance, the drawee, who afterwards accepts it, is bound by that condition; and if the terms of it be not performed, the property in the bill reverts to the payee, and he may recover the sum payable in an action against the acceptor (z)(1).

Conditional Indorsement.

Qualified

Indorse-

ment, to

ability.

*A payee or indorsee of a bill may also make a qualified indorsement, so as to transfer the interest in the bill to the indorsee, and enable him to sue thereon, without rendering the indorser personally responsible for the payment of the bill, as by adding under his indorsement "sans recours," or any equivalent words; and this is the proper mode of indorsing a bill where prevent Inan agent indorses a bill on behalf of his principal, and it is not intended that dorser's lihe shall be personally liable (a)(2). And this qualified mode of indorsing is [*235] allowed in France(b) and in America(c).

An indorsement for a Part.

Although an indorsement may be made in blank, in full, or restrictive, yet it cannot, after acceptance, be made for less than the full sum appearing

(z) Robertson v. Kensington, 4 Taunt. 30, (Chit. j. 884). Payee against the acceptors of a bill of exchange; when the bill was presented for acceptance, it had the following indorsement upon it, "Eddinburg, 19th November, 1808, pay the within sum to Messrs. Clarke and Ross, or order, upon my name appearing in the gazette as ensign in any regiment of the line between the 1st and 64th, if within two months from this date; P. Robertson." The bill had several subsequent indorsements, and when due was paid by the acceptors to the holder; the plaintiff's name had never appeared in the gazette as eneign in any regiment of the line; the plaintiff had a verdict, subject to a case reserved for the opinion of the court. The case was afterwards argued, and for the plaintiff it was contended that it was competent for him, by this special indorsement, to make only a conditional transfer of the absolute interest in the bill, and the defendants, by subsequently accepting the bill, became parties to that conditional transfer; that as the condition was not performed, the transfer was defeated, and they became liable, at the expiration of two months, to pay the plaintiff, to whom the property reverted, the contents of the bill, of which none of the indorsers could enforce payment against the acceptors, because they had all received the bill, subject to the condition, and were bound thereby. The court gave judgment for the plaintiff. See also Savage v. Aldren, 2

Stark. 232, (Chit. j. 1007).

(a) Goupy v. Harden, 7 Taunt. 160, 161; 2 Marsh. 454; Holt, 842, (Chit. j. 971). Evidence was given that when agents indorse fo-reign bills, for the mere purpose of transmitting them, without intending to incur responsibility for the payment, it is their practice to add to the indorsement the words " sans recours." Dallas, J. observed, "The defendants might have specially indorsed this bill sans recours, if they had thought fit so to do, but they have not done it, and therefore they are personally liable;" see also ante, 34, n. (d).

The mode of making a qualified indorsement may be thus: "I hereby indorse, assign, and transfer, my right and interest in this bill to C. D. or order, but with this express condition, that I shall not be liable to the said C. D. or any holder, for the acceptance or payment of such bill, A. B.," or the form may be as adopted in France, by the indorser writing his name, and subscribing "without recourse to me." Any person taking a bill or note, with notice of such qualification in the indorsement, must be considered as engaging not to sue the inderser, and the engagement is binding; Pike v. Street, Mood. & M. 226, (Chit. j. 1410); see ante, 193, note (u).

(b) 2 Pardess 378.

(c) Rue v. Stearns, 3 Mass. Rep. 225; Welsh v. Lendo, 7 Cranch, 159; Bayl. 95, Amer. edit.

(1) { An indorsement on the back of a promissory note, making its payment depend on a contingency, does not affect its negotiability. Its only effect subsequent holders. Tappen v. Elv, 15 Wend. 362. Its only effect is to give notice of the consideration to

A blank indorsement does not absolutely transfer the property in a note. Either indorser or indorsee may sue upon it. Or the indorser may turn it into a special indorsement and then he only can sue. Hartwell v. M'Beth, Har. Del. Rep. 363. And see Perkins v. Catlin, 11 Con.

⁽²⁾ If the holder of a bill, subject to certain duties and obligations in reference to the law of the place where the bill is drawn or is made payable, wishes to impose the same obligations upon his indorsee, it behoves him to make a special indorsement, or the indorsee will incur no other obligations than what are imposed by the law merchant of the place where the indersement is made. Aymar v. Sheldon, 12 Wend. Rep. 489.

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to be due upon the bill or note transferred (d)(1), because a personal contract I. Of the cannot be apportioned, and it would be making the acceptor liable to two Transfer of Bills and actions, when, by the contract raised by his acceptance, he intended to sub- Notes. ject himself only to one; but when a bill has been indorsed, before accept- 5thly. ance, for part of the sum for which it is drawn, it has been said that the ac- Modes of ceptor may, by his acceptance after this indorsement, become liable to two Transfer. actions(e); and when the drawer or indorser of a bill has paid part, it may Of numebe indersed over for the residue (f).

dorsements on an al-

There is no legal limit to the number of indorsements; and if there be longe. more than can be distinctly written on the back of the bill itself, a paper may [*236] be annexed, called in France an allonge, on which the latter indorsements Of adding "au bestmay be written, and which is considered part of the bill itself(g), and re-in," &c. quires no additional stamp. or " retour sans pro-tet."

It seems that an indorser like a drawer may, in order to avoid the expense and inconvenience resulting from a return of the bill, direct that the holder, in case the bill shall be dishonoured, shall apply to a named third person for payment, and which is effected by adding, immediately under the indorsement, "au besoin chez Messrs. --- (h)." But it appears, at least in the case of an inland bill, that such direction casts no obligation on the holder to present the bill to the referee in case of need(i); although we have seen

infra, note (f).
(e) Pownal Ferrand, 6 Bar. & C. 439; Beawes, pl. 286. Sed quære, see Goupy v. Harden, 7 Taunt. 160, 161; 2 Marsh. 454; Holt, 34?, S. C.; supra, note (a). In America, where a bill was first indorsed to the plaintiff as to part, and afterwards another indorsement was made to him of the residue, it was held that the two bad transfers did not make one good one; Hughes v. Kiddall, Bayl. 5th edit. 324; Bayl. 72, Amer. edit.

(f) Pownal v. Ferrand, 6 Bar. & C. 439; 9 D. & Ry. 603, (Chit. j. 1327); Johnson v. Kennion, 2 Wils. 262, (Chit. j. 371); Hawkins v. Cardy, 1 Salk. 65; Lord Raym. 360; Carth. 466; 12 Mod. 243, (Chit. j. 208); Callow v. Lawrence, 3 Maule & S. 95, (Chit. j. 911).

Hawkins v. Cardy, Lord Raym. 360. In an action upon a bill drawn by the defendant for 461. 19s. payable to Blackman or order, the declaration stated that Blackman indorsed 431. 4s. of it to the plaintiff; the defendant pleaded an insufficient plea, upon which the plaintiff demurred, but the whole court held the declaration bad, because the bill could not be indorsed for less than all the money due thereon, and the plaintiff discontinued his action; and per Gould, J. in Johnson v. Kennion, 2 Wils. 262, (Chit. j. 871). Where the drawer of a bill has paid

(d) Hawkins v: Cardy, Lord Raym. 360; part, you may indorse it over for the residue, otherwise not, because it would subject him to a variety of actions. (g) 1 Pardess. 365.

(h) 1 Pardess. 437, 438; ante, 165.

(i) Leonard v. Wilson, 2 Crom. & M. 589; 4 Tyrw. 415, S. C. In this case a bill of exchange was indorsed by the payee to the Manchester and Liverpool District Banking Company, who indorsed it, and added to their indorsement the following memorandum, "In need, S. P. and Co." After several other blank indorsements, the bill was indorsed in blank to the Bank of Liverpool, who indorsed it in blank to the plaintiff, who indorsed it specially, "Pay Messrs. Terney and Farley, or order," who indorsed it in blank by writing thereon, "Thomas Terney and Farrelly." After passing through several other hands, the bill when due was duly presented at S. A. and Co.'s, London, bankers, where it was made payable by the acceptance, and was dishonoured, the answer being "no advice." On the same day it was presented at S. P. and Co.'s, London, bankers, where it was by the said memorandum to be paid in case of need. S. P. and Co. refused to pay it, solely on the ground of the irregularity of Terney and Farley's indorsement. The custom of London bankers was admitted to be to refuse all bills, even their own acceptances, where there

⁽¹⁾ The assignment of part of a demand, due on a promissory note, gives no right of action to the assignee, as indorsee, either against the maker, or against the payee; the transfer of the note for less than the real sum appearing due, unless the residue has been extinguished, not constituting the assignee an indorsee within the law merchant. Douglass et al. v. Wilkeson, 6 Wend. Rep. 637.

An instrument for the payment of money, not payable to any particular person or to bearer, is not negotiable; and it was accordingly held that a memorandum made by a payer of a note for \$2500, on the back thereof, in these words, "Mr. Olcott, pay on within \$750," did not authorize a recovery on the money counts, by the holder against the payee. Ib.

I. Of the that as regards foreign bills such direction on the part of the drawer is com-Transfer of So he may add, "retour sans protet." The utility of adoptpulsory(j). Bills and ing these words has been already pointed out (k). Notes.

5thly. Modes of Transfer.

Delivery of Bill to Transferree.

Upon a transfer, whether by indorsement or bare delivery, the bill should, in order to prevent an extent of the crown and other difficulties that might otherwise arise, be delivered to the assignee(1); and in all cases of a transfer of a bill drawn in sets, each part should be delivered to the person in whose favour the transfer is made, for otherwise the same inconveniences may follow which we have seen may arise upon a neglect to deliver each of them to the payee (m). A delivery, however, is not essential to vest the legal right in the payee or indorsee, where there has been a complete transfer(n), and it need not be alleged in pleading; and if, after an absolute acceptance, the acceptor should improperly detain the bill in his hands, the drawer might nevertheless sue him on it, and give him notice to produce the [*237] bill, and in default of production give parol evidence of its contents(0). *But where bills are specially indorsed, the property in them does not pass before delivery (p). It is not necessary for the holder to give any notice to the acceptor of the indorsements, nor need such notice be averred in pleading(q).

Sending Bills or Notes by Post.

Where a creditor directs his debtor to remit him by post the money due to him by a bill of exchange, cash, note, &c. or where it is the usual way of paying such debt, if the bill be lost, the debtor will be discharged(r); but where the defendant, in discharge of a debt which he owed to the plaintiff, delivered a letter, containing the bills which were lost, to a bellman in the street, it was decided that he was not discharged from liability to pay the debt, because it was incumbent on him to have delivered the letter at the General Post-Office, or at least at a receiving-house appointed by that office(s). Bank-notes and others, payable on demand, should be remitted in halves by different conveyances (t), and other bills and notes should, before the first indorsement in blank, be filled up with the name of the party to whom they are sent, thus "pay E. F. for his use only."

is a lelter wrong in any indorsement. The bill was returned with due notice to the plaintiff, who gave due notice of dishonour to the Liver-pool Bank. At the Liverpool Bank the irregularity was pointed out to the plaintiff, who by their recommendation sent the bill to Terney and Farley, who lived in Ireland, to rectify the mistake, and the bill, with the proper indorsement on it, was then sent up to London, and again presented at S. P. and Co.'s, who then refused to pay it as being out of time; and it was held, that the Bank of Liverpool were liable to the plaintiff on the bill, and that the question of liability was not affected by the refusal of S. P. and Co. to pay the bill in consequence of the mis-spelling in Terney and Farley's indorsement, the holder not being bound to present the bill at that house.

(j) Ante, 165.

(k) Ante, 165. (l) The King v. Lampton, 5 Price, Rep. 130, (Chit. j. 1016).

(m) Ante, 155.

(n) But see Savage v. Aldren, 2 Stark. Rep. 236, (Chit. j. 1007).

(o) Churchill v. Gardiner, 7 T. R. 596,

(Chit. j. 605); Smith v. M'Clure, 5 East, 476; 2 Smith's Rep. 443, (Chit. j. 6:9); but see

ante, 227, note (k).

Churchill v. Gardiner, 7 T. R. 536, (Chit. j. 605). In an action by the payee of a bill against the acceptor, the declaration stated, the drawer made his certain bill of exchange, but there was no allegation that he delivered it to the plaintiff; and the defendant demurred especially for that cause; but the court was clearly of opinion that there was no foundation for the objection, the delivery of the bill to the plaintiff being sufficiently implied in the allegation, but the drawer, "made" the bill.

(p) Rex v. Lampton, 5 Price Rep. 428,

(Chit. j. 1016).
(q) Reynolds v. Davis, 1 B. & P. 625,

(Chit. j. 571).
(τ) Warwick v. Noakes, Peake Rep. 67; ante, 36, note (u).

(s) Hawkins v. Rutt, Peake Rep. 186, (Chit. . 511); and see Parker v. Gordon, 7 East, 385, (Chit. j. 727).

(t) See observations in Lane v. Cotton, I Salk. 17, and post, Sec. iii. as to the Loss of Bills, &c.

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If a party has transferred a bill without indorsing it, when it was intended that I of the he should do so, a bill may be filed in equity to compel him, and his assign- of Bills ees, if he has become bankrupt to indorse(u); and a special action on the and Notes. case might be supported against him for refusing to indorse (x); and if a transfer (x); and if a transfer (x); and if a transfer (x); and (x)has been made before, no doubt a formal indorsement may be made at any compelling time after a bill is due, even by the administrator of the party who transfer- an Indonered(y); and it should seem, that as the transfer implies an authority to do all ment. acts necessary to render it available, the party to whom the transfer has been made may sue in the name of the transferrer (z). But it seems that the promise to indorse will not enable the holder himself to make a sufficient indorsement in his name, especially if at the time of the promise the bill was not in existence, and the only remedy will be to sue him for the breach of his promise, or others in his name(a).

The cases of relief in equity have already been stated (b).

The nature of a transfer of a bill, note or check, the right which it vests in 7thly, the assignee, and the obligation which it imposes on the person making it, Rights and may, in a great measure, be collected from what has been previously said.

Liabilities of the Par-

With respect to the right of a bond fide holder for value, whether by in-Right of dorsement or delivery, he has such an interest in the bill or note that he may Indorsee. effect a policy of insurance to secure the due payment(c); and *though in [*238] this country he has no direct legal or equitable lien upon the fund deposited by the drawer with the drawee to cover the liability of the latter in respect of his acceptance, yet, on the bankruptcy of the drawer and acceptor, the arrangement of the property between the two estates may indirectly render such an equity available (d). And in a recent case (e), property so deposited was ordered to be sold for the benefit of the holder, and the holder allowed to prove for the deficiency against the estates of both drawer and acceptor; although it did not appear that the holder had any notice of the deposit. if a party take bills for the price of goods, and it he agreed that the bills are to be paid out of the proceeds, and the acceptors become bankrupt, the indorsees of the bills, without notice of the agreement, are entitled to the benefit of it(f). So if there be three partners in a particular transaction, in which one furnishes the goods and the other two accept bills for the price, and it be agreed that the bills are to be paid out of the return proceeds of the goods, and the two acceptors become bankrupt, the indorsees of the bills, with notice of the agreement, are entitled to the benefit of it, after the joint creditors, if any, of the three are paid(g). And where C., a factor, accepted bills drawn by A. and B., his principals, under an agreement that the proceeds of goods sent to him as factor should be security for payment of the

(u) Ante, 203, 204.

(Chit. j. 1097).

(z) Ante, 204, note (l).
(a) Mozon v. Pulling, 4 Campb. 51, (Chit. j. 914).

(b) Ante, 98, 189, and see post, Sec. ii. (c) Tasker v. Scott, 6 Taunt. 234; 1 Marsh.

(d) Ex parte Waring, 2 Rose, 182; 19 Ves. 345; 2 Gl. & J. 404. In France the transfering a bill is considered an appropriation of the effects in the hands of the drawee, and though

he has not accepted, yet the holder may proreed against the funds, though not on the bill, in preference of any other creditor of the drawer; 1 Pardess. 429, 442, 443, 466.

(e) Ex parte Perfect and others, 1 Mont. Rep. 25.

(f) Ex parte Prescott and others, 1 Mont. & Ayr. 816; 8 Dea. & Chitty, 218, S. C.
(g) Ex parte Copeland, 2 Mont. & Ayr.

177; 3 Des. & Chit. 199, S. C. The return proceeds are not in the reputed ownership of the bankrupts, being clothed with a trust; id. ibid.; and see Ex parts Flower, 2 Mont. & Ayr. 224; 4 Den. & Chit. 449, S. C.; 70il; Part II. Ch. VIII. Bankruptcy.

⁽x) Rose, assignees, v. Sims, 1 Bar. & Ad. 521, (Chit. j. 1510); see form of declaration; and see ante, 204, note (m).
(y) Watkins v. Maule, 2 Jac. & W. 242,

I. Of the Bills and Notes. 7thly, Liabilities

ties.

bills, and such bills were paid by A. and B. into their bankers, who knew Transfer of of the agreement, and A. and B. became bankrupt and the bills were dishonoured; it was held, that the bankers might have the proceeds of the goods applied in payment of the bills and prove for the balance remaining due Rights and against both estates(h).

The title of an indorsee is the title of all the prior parties to the bill or And the bon's fide holder may sue the acceptor and the drawer and indorser separately at the same time (j). But if the person be not what the law considers a bon's fide holder, as if at the time he received the instrument he knew that circumstances existed which rendered it improper that payment should be enforced, he will not acquire any better interest in the same than the party had who transferred it to him. Therefore a person who receives a bill, with notice that it is to be negotiated only upon certain terms, or for a particular purpose, holds the bill subject to such terms; and, consequently, where A., a creditor of B., having deeds in his possession as a security for a debt, receives a bill indorsed by B., for the purpose of getting it discounted, but neglects to do so, he cannot appropriate the bill to his own use, and maintain an action upon it against the acceptor (k)(1). So, though a bona fide holder may in general recover against an accommodation acceptor, yet

[*239] *where the creditor of the drawer who had procured such an acceptance for his accommodation, after the drawer had absconded and committed an act of bankruptcy, pursued him and obtained from him such acceptance as security for his debt, it was held that he could not retain it under such circumstances, and that the acceptor might sue him in trover(1). ed for accommodation, and left in the hands of the drawer to get discounted, and pay other bills accepted by the same person, cannot be retained by a holder, who received it with knowledge of the fact, and the acceptor may, in an action of trover, recover damages to the full amount of the sum payable by the bill, subject to be reduced to nominal damages on delivering it up(m). So where a creditor obtained a check from his debtor, and even payment thereof from the bankers, under circumstances which he knew rendered it unjust to require the bankers to pay, he was compelled to refund (n). So if

> (h) Ex parte Hobbhouse and others, 3 Mont. & Ayr. 269; 2 Den. 291, S. C. Having proved the full debt makes no difference, it must be expunged pro tanto, id. ibid.; and see Caze-nove v. Prevost, 5 Bar. & Ald. 70.

> (i) See per Parke, B., in Edwards r. Jones,2 M. & W. 414, 418.

(j) Since, however, the late rule T. T. 1 Vict. the acceptor, like the other parties to the bill, will be allowed to stay proceedings on payment of the bill and of the costs of the action against himself only. See post, Part II. Ch. III.

(k) Delaney v. Mitchell, I Stark. 439, (Chit. j. 976).

(1) Smith v. De Witts, 6 Dowl. & R. 120,

(Chit. j. 1258); ante, 204, notes (p), (q).
(m) Evans v. Kymer, 1 Bar. & Ald. 528,
(Chit. j. 1512); Treuttel v. Barrandon, 8
Taunt. 100; 1 Moore, 543, (Chit. j. 1002);
Goggerly v. Cutbbert, 2 New Rep. 176.

(n) Martin v. Morgan, 3 Moore, 635; 1 Gow, 123, (Chit. j. 1045).

(o) Pike v. Street, Mood. & M. 226, (Chit. j. 1410).

(1) A note indorsed for the accommodation of the maker, delivered to him to be used in renewal of a former note about to fall due at a bank, transferred by the maker as collateral security for the payment of another debt owing by him, cannot be enforced against the indorsee by the creditor to whom such transfer is made. Wardell and others v. Howell, 9 Wend. Rep. 170.

the indorsee of a note take it, subject to an agreement not to sue the indorser, he is precluded from so doing(o). But an agreement between the payee and

Where a note has effected the substantial purpose for which it was designed by the parties, an accommodation indorser cannot object that it was not effected in the precise manner contemplated at the time of its creation; but where a note has been diverted from its original destination, and fraudulently put into circulation by the maker or his agent, the holder cannot recover upon it against an accommodation indorser, without showing that he received it in good faith, in the ordinary course of trade, and paid for it a valuable consideration. Ibid.

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maker of a note that payment shall not be enforced except upon certain terms, I. Of the will not bind a subsequent indorsee for value, though he give but part only of Trainler of the value of the note (p). And if a bill be transmitted to a person to get $\frac{\text{Bills and}}{\text{Notes}}$. discounted, and take up another bill to which he was a party, and he do not 7thly, succeed in getting such bill discounted, but pays the other, he may retain the Rights and transmitted bill and sue the parties thereto, in order to reimburse himself the Liabilities amount of the bill which he took up(q). In a late case(r) it was held, that of the Para bill broker who receives a bill from a customer merely for the purpose of procuring it to be discounted, has no right to mix it with bills of other customers, and to pledge the whole mass as a security for an advance of monies to himself; and that still less has he a right to deposit bills which are received merely for the purpose of discount as a security or part security for money previously due from him; and that if the pledgee of bills under such circumstances receive them from the bill broker, with knowledge or reasonable ground of suspicion, he cannot hold them as against the customer.

It is, however, to be observed, that in this case there was no direct evidence of any usage or custom among bill brokers so to pledge the bills of their employers; the effect of such evidence, so far at least as regards advances actually made at the time of deposit, will appear from the following more re-

cent decisions:-

*W. and P., brokers in London, had in their possession bills of different [*240] customers to the amount of nearly 3000l. which had been left with them to They mixed these bills with others of their own to raise money upon. about nearly the same amount and deposited the whole with F. and Co., who were merchants and capitalists, for an advance of 3000l. then made and for a preceding advance made a few days before on a promise to bring bills; evidence was given that it was usual and customary for bill brokers in London to raise money by a deposit of their customers' bills in a mass, and that the bill broker alone was looked to by the customer who gave the bill broker dominion over the bill; in an action brought by F. and Co. on one of the bills against one of the customers, who was a party to the bill, the judge left it to the jury to say whether F. and Co., the plaintiffs, took the bills from W. and P., the bill brokers, with due care and caution and in the ordinary course of business, and the jury being of opinion that they had so taken the bills, found a verdict for the plaintiff; and it was held, that the defendant, the customer, could not complain of such summing up; and that the court would not disturb the verdict(s). In another action(t) arising out of the same transaction, and which was an action of trover brought by one of the customers (who was himself also a bill broker) against F. and Co. to recover the value of some of the bills, the judge directed the jury that the prin-

(p) Edwards v. Jones, 2 M. & W. 414; S. C. 5 Dowl. 585; 7 C. & P. 633. Quære, as to the legality of an agreement which substitutes a different mode of payment from that provided by the note itself; see per Parke, B. ibid.

(q) Walsh v. Tyler, Sittings at Guildhall, in K. B. coram Lord Ellenborough, after Michaelmas Term, 1817; 2 Stark. 288, (Chit. j. 1009). Declaration on a bill, dated 18th March, 1817, for 50l. payable three months after date, drawn by Shaw on the defendant Tyler, and indersed by him to the plaintiff. Defence, that Shaw, the drawer, sent the bill to the plaintiff to be discounted, and with a request to send up the amount to Shaw, in order that he might take up a bill for 771. 10s. then falling due; and that the plaintiff did not send up the money; and af-

terwards the bill for 77l. 10s. having been returned to and paid by him, proved the amount under Shaw's commission. Per Lord Ellen-borough. "This affords no defence. If the produce of the bill was to have been applied for another purpose, then the plaintiff had no right to retain the bill or sustain this nation; but the plaintiff being unable to discount the bill, and having been compelled to pay that to which he was a party, he had a right to protect himself by applying the bill in question to cover his own advance." Scarlett for the plaintiff.

(r) Haynes o. Foster, 2 Crom. & Mee. 237. (s) Foster v. Pearson, 1 C. M. & R. 849; 5 Tyr. 255, S. C.

(t) Stephens v. Foster, id. ibid.

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I. Of the Transfer of Bills of the Par-

ciple laid down in Haynes v. Foster, that a bill broker who receives a bill from a customer to get it discounted had no right to mix it with bills of other or Buis and Notes. customers, and to pledge the whole mass as a security for on advance of Rights and curity or part security for money previously due from him, was to be taken Liabilities by them as the general law has the security for money previously due from him, was to be taken labeled to be the security for money previously due from him, was to be taken labeled to be the security for money previously due from him, was to be taken labeled to be tak money to himself, and still less had he a right to deposit such bill as a selaw, the parties might contract as they thought proper; and he left it to the jury to say whether the wage set up by the defendants as to the course of dealing in such cases was established to their satisfaction, and if so, whether they thought that the plaintiff, who was a bill broker himself, had contracted with reference to that usage; and the jury having found for the defendants, the court refused to disturb the verdict. And it was held that a bill broker is not a person known to the law with certain prescribed duties, but that his employment is one which depends entirely upon the course of dealing, that his duties may vary in different parts of the country, and their extent is a question of fact to be determined by the usage and course of dealing in the particular place.

The court also seemed to consider that the old established rule of law, "that the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, can give a title which he does not himself possess to a person taking them bona fide for value," is not to be qualified by treating it as essential that the person so taking them should take them with due care and caution; but that the person taking them bond fide for value has a good title, though he take them without care or caution except so far as the want of such care and caution may affect the bona fides and honesty of the transaction. And this doctrine has since been adopted by the

Court of King's Bench(u).

[*241]

*An indorsement in blank not only authorises the person to whom the transfer is made to sue, but also enables as many persons as agree, whether partners or not, to join in an action on the instrument(v).

A transfer by indorsement vests in the indorsee a right of action against all the precedent parties whose names are on the bill; and after the bill bas been duly indorsed by the payee in blank, it is transferable by mere delivery, and the holder may sue all parties to the bill(x); but unless the payee or the drawer, when the bill is payable to his order, has first indorsed it, a party who becomes possessed of it by delivery can only sue the person from whom he obtained it, and the action must be for the original consideration and not upon the bill itself(y). And if in an action by an indorsee against the acceptor the declaration states the bill to have been indorsed by the drawer to B., the plaintiff must go on to shew an indorsement by B., and it will not be sufficient to allege that B. delivered the bill to the plaintiff(z)(1).

(u) Goodman v. Harvey, 4 Ad. & El. 870; 6 N. & M. 372, S. C. See post, Sec. iii. as to Lost Bills.

(z) Cunliffe v. Whitehead, 3 Bing. N. C. 828; 5 Scott, 81, S. C.

⁽v) Ord v. Portal, 3 Campb. 240, (Chit. j. 861); Attwood v. Rattenbury, 6 Moore, 579, (Chit. j. 1181). See post, Part II. Ch. I. By and against whom Action may be brought. See also post, Part II. Ch. V. sec. i. Evidence -Proof of Plaintiff's Interest.

⁽x) Anon. Lord Raym. 738, (Chit. j. 202); Miller v. Race, Burr. 452, (Chit. j. 346); Grant v. Vaughan, Lord Raym. 485; Burr. 1516, (Chit. j. 365); ante, 227; Peacock v. Rhodes, Dougl. 633, (Chit. j. 408).

(y) Post, 244, 246.

(z) Cunliffa v. Whitchand v. Bing N. C.

^{(1) \(\)} In an action against the maker of a note indorsed by the payee in blank, the endorsers and holders must prove the indorsement of the note to them before they can recover. Briggs 5 Briscoe, 12 Louis. Rep. 468. }

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The mere act of indorsing a bill has a peculiar effect, unlike that of any 1. Of the other transfer or instrument. In general, a party who assigns his property Transfer of Bills and Bills and in a chattel merely parts with it without any engagement that it shall turn Notes. out productive, unless accompanying the transfer there is an express war-7thly, ranty; but a mere indorsement not only passes the interest to the indersee, Rights and but also amounts to an undertaking that the bill or note shall be duly honour-Liabilities ed, and that if it is not, and the indorser has due notice of the dishonour, he of the Parwill pay the amount to the indorsee(1). The simple writing the name on Liability of the back of the bill, and handing it over to the indorsee, implies this engage- Indorser. ment, and an adequate consideration for making it, whereas a mere guarantee, that a bill or note shall be paid, would be void, unless adequate consideration be expressed on the face of the writing (a).

With respect to the *liability* of the party transferring a bill, it is said that a transfer by indorsement is equivalent in its effect to the drawing of a bill, the indorser being, in almost every respect, considered as a new drawer on the original drawee (b)(2); on which principle it is said to have been decided that a promissory note indorsed may be declared on as a bill of exchange(c); or the indorser may be described as having drawn the bill(d); and if the drawee refuse to accept, the indorser is immediately liable to be Where a bill was drawn by the plaintiffs upon F. W., and indorsed by the plaintiffs to the defendant, and re-indorsed by the defendant to the plaintiffs, to *secure the payment by F. W., it was held plaintiffs had no [*242] remedy on the bill as such, and there not appearing any consideration for the defendant's undertaking to indorse, he could not be sued thereon (f). But where the payee of a bill of exchange indorsed it specially to the plaintiffs, and immediately after the special indorsement the defendant indorsed the bill, and then the plaintiffs indorsed it; it was held that the defendant's indorsement was equivalent to a new drawing by the defendant, and that he

(a) Morley v. Boothby, 3 Bing. 107, note. (b) Smallwood v. Vernon, 1 Stra. 479, (Chit. j. 250); Hill v. Lewis, 1 Salk. 133, (Chit. j. 178); Williams v. Field, 3 Salk. 68, (Chit. j. 197); Claxton v. Swift, 2 Show. 441; S. C. id. 495, (Chit. j. 167, 162, 171); Heylyn v. Adameon, 2 Burr. 674, (Chit. j. 849); Anon. Holt, 115, (Chit. j. 197); Claxton r. Swift, Skin. 255; Anon. id. 843; Hill v. Lewis, id. 411; Luke v. Hayes, 1 Atk. 282; Haly v. Lane, 2 Atk. 182, (Chit. j. 294); Gibson v. Minet, 1 Hen. Bla. 587, (Chit. j. 479); Houle v. Baxter, 8 East, 182, (Chit. j. 664); Ballingalls v. Gloster, id. 482, (Chit. j. 673); Allen

v. Walker, 2 M. & W. 317.

(c) Brown v. Harraden, 4 T. R. 149, (Chit. 470); cites Buller v. Cripps, 6 Mod. 29, 30, (Chit. j. 222); but see Gwinnell r. Herbert, 5 Ad. & El. 436, post, 242, note (h).
(d) Brown v. Harraden, 4 T. R. 149, (Chit. j. 470).

(e) Ballingulls v. Gloster, 8 East, 481, (Chit. j. 673); Starey v. Barnes, 7 East, 488, (Chit. j. 729).

(f) Britten and Wilson v. Webb, 2 B. & . 483; \$ D. & R. 650, (Chit. j. 1198); Bishop r. Hayward, 4 T. R. 470, (Chit. j. 492); ante, 26, note (o).

The indorser of a note, under the statutes of Indiana warrants two things: 1st, That the note is valid and the maker liable to pay it; 2dly, That the maker is solvent and able to pay it. Howell v. Wilson, 2 Black. 418. The indorsee of a note obtained from the maker without consideration has a right, as soon as he discovers the imposition, to sue the indorser. Ibid. }

(2) The indorsement of a note to the maker is an extinguishment of it, and it cannot be recovered by his indorsing it to a third person or to the original payee, but such indorsement might create a new obligation in the indorser. Long v. Bank of Cinthianns, 1 Litt. 290. { Clai-

burne v. Planters Bank, 2 How. 727. }
Although a negotiable note not payable to bearer may pass by delivery, without indorsement; t, if it be indorsed, the indorser is liable as upon a new bill to bearer. Eccles v. Ballard, 2 M'Cord, 888. Brush v. Reeves' Admrs. 8 John. 489.

^{(1) \} An indorsement is in the nature of a new and distinct contract, and is an engagement to pay to whoever may by subsequent negotiation, become the holder of the bill or note, the amount secured by it. Pense v. Turner, 3 How. 375. And where one leaves with another blank endorsements of his name, without restriction as to the manner of using them, he is liable for whatever sums the notes may be drawn under such indorsements. Kimbro v. Lythe. 10 Yerg. 4 17.

Bills and Notes.

Liabilities

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I. Of the was liable to be sued upon the bill by the plaintiffs(g). But although it be Transfer of true that every indorsement of a bill is in the nature of a new drawing, it is otherwise with respect to promissory notes, and the indorser of a note cannot be sued as a new maker, because the maker of a note stands in the situation 7thly, Rights and of the acceptor of a bill, and not of drawer(h). Nor can the indorser of a note not negotiable for want of the words "or order," be sued by his immediate indorsee as upon a new contract arising out of the indorsment without a second stamp(i). In order to prevent such liability, a party may indorse a bill so as to transfer the interest therein without subjecting himself to liability, as by adding the words "sans recours," or any words in English of equivalent meaning (j).

It has been contended that an indorsemnt is equivalent to a warranty that the prior indorsement were made by persons having competent authority(k): but the court seemed to deny that doctrine(1); and though an indorsement admits all prior indorsements to have been in fact duly made(m); yet an indorser, by his indorsement, merely engages that the drawee will pay, or that he, the indorser, will, on his default, and due notice thereof, pay the same, and which is the extent and limit of his implied contract(1).

As the act of indorsing is similar to that of drawing, the obligation which it imposes on the indorser to the indorsee, and the mode in which that obli-

(g) Penny v. Innes, 1 Cro. M. & Ros. 439; 5 Tyrw. 107. No question was raised as to the consideration for the defendant's indorsement. It was held also that a fresh stamp was not necessary. But see Plimley v. Westley, 2 Scott, 423; infra, note (i), when instrument not negotiable.

In the American edition of Bayley on Bills, p. 94, (Boston, 1826), is the following note of a case which appears to be at variance with the above decision: "Where A., being in possession of a note to which he was not a party, and which had not been indorsed by the payee, indorsed it to B. for a valuable consideration, it was held that B. could maintain no action against A. without proof of some special contract between A. and B.; Birchard v. Bartlett, 14 Mass. R. 279." But see the cases cited in the American edition of Chitty on Bills, p. 109, (Philadelphia, 1826).

(h) Gwinnell v. Herbert, 5 Ad. & El. 436; 6 N. & M. 723, S. C. per Littledale, J. "It is said that in the case of a bill of exchange, overy indorser is a new drawer. But even that requires qualification. Bills are drawn according to the custom of merchants all over the world; and merchants would be much surprised at being told that an indorser might be consider-

ed a new drawer in all respects. It may be correct to say that an indorsement of a bill is in the nature of a new drawing. But, supposing the indorser of a bill to be strictly in the situation of a drawer, it does not follow that the indorser of a note is a maker. The drawer of a bill is liable only after presentment to the acceptor; but the maker of a note is in the aituation of acceptor."

(i) Plimley v. Westley, 2 Scott, 423; S. C. 2 Bing. N. C. 249; 1 Hodges, 324. Second stamp not necessary where instrument negotiable; Penny v. Innes, 1 C. M. & R. 439; supre, note (g). See post, 820, (30).

(j) Ante, 228, 235.

(k) See argument in East India Company r. Tritton, 3 Bar. & Cress. 280; 5 Dowl. & Ry. 214, (Chit. j. 1216); and the decision of Chambre, J. in Smith v. Mercer, 6 Taunt. 83; 1 Marsh. 453, (Chit. j. 923), was relied upon.

(1) Id. ibid. In 2 Pardess. 376, and Code de Commerce, No. 140, it is said, "L'Endosseut est garant solidaire avec les autres signataires, de la verité de la lettre, ainsi que du paiement a l'écheance.'

(m) Lambert v. Pack, 1 Salk. 127, (Chit.j. 211); post, Part II, Ch. V. Evidence.

An inderser of a note is only a provisional guarantee for the payment of the money. Tidd r. Campbell, 2 Brev. 21; Kilpntrick v. Henton, 3 Id. 92. But he impliedly affirms the genuineness of the instrument and of the previous endorsements, and the indorsee is not bound to prove the making of the note, and its endorsement to the defendant indorser. 'Woodward v. Harlin, l. Alab. Rep. N. S. 104.

In Louisana a person not a party putting his name on a bill or note, is presumed to have done so as surety. Lawrence v. Oakey, 14 Louis. Rep. 386. But this guaranty is considered as a direct and positive understanding and not conditional. Id. }

^{(1) {} Where A. makes a promissory note payable to B. or his order, and C. indorses it, a declaration, in such a case, in an action by a third person claiming by transfer from B., charging C. as the maker of the note, is bad. Dava v. Hall, 17 Wend. 214. But it seems that where an indorser of such a note is privy to the consideration, he may be charged directly as maker or indorser; and that a bona file holder may, in all cases, write a bill of exchange over the name of the indorser, or fill up the blank in any form consistent with the intent of the parties. Ibid.

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gation may be extinguished by the holder's laches or otherwise, is in all I. Of the cases exactly similar to that which a drawer of a *bill is under to the payee(n); Transfer of Bills and for, as observed by Lord Ellenborough, C. J., "when it is laid down that Notes. an indorser stands in all respects in the same situation as a drawer, all the consequences follow which are attached to the situation of the latter(o)." Rights and The indorser, however, is not liable in any instance to the acceptor, unless Liabilities indeed in the case of an acceptance for his honour(p), or for his accommo- of the Pardation; nor when he has indorsed on behalf of a firm, though in his own results. name, is he liable to be sued by any partner (q). Neither, since the Stamp Acts, can the indorser of a bill not negotiable be charged as drawer without a second stamp(r). We have seen, that if an agent indorse in his own name, without qualifying his indorsement, he may at law be personally liable even to his principal(s). But the mere circumstance of the holder writing over a blank indorsement to him a direction, ordering the money to be paid to a particular person without adding his own name, does not render him an indorser, or liable as such(t).

An indorsement of a bill once complete, by delivery over to the indorsee Revocation for value, is not revocable without his consent (u)(1); and although by mistake fer, &c. an indorsement has been erased by a third person the indorser will continue when. liable(x); and where the agent of a person, whose name was forged as an indorser, paid the bill for his honour, and cancelled the subsequent indorsers' names, it was held, in an action by such agent against the person to recover back the money, that such cancellation did not discharge the indorsers, and that the person so sued might nevertheless sue them, so that the cancellation had not predjudiced his security on the bill(y). But an indorsement, like an acceptance, may, before it has been delivered over to a bona fide holder, be revoked(z). If the indorsee assent to the erasure, care must be observed not to injure the security by any suspicious appearance(a); and where there has been an erasure of an indorsement, especially upon a bill or note payable on demand, a party who takes it should previously inquire into the circumstance(b). But an indorser who has merely transferred the instrument to an agent to receive the amount, or to a person for a particular purpose, without vesting in him any beneficial interest, may always countermand the authority, and after notice thereof, the drawer should not pay the indorsee, but should require an indemnity from the indorser, and at all events defend at law or file a bill of interpleader; or move the Court, under 1 & 2 Will. 4, c. 58, s. 1.

(n) Lambert v. Oakes, Holt, 117, (Chit. j. 211); and see 1 Pardessus, 461, 462. But it is said there is this difference, that an indorser is considered as a new drawer at the place where he indorsed, and not where the drawer drew the bill, and he is liable to re-exchange accordingly; 1 Pardessus, 461, 462.

(o) Ballingalls v. Gloster, 3 East, 483, (Chit. j. 673); Starey v. Barnes, 7 East, 435, (Chit.

(p) Poth. pl. 111, 112. (q) Teague v. Hubbard, 8 Bar. & C. 345;

 Man. & Ry. 369, (Chit. j. 1396); ante, 60.
 (r) Plimley v. Westley, 2 Scott, 428; ante, 242, note (i); and see ante, 196, 197, note (o); though such stamp is unnecessary when the bill is negotiable; Penny v. Innes, 1 C., M. & R. 439; ante, 242, note (g).

(*) Ante, 83, 34; but equity will in some

cases relieve; Kidson v. Dilworth, 5 Price, 564, (Chit. j. 1026); ante, 85, note (i). (t) Vincent v. Horloch, 1 Campb. 442,

(Chit. j. 757); ante, 230, note (y).
(u) 1 Pardess. 372, 373; 2 Pardess. Lettre

de Change, 373.

(x) Wilkinson v. Johnson, 5 Dowl. & R. 403, and 3 Bar. & C. 423, (Chit. j. 1231); Cox v. Troy, 5 Bar. & Al. 474; 1 Dowl. & R.

88, (Chit. j. 1129); 1 Pardess. 373.
(y) Wilkinson v. Johnson, 5 Dowl. & R.
403; 8 Bar. & C. 428, (Chit. j. 1281).
(z) Cox v. Troy, 5 Bar. & Al. 474; 1 Dow.

& Ry. 88, (Chit. j. 1129); and see 2 Pardess.

(a) 1 Pardess. 878.

(b) Gascoigne v. Smith, M'Clel. & Y. 338, (Chit. j. 1256).

J. Of the Bills and Notes.

rer by Delivery.

*It has been said that a transfer by mere delivery, without any indorsement, Transfer of when made on account of a pre-existing debt, or for a valuable consideration passing to the assignor at the time of the assignment (and not merely by way of sale or exchange of paper) (c), as where goods are sold to him(d), impos-7thly, Rights and es an obligation on the person making it to the immediate person in whose Liabilities favour it is made, equivalent to that of a transfer by formal indorsement(e). of the Par- But this expression seems incorrect, for the party transferring only by delivery can never be sued upon the instrument, either as if he were an in-Liability of dorser, or as having guaranteed its payment, unless he expressly did so. The expression should be, "that if the instrument should be dishonoured the transferrer in such case is liable to pay the debt in respect of which he transferred it, provided it has been presented for payment in due time, and that due notice be given to him of the dishonour (f)." A distinction was once taken between the transfer of a bill or check for a precedent debt, and for a debt arising at the time of the transfer; and it was held, that if A. bought goods of B., and at the same time gave him a draft on a banker, which B. took without any objection, it would amount to payment by A., and B. could not resort to him in the event of the failure of the banker(g)(1). But it is now settled, that in such case, unless it was expressly agreed at the time of the transfer, that the assignee should take the instrument assigned as payment, and run the risk of its being paid, he may, in case of default of payment by the drawee, maintain an action against the assignor on the consideration of the transfer(h). And where a debtor, in payment of goods, gives an order to pay the bearer the amount in bills on London, and the party takes bills for the amount, he will not, unless guilty of laches, discharge the original [*245] debtor(i). And where a person obtains money or *goods on a bank note,

(c) Hornblower v. Proud, 2 B. & Al. 327.

(Chit, j. 1049).

(d) Owenson v. Morse, 7 T. R. 64; Ward v. Evans, Lord Raym. 928, (Chit. j. 216); Lambert v. Oakes, 12 Mod. 244, (Chit. j. 211); Anon. id. 409, (Chit. j. 215); Puckford v. Maxwell, 6 T. R. 52, (Chit. j. 531).

(e) Ward v. Evans, Lord Raym. 929, (Chit. 216); Anon. 12 Mod. 408, (Chit. j. 215); Ward v. Sir Peter Evans, id. 521, (Chit. j. 216); Moor v. Warren, and Holme v. Barry, 1 Stra. 415, (Chit. j. 249); Turner v. Mead, id. 416, (Chit. j. 248); accord.; Anon. 12 Mod. 511, (Chit. j. 216); semble, contra.

(f) Camidge v. Allenby, 6 Bar. & C. 373; 9 D. & R. 391, (Chit. j. 1319).

(g) Clerk v. Mundall, 12 Mod. 203; 1 Salk. 124; 3 Salk. 69, (Chit. j. 181, 200); Anon. id. 408; Anon. id. 517; Anon. Holt, 298, 299, (Chit. j. 214); post; Vin. Abr. tit. Payment, A.; Cooke's Bank. Law, 178; Tassell v. Lewis, 1 Ld. Raym. 748; but see Hepkins v. Grey, 7 Mod. 189. In Camidge v. Allemby, 6 Bar. & Cress. 373; 9 Dow. & R. 891, (Chit. j. 1819); Bayley, J. seems to have recognised this distinction, and stated, "that if the country bank notes had been taken at the time of sale as money, the party delivering them would not be kin-ble if they were dishonoured." Altter if taken afterwards.

(h) Owenson v. Morse, 7 T. R. 65, 66.

Popley v. Ashley, Holt, 122, (Chit. j. 225); 2 B. & P. 518; and see Ex parte Blackburne, 10 Ves. 204, (Chit. j. 706); infra, note (i); ante, 178 to 180.

(i) Ex parte Dickson, cited in 6 T. R. 142, 143, and ante, 178 to 180; Ex parte Blackbarne, 10 Ves. 204, (Chit. j. 706); 1 Mont. 142, 149, 150, acc.; Vernon v. Bouverie, 2 Show. 296, (Ch. j. 166); Bolton v. Reichard, 1 Esp. Rep.

106, (Chit. j. 522), contra. Owenson v. Morse, 7 T. R. 64. The plaintiff bought some plate of the defendant, and gave him some country bank-notes in payment; the netes were dishonoured, on which the defendant refused to deliver the plate. The plaintiff brought trover and insisted that the notes were payment, but on a case reserved, the court held that they were no payment, unless the defendand had agreed to take them as payment, and run the risk of their being paid. Nonsuit en-tered. See also Tapley v. Martens, 8 T. R. 491, (Chit. j. 625).

Blackburne, Ex parte, 10 Ves. 204, (Chit.) 706). Goods sold to be paid for by bills at three months. The drawers and acceptors becoming bankrupts before the bills were due, the venders having received dividends under their commissions, were entitled to prove under a commission against the vendees, who had not inderest the hills, the deficiency as a debt: till that shall be ascertained a claim and dividend reserved for

⁽¹⁾ Receiving the transfer of a note as collateral security for the payment of a pre-existing debt, is not taking it in the ordinary course of trades, and for a valuable consideration, as between the creditor and an accommodation indorser. Wardell v. Howell, 9 Wend. 170.

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navy bill, or other bill or note on getting it discounted, although without in- I. Of the dorsing it, and it turns out to be forged, he is liable to refund the money to Transfer of the party from whom he received it, on the ground that there is in general Notes. an implied warranty that the instrument is genuine (k)(1); although there is

7thly.

the whole. The Lord Chancellor said, "I take it to be now clearly settled, that if there is an antecedent debt, and a bill is taken without taking an indorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to. It has been held, that if there is no antecedent debt, and A. carries a bill to B. to be discounted, and B. does not take A.'s name upon the bill, if it is dishonoured there is no demand, for there was no relation between the parties except that transaction, and the circumstance of not taking the name upon the bill is evidence of a purchase of the bill. In a sale of goods the law implies a contract that those goods shall be paid for. It is competent to the party to agree that the payment shall be by a particular bill. In this instance it would be extremely difficult to persuade a jury, under the direction of a judge, to say an agreement to pay by bills was satisfied by giving bills whether good or bad. The bills were only a mode of paying the debt of 8000l. If they are not paid, the original debt, arising out of the contract for goods sold and delivered, remains. It is clear, the creditor still holding the bills, cannot resort to that original contract. In general cases, where the bill is not paid, if there is no bankruptcy, the creditor must come immediately upon the bill dishonoured, saying, he cannot procure payment, and desiring to have payment, and then he might maintain an action for goods sold and delivered. There may be cases in which he may have received part of the money without involving the difficulty from giving time as to the rest of it; as it part was paid before it was due; in that case, if no time was given for payment of the residue, an action for goods sold and delivered would lie for the residue.'

(k) Jones v. Ryde, 1 Marsh. 157, 159; 5 Taunt. 489, (Chit j. 906); Brace v. Bruce, 1 Marsh. 165; 5 Taunt. 495, (Chit. j. 908); Bayl. 5th edit. 170; per Littledale, J. in Camidge v. Allenby, 6 B. & C. 373, 385. See

post, Ch IX. s. ii. Payment by Mistake.
Jones v. Ryde. Assumpsit for 1000l. for money had and received; at the trial the plaintiffs had a verdict, subject to the opinion of the court on the following case: The defendants, bill brokers, were possessed of a navy bill, purporting to be for 1884l. 16s. 10d. which the plaintiffs, also bill brokers, discounted for them at their request. The plaintiffs afterwards discounted it with Mr. Williams, who presented it for payment. The date and sum in the bill had been altered since it was issued, and before it came to the hands of the defendants, the bill being originally issued for 8841. 16s. 10d. only. Williams received 8841, 16s, 10d, from the transport-office, and the plaintiffs repaid him the 1000%, and brought the present action. The court held, that the plaintiffs were entitled to

recover, and although the defendants could not Liabilities be sued as indorsers (the instrument being of the Partransferable by delivery) they were not released from the responsibility they incurred by passing an instrument which purported to be of greater value than it really was. And per Gibbs, C. J. "The ground of resisting this claim is, that it was a negotiable security without indorsement; and that when the holder of a negotiable security passes it away without indorsing it, he means not to be responsible upon it. This doctrine was fully discussed in the case of Fenn v. Harrison, 3 T. R. 757, (Chit. j. 463, 467); and the proposition is true, but only to a certain extent. If a mon pass an instrument of this kind without indorsing it, he cannot be sued as indorser but he is not released from the responsibility which he incurs by passing an instrument which purports to be of greater value than it really is. This question must often have occurred in the case of bank notes: I believe it is not disputed, but that if a man take a forged note, he is entitled to recover the amount of it from the person of whom he received it; and I cannot distinguish this from the case of a promissory note; for though one should not be answerable on the note as party to it, one should be liable for the money which had been paid on the supposition of its being worth so much." Mr. Justice Chambre, "There can be no doubt in this case: the general principle is perfectly clear, that where money has been paid without n consideration, it is to be recovered back. It would be very mischievous if the doctrine contended for by the defendants could be supported, as it would very materially affect the credit of these instruments. The person who takes them gives credit to the person who passes them to him for the amount, and if they fail, the money must be refunded. In this case, the plaintiffs, or at least Williams, who stood in their place, have done nothing but what was for the advantage of the defendants.

In Bruce v. Frace, 1 Marsh. 165; 5 Taunt. 495, (Chit. j. 908), the same doctrine was established with reference to a victualling bill.

In Fuller v. Smith, Ry. & Moody, 49; 1 C. & P. 197, (Chit. j 1205); where the plaintiffs, bankers, discounted for the defendants, bill brokers, a bill of exchange, which the latter did not indorse, and the signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged; it was held that the defendants were liable to refund the money, and that the fact of their having paid over the amount to the indorace, for whom they were brokers, would not relieve them from their liability.

But see the cases as to recovering back money paid, post, Ch. IX. s. ii. Of Payment by Mistake.

⁽¹⁾ The indorser of a bill is not untitled to relief, on the ground of error or fraud, because the previous indorsement is a forgery committed by the drawer, unless he shows that such error was

Bille and Notes.

no guarantee implied by law in the party passing a note payable on demand Transfer of to bearer, that the maker of the note is solvent at the time when it is so passed(l). And though a party do not indorse a bill or note, yet he may, by a collateral guarantee or undertaking, become personally liable(m).

7thly. Rights and Liabilities ties.

*But, as on a transfer by mere delivery, the assignor's name is not on the instrument, there is no privity of contract between him and any assignee, beof the Par- coming such after the assignment by himself, and consequently no person but his immediate assignee can maintain an action against him, and that only on the original consideration, and not on the bill itself(n). And if only one of several partners indorse his name on a bill, and get it discounted with a banker, the latter cannot sue the firm, though the proceeds of the bill were carried to the partnership account(o).

When a transfer by mere delivery, without indorsement, is made merely by way of sale of the bill or note, as sometimes occurs(p); or exchange of it for other bills(q); or by way of discount, and not as a security for money lent(r); or where the assignee expressly agrees to take it in payment, and

(1) Pcr Littledale, J. in Camidge v. Allenby, 6 B. & C. 373, 385.

(m) Post, 248.

(n) Ward v. Evans, Ld. Raym. 928, (Chit. 216, 218). In the matter of Barrington, 2 Sch. & Lef. 112.

In the matter of Barrington and Burton, bankrupts, 2 Sch. & Lef. Rep. 112, (Chit. j. 697). B. hands over a negotiable note for valunble consideration to G., not indorsing it, but giving a written acknowledgment on a separate paper to be accountable for the note to G. G. indorses the note, which, together with the written acknowledgment, comes into the hands of M. for valuable consideration, and B. and the several parties to the note become bankrupts; M. cannot prove the note against the estate of B. the written acknowledgment not being assignable: but is entitled to have the amount made an item in the account between B. and G. and to stand in the place of the latter. The Lord Chancellor: "This undertaking, though for valuable consideration, was not assignable with the note, nor can it give the holder of the note, to whom it was transferred, a right to prove under it against the estate of Barrington and Burton; the note does not make them debtors; they are indeed chargeable, on the ground of their undertaking in account with Gray and Son; but you can make yourselves creditors to the bankrupt's estate only by your equitable right to stand in the place of Gray and Son. To this end an account must first of all be taken, to see whether the bankrupt's estate is debtor to Gray and Son; and the most proper course would have been to petition that the assignees of Grav and Son might prove for your benefit on the estate of Parrington and Burton; if there

shall appear to be a sufficient balance due by them to Gray and Son, you will be entitled to be paid 3001, out of that balance; but this undertaking does not make you creditors on the estate of Barrington and Burton. It only gives you a right to have it made an item in the account between them and Gray and Son."

(o) Emly v. Lye, 15 East, 7, (Chit. j. 849); ante, 58, 59; infra, note (s).

(p) Fenn v. Harrison, 3 T. R. 767, (Chit. j. 463, 467); Fydell v. Clark, 1 Esp. Rep. 447, (Chit. j. 561); Bank of England r. Newman, 1 Lord Raym. 422, (Chit. j. 207); 12 Mod. 224; and Comyns, 57; S. C., 1 Mont. 142. 149, 150; Ex parte Suttleworth, 8 Ves. 368, (Chit. j. 583); Cullen, 100, 101.

(q) Hornblower v. Proud, 2 B. & Al. 327, (Chit. j. 1049); Fydell v. Clark, 1 Esp. Rep. 447, (Chit. j. 561).

(r) Fenn r. Harrison, 3 T. R. 759; Ex parte Shuttleworth, 3 Ves. 368; Fydell r. Clark and another, 1 Esp. Rep. 447; and see Lord Raym. 442; 15 East, 12; 10 Ves. 206; Ex parte Isbester, 1 Rose, 23; Bayl. 5th edit. 368, 369.

In Fenn r. Harrison, 3 T R. 759, (Chit. j. 463, 467), Lord Kenyon said, "It is extremely clear, that if the holder of a bill send it to market without indorsing his name upon it, neither morality, nor the laws of this country, will compel him to refund the money for which he sold it, he did not know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counter into circulation to impose upon the world, instead of the current coin. In this case, if the defendant had known the bill to be bad, there is no doubt that he would have been obliged to refund the money."

caused by the plaintiff, or that he participated in the fraud. Olivier v. Audry, 7 Louis. Rep.

Whether the indersement of a note was made for the accommodation of the drawer, or taken in the regular course of business, the holder can look to his immediate indorser, even if the in-dorsement preceding it is a forgery. Ibid.

it was an accommodation indorsement, and the prior indorsement forged. And this is upon the principle that the last indorsement is a guaranty of all preceding indorsements. Harris v. Bradley, 7 Yerg. 319.

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to run all risks(s); he has in general no right *of action whatever against the I. Of the assignor, in case the bill turns out to be of no value. But there can be no Transfer of doubt that if a man assign a bill for any sufficient consideration, knowing it to be of no value, and the assignee be not aware of the fact, the former would, in all cases, be compellable to repay the money he had received(t). And Rights and it should seem, that if, on discounting a bill or note, the promissory note of Liabilities country bankers be delivered after they have stopped payment, but unknown of the Parto the parties, the person taking the same, unless guilty of laches, might recover the amount from the discounter, because it must be implied, that at the time of the transfer the notes were capable of being received if duly presented for payment(u)(1).

The obligation of the assignor, though in general *irrevocable*, may, however, be discharged or released by the act of the holder, in the same manner as the obligation of the drawer(s); it may also be discharged by payment of the bill by any prior party (y)(2). But the taking another party in execution will only operate as a payment by such party and will not operate

in favour of any other (2)(3).

Ex parte Shuttleworth, 3 Ves. 368, (Chit. j. 593). Newton gave the bankrupt before his bankruptcy cash for a bill, on discounting the same, but refused to allow the bankrupt to indorse it, thinking the bill better without his name. He had proved the amount under the commission, and on a petition to have the proof expunged, the Chancellor granted the petition, observing, that this was a sale of the bill. The same doctrine was entertained in Ex parte Blackburne, 10 Ves. 206; anle, 214, note (i); and see Ex parte Roberts, 2 Cox, 171.

Fydell v. Clark and another, 1 Esp. Rep. 447, (Chit. j. 561). Where bankers, in discounting a bill, give their customers bills or notes without indorsing them, which turn out to be bad, the bankers are not liable. S. P. Bank of England v. Newman, 1 Ld. Raym. 442, (Chit. j. 207); Emly v. Lye, 15 East, 7, 12, (Chit. j. 849).

(1) Owenson v. Morse, 7 T. R. 65, 66; ante, 244, note (1). Cooke's Bank Law, 120; Exparte Shuttleworth, 3 Ves. 368, (Chit. j. 583); Exparte Blackburne, 10 Ves. 206; Emly v. Lye, 15 East, 13: 1 Mont. 142, 149, 150.

Lye, 15 East, 13; 1 Mont. 142, 149, 150.
Emly v. Lye, 15 East, 13, (Chit. j. 849).
Per Bayley, J. "If a person buy goods of another, who agrees to receive a certain bill in

payment, the buyer's name not being on it, and that bill be afterwards dishonoured, the person who took it cannot recover the price of his goods from the buyer, for the bill is considered as a satisfaction. It has been so held, and I can see no difference where money, instead of goods, is given for the bill;" and per Kenyon, C. J. in Owenson v. Morse, 7 T. R. 66. See

the cases, ante, 244, 245, 246, in notes.
(1) Anon. 12 Mod. 517, (Chit. j. 216); Fenn v. Harrison, 3 T. R. 759, (Chit. j. 463, 467); Popely v. Ashley, Holt, 121, (Chit. j. 225); Bayl. 5th edit.

(u) Sed quære; see Camidge v. Allenby, 6 B. & C. 373; 9 Dow. & Ry. 391, (Chit. j. 1319); post, Ch. IX. s. i. Of Presentment for Payment.

(x) Synderbottom v. Smith, Stra. 649, (Chit. j. 263); Gee v. Brown, Stra. 792, (Chit. j. 267); ante, 194.

(y) Hull v. Pitfield, 1 Wils. 46, (Chit. j. 306).

(z) Hayling v. Mulhall, 2 Bla, Rep. 1235, (Chit. j. 400); Macdonald v. Bovington, 4 T. R. 925, (Chit. j. 497); Claxton v. Swift, 2 Show. 481, (Chit. j. 167); post, Ch. IX. s. ii. Payment. See post, S20, (31).

(2) Where a negotiable promissory note, signed by one person as principal, and others as sureties, is paid by the principal after it is due, no action can be maintained on it by any person against the sureties. Merrimac Bank v. Parker, 7 Pick. Rep. 88.

Where a surety in a joint note, paid it, but took no assignment from the creditor, of a judgment previously obtained upon it, against the principal debtor, held that the payment satisfied the judgment. Sherwood upon the relation of the State Bank v. Collier, 3 Devereux's R. 380.

(3) If the indorsee after taking the maker in execution, take of him a bond or warrant of attorney to confess judgment, in satisfaction of the execution, this discharges all the other parties. M'Fadden v. Parker, 4 Dall. Rep. 275.

The discharge of one joint promissor under an insolvent act will not operate as a release of the other. Tooke v. Bennett, 3 Caines' Rep. 1.

The holder's proceedings under a commission of bankruptcy against the acceptor of a bill, will

⁽¹⁾ Where bank bills are received in payment, and at the time of such payment the bank which issued the bills has in fact stopped payment, although the failure is not at the time known at the place of payment, the loss falls upon the party paying, and not upon the party receiving the bills. Lightbody v. Ontario Bank, 11 Wend Rep. 9. { Hawley v. Thornton, 2 Hill, 509 S. P. Contra, Scroggs v. Goss, 8 Yerg. 175. }

If a party indorse a bill for the accommodation of the drawer, which is I. Of the Transfer of also accepted by a third person for the like accommodation, such indorser Bills and Notes.

not discharge the responsibility of the antecedent parties. Kenworthy v. Hopkins, 1 Johns. 7thly. Rights and Cas. 107.

Liabilities

Indemnity

of an Ac-

er, &c.

A suit may lie by an indorser against his indorsee upon a special guaranty. 4 Yeates' Rep. of the Par- 436. If the holder of a note, knowing that it was made and discounted for the accommodation of ties. the indorser, give time to the indorser, without consulting the drawer, the latter will not thereby

be discharged. Walter r. Bank of Montgomery County, 12 Serg. and R. 382. So, an agreement by the holder of a bill with the drawer for delay, without any consideration, commodaand without any communication with, or assent of the indorser, will not discharge the latter,

tion Indors- after due notice of dishonor. M'Lemere r. Powell, 12 Wheat. 554, 556. Quere, whether the indorser has a right to require the holder to compel payment of a bill by suits against the principal. Id. See infra.

The drawer of a check is not surety for the payee, though it be drawn for the accommodation of the latter. Therefore, if a subsequent holder give time to the payee, he being bound to pay the holder, this will not discharge the drawer, even though such holder know that the check was made for the payee's accommodation. Murray v. Judah, 6 Cowen, 484.

So, a receipt of part of a bill, after a regular demand and protest for non-payment, though without the knowledge or consent of the drawer, will not discharge him for the balance appaid. Motte r. Kennedy, 3 M'Cord, 13.

Although the holder of a promissory note, upon the request of the surety, neglects to sue the principal, the surety is not thereby discharged. Fry c. Baker, 4 Pick. 382. { Beardsley c. Warner, 6 Wend. 616. Hogaboom c. Herrick, 4 Verm. 131. }

If an indorsee give time of payment, the indorser is discharged. Whittelsey et al. v. Dean, 2

Aiken's Rep. 263

If the holder of a note take collateral security, the indorser is not thereby discharged, unless the right of action on the note be suspended by such act of the holder. Moar r. Wright, I Vermont Rep. 57.

Where the payees of a promissory note, without the request of the surety, commenced a suit thereon, and attached the property of the principal, and afterwards, by an arrangement made with the principal, dissolved the attachment and discontinued the suit, it was held, in an action brought against the surety on said note, that he was not released from his liability thereon. Montpelier Bank r. Dixon, 4 Vermont Rep. 587.

An agreement without consideration by a creditor with the principal debtor, changing the time of payment of a note, does not discharge the surely to such note. Olcott v. Rathbone, 5 Wend.

Rep. 490.

 Λ_n agreement for delay, without consideration, made between the principal debtor and his creditor, will not discharge a surety. An agreement to have that effect must be a binding agreement, or one to the prejudice of the surety. Hall and Montross v. Constant, 2 Hall's Rep. 185. Planter's Bank v. Sellman, 2 Gill & John 230. }

Where the holder of a note appears at the concurso of the maker's creditors, and votes that property which is mortgaged to secure the payment of the note shall be sold on time, the inderer is discharged. Lobdell r. Niphler, 4 Miller's Louisiana Rep. 294.

An indorser is not discharged by the acceptance by the holder of a note, of a bond and warrant of attorney from the maker, for the purpose of entering judgment thereon, and increasing his security; the bond and warrant in such case, are considered as collateral security. The Mohawk Bank v. Van Horne, 7 Wend. Rep. 117.

If a note payable in specific articles be assigned as collateral security to a bond, and the saignce make a new contract with the maker, the note becomes his own, and all parties to the bond

are discharged. Erwin v. Cooke, 2 Devereux's Rep. 183.

A creditor who, on receiving a new note surrenders the first, novates his debt, the surelies he had for the payment of the first are discharged, and the accommodation indorser must be so, if his name be not on the note taken to renew the former. Morgan et al. v. Their Creditors, I Miller's Louisiana Rep. 527.

If a creditor gives a receipt for a draft in payment of his account, the debt is novated. Hunt

r. Boyd, 2 Miller's Louisiana Rep. 109.

The debt is not novated when the vendor consents that the person proposed as indorser may, if he choose, pay the price in cash. Lalawrie v. Cahallen, 2 Miller's Louis. Rep. 401.

Where three individuals are bound in solido for the whole amount of a note, if the holder accept a less sum from two of the drawers, who are released from responsibility, the indorser is discharged. Abat v. Holmes, 8 Id. 351.

A See also Bradford v. Hubbard, 8 Pick. 155; Oxford Bank v. Lewis, Idem, 458; Gloucester Bank v. Worcester, 10 Pick. 528; Parsons v. Same, Idem, 533; Planter's Bank v. Sellman, 2 Gill & John. 230; State Bank v. Wilson, 1 Dev. 484; Bush v. Critchfield, 5 Ham. 113; Brown Williams, 4 Wend. 360; Southwick v. Sox, 9 Wend. 122; Keeler v. Bartine, 12 Idem, 110; Bank of the United States v. Hatch, 6 Peters' 250.

If the holder of a note takes a higher security from the drawer, it discharges the endorser, though time be not given. Bank of Wilmington v. Simmons, 1 Har. Del. Rep. 331. Indulgence

may, after he has been compelled to pay the bill, support an action thereon I. Of the against the acceptor, or may prove under his commission, in case of his Transfer of bankruptey (a) (1) And such an accommodation independ in case of his Bills and bankruptcy(a)(1). And such an accommodation indorser, in case there be Notes. reasonable ground to apprehend the insolvency of his principal, has an equit-7thly. able right to withhold the payment of any money which he may owe to him, Rights and until he has been indemnified against any liability on account of his indorse-Liabilities ment, though such liability would be no defence at law to an action by the of the Parties. principal(b). If the indorser of a dishonoured bill promise the indorsee that if he will sue the acceptor, he, the indorser, will pay the law-expenses, to entitle the indorsee to recover on this promise, the amount of his attorney's bill on suing the acceptor, it is not necessary for him to prove that he paid the attorney, his liability to do so being sufficient(c).

*Where the defendant drew upon his brother, C. L. H., certain bills of [*248] exchange, and indorsed them to the plaintiffs, as security for advances made and to be made by them to C. L. H.; and as a further security, C. L. H., by a deed, to which the plaintiffs and defendants respectively were parties, assigned to one B. the lease of his house and the fixtures, furniture and effects therein, in trust that at the request of the plaintiffs, B. should sell the same, and apply the proceeds in discharge of the debts then due or thereafter to become due to the plaintiffs; and the deed also contained a proviso that the premises should be sold or offered for sale, and the proceeds if sold applied in the manner specified in the deed before any proceedings should be commenced against the defendant upon the bills; and the trustee (with the knowledge and assent of the defendant) never took possession, but C. L. H. remained on the premises; and the goods of C. L. H. were afterwards sold by the assignees appointed under a commission sued out against him; it was held, that the proviso was no bar to the plaintiff's right of action upon the bills(d).

(a) Houle r. Baxter, 3 East, 177, (Chit. j. 664). Defendant ordered goods of Capper, and to obtain these materials accepted a bill, drawn on him by Capper; and to increase the credit of the bill, Cupper prevailed on the plaintiff to lend his indorsement. Capper indorsed the bill to Abad, who supplied the silver of which the goods were made, and delivered it to the defendant. Before the bill became due, the defendant became a bankrupt, and obtained his certificate. Plaintiff took up the bill and brought this action, and upon the trial the plaintiff had a verdict, subject to the opinion of the court; and the court held that the bankruptcy of the defendant was a bar to the action, because the plaintiff might have proved under the commission. In Brown and others r. Massey, 15 East, 220, (Chit. j. 852), it appears to have

7'

been questioned whether an accommodation indorser could sue an accommodation acceptor. if at the time he so indorsed he knew that the

acceptor had received no value. And see Wiffen v. Roberts, 1 Esp. R. 261, (Chit. j. 536).

(b) Wilkins v. Casey, 7 T. R. 711, as observed upon by Lord Ellenborough, C. J. in Willis r. Freeman, 12 East, 659, (Chit. j. 802); Ex parte Metcalfe, 11 Vez. 407, (Chit. j. 719); Madden v. Kemster, 1 Campb. 12, (Chit. j. 739); See Stonehouse v. Read, 5 D. & R. 603; 3 Bar. & Cres. 669, (Chit. j. 1242); post, Ch. VII. s. iii. Indemnity to Acceptor.

(c) Bullock v. Lloyd, 2 Car. & P. 119,

(Chit. j. 1274).
(d) Lancuster v. Harrison, 4 Moore & P. 561; 6 Bing. 726, S. C.

to the maker on receiving securities from him, does not discharge the endorser, where there is no valid agreement for giving time of payment for a definite period. Bank of Utica v. Ives, 17 Wend. 501. Or where there is no evidence of the maker's acceptance of such indulgence. Hefford v. Morton, 11 Louis. 115. And see the following cases on this subject; Freeman's Bank v. Rollins, 1 Shep. Maine Rep. 202; Bank of S. Carolina r. Myers, 1 Bai. 412; Perry v. Corneal, Wright, 197; Westcott v. Price, Idem, 220; Wakefield v. Limbert, R. M. Charlton's Rep. 13; Commercial Bank r. Hughes, 17 Wend. 94; Nicherson v. Revell, 6 Nev. & M. 192; S. C. 4 Adol. & El. 675. Receiving part payment for the acceptor or maker and neglecting to give notice to the indorser, will discharge him. Kilpatrick v. Heaton, 2 Brev. 21; 3 Brev. 93, S. P. }

(1) { The indorser of an accommodation note is to be considered in the light of a surety, and when sued may produce the original contract on which the note was given, to show that it was stipulated the note should not be negotiated. Louisiana State Bank v. Senecal, 11 Curry, 29. }

I. Of the Transfer of Bills and Notes. Sthly, Of Collateral Guaran-

tees that a

Note shall

be paid.

Bill or

Sometimes on the transfer of bills or notes, a party may object to indorse, but yet will collaterally guarantee the payment. In France, when a money changer or commercial agent sells a bill to a banker or merchant, he puts his name upon the bill, and thereby warrants the payment, or in case of a note, he guarantees on a separate paper called a val, that the note is Where the party is benefitted by the transfer, it should seem that even his verbal promise would be valid, but when the engagement would be collateral, and within the meaning of the statute against frauds, as an agreement to answer for the debt, default, or miscarriage of a third person, it must be in writing, and either expressly or impliedly state on the face of it an adequate consideration; (1) and it has been decided, that a written engagement that a bill, note or check shall be paid, will not be valid unless according to the requisites of the statute against frauds, it sufficiently, on the face of it, shows that there was an adequate consideration for giving it(f); therefore, an undertaking in these words, "Messrs. Morley & Co. we hereby promise that your draft on Wm. Clark, Son & Co. due at Messis. Mastermans' at six months, on the 27th Nov. next, shall be then paid out of money to be received from St. Phillip's Church, say amount, 1741. 13e. 5d.

Wm. Clark, Wm. Boothby, 26 May, 1824," is void under the statute, no consideration appearing for Boothby's promise (f).

The following memorandum is also void:—" Inclosed I forward you the bills drawn per J. A. upon and accepted by L. D. which I doubt not will meet due honour, but in default thereof I will see the same paid. B. J. [*249] A.(g)." But where an agent remitted bills in payment of his principal's

(e) See De la Chaumette v. Bank of England, 9 B. & C. 210; Dans. & L. 319; 2 Bar.

& Ald. 385, (Chit. j. 1419, 1542).

(f) Morley v. Boothby, 3 Bing. 107; 10

Moore, 395; 3 Law J. 177, C. P., S. C.; see also Phillips v. Bateman, 16 East, 356. See post, 820, (32).

(g) Hawes v. Armstrong, 1 Bing. N. C. 761; 1 Scott, 661; 1 Hodges, 179, S. C. Tindal, C. J. "The consideration is thus

stated in the present case:—that the plaintiffs, at the request of the defendant, would give time for the payment of the debt of 2601, then due from John Thomas Armstrong and Dell, and would take, accept and receive, by way of security for the payment of the same, the several bills of exchange set out in the declaration, and would forbear and give time to the said John Thomas Armstrong and Dell for payment of the said debt or sum of 260%, until the said bills should respectively become due and payable. And whether this consideration sufficiently appears in the written memorandum, is the point in dispute. That such consideration does not appear expressly and in terms in such memorandum is apparent on the bare inspection of the writing itself. It is not, however, necessary that such consideration should appear in cx-

press terms: it would undoubtedly be sufficient in any case, if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it that such and no other was the consideration upon which the undertaking was given. Not that a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum, would be sufficient to satisfy the statute, but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise. Now, looking at the memorandum in this case and reading it as persons of ordinary understanding would read it, we cannot come to the conclusion, that giving time and forbearing to sue was necessarily the consideration for the promise of the defendant. It may have been so, undoubtedly, and most probably it was. But the consideration may also have been, for any thing to the contrary to be collected from the written agreement, an engagement on the part of the plaintiffs to extend their credit to Armstrong and Dell, or an engagement by the plaintiffs to dicount these bills for Armstrong and Dell. For there is noth-

So in Virginia, though in their statute the word promise was used. 5 Cranch's Rep. 151, 152.

The words "value received" in a guaranty to pay the debt of another, are a sufficient expressing of the consideration. Watson v. M'Laven, 19 Wend. 557.

⁽¹⁾ Although this is the English rule, and has been adopted in New York, Sears r. Brink, 3 Johns. Rep. 210. Leonard v. Vredeuburgh, S Johns. Rep. 29, and in South Carolina, 2 Nott & M'Cord, 372; yet it has been rejected in many of the States. See Levy v. Merrill, 4 Green. Rep. 180, 387. Packard v. Richardson, 17 Mass. Rep. 122. Sage v. Wilcox, 6 Con. Rep. 81.

1,[

debt, and wrote, "that should they not be honoured when due, he (the I. Of the agent) would see them paid," this was holden a sufficient engagement within Transfer of the statute (h). And in a very recent case, where the plaintiff having pressed W. for payment of a debt, the defendant, W.'s attorney, sent to plaintiff a bill accepted by W. at two months inclosed in a letter, in which the descendent said, "W. being disappointed in receiving remittances and your tees in lieur expressing yourself inconvenienced for money, I send you his acceptance of Indoneat two months;" and the plaintiff refusing to take the bill unless defendant ment. put his name to it, the defendant wrote on the back of the letter "I will see the bill paid for W." It was held, that the defendant was responsible, and that the consideration (viz. the forbearing to sue) for the guarantee sufficiently appeared(i). So a written promise, "Messrs. B. & Co.—Gentlemen, our mutual friends, Messrs. S. & Co. having accepted the underwritten bill drawn on them by your firm, I hereby give my guarantee for the due payment of the same, should it be dishonoured by the acceptors," was held binding on the defendant(k). And a written promise, "Mr. P.—Sir, M. L. having chartered your ship, Roberts, to bring a cargo from New-Brunswick, and the same being landed to the *charterer, and he having paid [*250] you one-half of the freight, and given you his acceptance for the remainder, at four months date, I engage to be accountable to you for the amount of the said acceptance should it not be paid when due," was also holden valid(1). And from a late case it should seem that the following is a sufficient guarantee within the statute. "In consideration of your being in advance to Messrs. Lees in the sum of 10,000l. for the purchase of cotton, I hereby give you my guarantee for that amount on their behalf .- J. BROOKS:" at all events the plaintiffs giving up such guarantee is a sufficient consideration for the defendant's promise to see certain acceptances paid(m).

ing whatever in the letter itself that necessarily connects the undertaking of the defendant with the consideration of forbearance; no expression to denote that the bills are delivered in satisfaction of or as security for the debt then due from Armstrong and Dell to the plaintiffs, nor even any mention that any debt was due to them. Undoubtedly, it is extremely probable, from the amount of the debt due from Armstrong and Dell agreeing exactly with the amount of the bills inclosed in the letter, that such bills were sent as a security for the debt then due, and if so, that the forbearance for the time the bills had to run must have formed the ground for the promise of the defendant; and there is no written evidence to show that such was the case: and after proof of the existence of such debt by parol evidence (which might be admitted) the great link in the chain of the evidence would still be wanting, and there would be nothing but parol evidence to supply it, namely, that the forbearance of suing for that debt was the

consideration for the particular promise.
"Thinking, therefore, in this case, that the consideration for the defendant's promise is left in complete uncertainty upon the defendant's letter, we cannot bring ourselves to the conclusion that the memorandum is sufficient to take the case out of the statute of frauds, and consequently we hold that there must be judgment

for the defendant.' In Ellis v. Levi, (decided T. T. 1836), the court pronounced a like judgment on the follow-

ing agreement:—
"Mr. T. Ellis, 60, Whitechapel. Mr. Ri-

chard H. Chase, of the Office of Ordnance, Barbadoes, about to proceed thither in the Mary, having incurred an account with you amounting to 491. 5s. with the understanding that he is to transmit the amount to you three months after he shall have arrived at Barbadoes, we hereby guarantee his performance of the said engagement, and in failure thereof we will be responsible to you. Isaac Levy and Bing. N. C. 767, note (a); 1 Scott, 669, note (a), S. C.

(h) Morris v. Stacy, Holt, C. N. P. 153, (Chit. j. 950). There A. an agent for some manufactures, sold to B., who likewise acted as an agent, a quantity of shoes, and received certain bills of exchange in payment. B. being pressed to indorse them refused, but wrote a letter to A., in which he inclosed the bills, and added "that should they not be honoured when duc, he (B.) would see them paid." Held, that this was a sufficient agreement within the 4th section of the statute against frauds to bind B. to pay for the goods in default of his principal. Sed vide Hawes v. Armstrong, 1 Bing. N. C. 761, ante, 248, note (g).

(i) Emmott v. Kearns, 5 Bing. N. C. 559. (k) Boehm v. Campbell, 3 Moore, 15; 8 Taunt. 679, (Chit. j. 1045). Sed quære; see ante, 248, note (g).

(1) Pace v. Marsh, 1 Bing 216; 8 Moore,

59, S. C. Sed quare; see ante, 248, note (g).

(m) Haigh v. Brooks. T. T. 1839, Q. B. 2

Perry & Dav. Lord Denman, C. J. in delivering the judgment of the court said, "It was ar-

I. Of the Bills and Notes.

8thly. Guarantee in lieu of Indorsement.

But even in those cases where a valid engagement has been made, that a Transfer of bill or note shall be paid, it is effectual only between the original parties to it, and not transferable at law, or in equity, or in bankruptcy; nor can the action or proof be upon it, as in the case of the indorsement of a bill or note, but it must be on a special agreement, or the consideration which existed before, or passed at the time of the transaction(n). So a written engagement to warrant the payment of a bill of exchange, although good for other purposes, is not within the statute of 6 Geo. 4, c. 16, s. 51, which applies only to what arises on the face of the instrument (o)(1).

> gued for defendant that this guarantee is of no force, because the fact of plaintiff's being already in advance to Lees could form no consideration for defendant's promise to guarantee to plaintiff the payment of Lee's acceptances. In the first place this is by no means clear. That 'being in advance' must necessarily mean to assert that he was in advance at the time of giving the guarantee, is an assertion open to argument. It may possibly have been intended as prospective. If the phrase had been in consideration of your becoming in advance,' or on condition of your being in advance, such would have been the clear import. As it is, nobody can doubt that the defendant took a reat interest in the affairs of Messrs. Lees, or believe that the plaintiff had not come under the advance mentioned at defendant's request. Here is then sufficient doubt to make it worth defendant's while to possess himself of the guarantee, and if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it. But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact would entitle us to hold that a party was not bound by a promise made upon any consideration which

could be valuable; while of its being so, the promise, by which it was obtained from the holder of it, must always afford some proof. Here, whether or not the guarantee could have been available within the doctrine of Wain r. Warlters, the plaintiff was induced by the defendant's promise to part with something which he might have kept, and defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can defendant be justified in breaking this promise by discovering afterwards that the thing, in consideration of which he gave it, did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives, and of their weight he was the only judge."

(n) Ex parte Harrison, 2 Cox, 172; 2 Bro. C. C. 614; in re Barrington, 2 Schol & Lef. 112, (Chit. 607), ante, Ex parte Hustler, 1 Glyn. & J. 9, (Chit. j. 1019, 1106); Ex parte Isbester, 1 Rose, 20; Ex parte Bell, 19th April, 1829, 1 Mont. Bank. Law, 3d edit. 194.

(o) Ex parte Harrison, 2 Cox, 172; S. C. 2 Bro. C. C. 614. A decisen on similar provision in 7 Geo. 1, c. 31.

(1) Where upon the back of a promissory note made by S. and A. to the plaintiffs, were written the words, "I guaranty the payment of the within note," which were signed by the defendant, it was held, that he was a guarantee and not a surety. Oxford Bank c. Haynes, 8 Pick-Rep. 423.

The guarantee of a promissory note will be discharged by a neglect of the holder to demand

payment of the maker and to give the guarantee notice of non payment, provided the maker was solvent when the note fell due, but has since become insolvent. Ibid.

Where A. gave to B. a writing in these words: "Whereas B. has agreed to indorse C.'s notes

at the Middletown Bank, to the amount of 4000 dollars, I hereby agree to be responsible to B. for one half the amount of any loss he may sustain by said indorsement; and I agree to pay the one half of any payments which B. may be obliged to make, in the same manner and at the same time I should be obliged to pay it, provided I was joint indorser with him on said notes; it was held, 1. That such writing was not on its face a continuing guaranty, but was limited to the indorsement of notes once only, to the amount of \$4000; 2. That parol evidence of the subject matter of the agreement and of the circumstances under which it was made, was inadmissi ble to affect the construction; 3. That by virtue of the agreement, B. was authorized to indorse the notes of C., by attorney, the act being fixed, and not requiring the exercise of judgment or discretion, and therefore capable of delegation; 4. That B. was not bound to give notice to A. of the several indorsements of C.'s notes, as they were made; and 5. That A. was not entitled, as an indorser, to strict notice of the dishonor of such notes. Hall v. Rand, S Conn. Rep. 560.

A declaration upon an indersement of a promissory note guaranteeing payment by the maker, must set out the consideration of such indersement. The guaranter upon such indersement is not liable without a demand and notice of non-payment. Green v. Dodge et at., Ohio Rep.

Cond. 436.

Where a note given by a partner for his individual debt, in the name of the firm was delivered by the payee to the defendant, the other partner, to secure it by an attachment in the name of the payee, upon the defendant's guaranteeing the payment of it, it was held, that there was a sufficient consideration for the guaranty; and that as the defendant at the time of signing the guaran12

Section II.—Of Actions for Bills or Proceeds, and Bills IN EQUITY TO RESTRAIN TRANSFERS.

When a bill or note was void in its creation (q), or has been unduly obtained II. Of Ac-

(p) See ante, 97 to 101.

Trover. 180, (Chit. j. 1027). The bill was given for and Bills (q) Lloyd v. Gurdon and another, 2 Swanst. money won at play; ante, 98, note (z).

to restrain Negotia-

ty, knew for what consideration the note was given, he could not avoid the guaranty on the tion, &c. ground that he erroneously supposed himself to be liable on the note. Flagg v. Upham, 10 Pick. Ĭ47.

Where a promissory note was paid by a surety, the guaranter was held not to be liable to

contribution. Longly v. Griggs, Id. 121.

A guarantee in general terms, warranting the collection of a note, does not authorize a suit against the guaranter by any subsequent holder of the note; it is a special contract, which can be enforced only in the name of the person with whom the contract was made. Lamorieux v. Hewit, 5 Wend. 307.

Such general guaranty cannot be altered on the trial, so as to make it a guaranty to the plain-

tiff in the suit, as is done in filling a blank indorsement of a promissory note. Ib.

A guarantee cannot object laches in the holder for not seeking satisfaction of the principal debtor, if a suit be commenced within three months after the debt falls due. 1b.

The doctrine of laches in such case is not applicable, if the principal debtor be insolvent. Ib. In articles for the purchase of land, whereby the purchaser covenanted to pay in notes "such as he would be responsible for," the covenant binds him as a guarantor. Ward r. Ely, 1 Devreux's Rep. 372.

When the payment of a note is guaranteed by a third person, it is an absolute undertaking that the note shall be paid when due, and if not paid, a suit may be immediately commenced upon the guaranty, and if the guaranty is by the indorser of the note, it dispenses with the necessity of a demand of the maker and notice to the indorser. Cumpston v. M'Nair, 1 Wend. Rep. 457.

Where the plaintiff in an action against B., on his guaranty of A 's note, averred in the declaration, that "in consideration the plaintiff would delay the collection of said note, and not exact payment thereof for four years thereafter, and of the plaintiff's promise of forbearance to collect the same for that time," the defendant promised, &c.: it was held, that this was a sufficient allegation of consideration for the defendant's engagement, and adapted to proof of an agreement on the part of the plaintiff to forbear. Breed r. Hillhouse, 7 Conn. Rep. 523.

Where the payee of a promissory note, after it became due, accepted the guaranty of a third

person for a certain period, and actually forbore suit during that period; it was held, that these

facts afforded prima facic evidence of an agreement by the plaintiff to forbear suit. Ib. If, after the dishonour of a note, the indorser promise to pay it, such promise is presumptive

evidence of due demand and notice. Ib. And this rule is applicable to the case of a third person, who has guaranteed the payment of

Where a third person guaranteed the payment of a note, by an indorsement in these words, "I hereby guaranty the payment of this note, within four years from this date," it was held, that this was an absolute engagement on the part of the guarantor, that the note should be paid within the time specified, by the maker, or by himself; and that demand and notice were not

necessary. Ib. When a note is indorsed, guaranteeing the solvency of the maker, held, that the holder will be entitled to recover from the indorser, upon proving demand and notice, without proof of the

maker's insolvency. Bell r. Johnson and Hicks, 4 Yerger's Rep. 194.

{ A guaranty in these words, "I warrant this note good," endorsed by a payce upon a note, is a guaranty that the note is collectable: and not that it will be paid on demand; and to charge the guarantor it is necessary to show that payment cannot be enforced against the maker. Curtis v. Smallman, 14 Wend. 231.

Where one of the signers of a note payable on demand, added these words, to his name, "surety ninety days from date." They were holden to constitute a guaranty that the principal should remain of sufficient ability to pay the note for that period; and that the liability of the surety could not be extended beyond the ninety days. Ulmer v. Reed, 2 Fairf. 293. And see True v. Harding, 3 Fairf. 193; Erwin v. Sanborn, 1 Har. Del. Rep. 125; Lee v. Dick, 10 Pe

Where an absolute guaranty is endorsed upon a note payable to bearer, at the time of the making thereof, and the note and guaranty are transferred by the payee, the assignee may maintain an action in his own name against the guaranter without showing demand of payment of the maker and notice of non-payment. Hough v. Gray, 19 Wend. 202; Watson v. M'Laron, Id. 557. But such guaranty is not negotiable unless it be upon the note in which case it may be treated as an endorsement without a necessity of demand and notice. Ib. And such a guarantor is liable for the whole note and not merely for the amount received by him. Oakley v. Boorman, 21 id.

tions of Trover. and Bills in Equity to restrain Negotiation, &c.

II. Of Ac- or is detained contrary to the purpose for which it was delivered, either to an agent, or to any person aware of the circumstance, the party entitled to the instrument, even though an accommodation *acceptor, may maintain an action of detinue or trover to recover the same or its value (r)(1), or assumpsit for money had and received, if the proceeds of the bill have been received(s), and this without being subject to the set-off (t); and the negotiation of it may be [*251] restrained by a court of equity(u), which has a peculiar jurisdiction, to prevent a party from being sued at law upon a security which has been improperly obtained, and to order it to be delivered up to be cancelled(x). Courts of equity have also concurrent jurisdiction with the courts of law in relieving against bills and notes taken when overdue (y).

If a party receiving a bill payable to order for the purpose of getting it indorsed for another person, procures the indorsement, pays in the bill to his

(r) Evans v. Kymer, 1 Bar & Adol. 529, strained from parting with or assigning the note (Chit. j. 1512); ante, 97, note (a). See post, till answer or further order. See also 3 Bro. C. 820. (33).

(s) See Atkins r. Owen, 4 Ad. & El. 819, infra, note (z).

(t) Jones v. Fort, 9 B. & C. 764; 4 M. & Ry. 547, (Chit. j. 1445).

(u) Bromley r. Holland, 7 Ves. 20; Jervis v. White, id. 413; Newman v. Milner, 2 Ves. jun. 483, (Chit. j. 514); Hammersley v. Purling, 3 Ves. 757; Berkeley v. Brymer, 9 Ves. 355, (Chit. j. 692). As to partners, see ante, 49, 52, 53. As to want of consideration, see ante, 69 to 81. As to Illegality, see ante, 81 to 97.

(x) Newman v. Milner, 2 Ves. jun. 488, (Chit. j. 514). Plaintiff prayed a discovery, injunction, and delivery of a bill of exchange; apon the answers and evidence, the right being clear, the court refused an opportunity of trying it at law, and decreed an immediate delivery. Sec also Jervis v. White, 7 Ves. 413; 2 Ves. & Bea. 302; Houlditch v. Nias, 8 Price, 689; Solly v. Moore, 8 Price, 631; ante, 98.

Smith v. Haytwell, Ambl. 66; 3 Atk. 566, (Chit. j. 319). Bill to be relieved against a promissory note given upon a marriage brokage agreement; on motion, the defendant was re-

C. 177; Prac. Reg. Ch. 233; wood, 8 Anst. 851, (Chit. j. 575); Cotton v. Catlyn, 2 Eq. Ca. Abr. 525. An injunction was granted to prevent the negotiating a note at play. upon atfidavit before service of the subpose. See also Newman v. Franco, 2 Anst. 519, (Chit. j. 535); Andrews v. Berry, 3 Anst. 624; Newland on Cont. 491 to 494.

Burrows v. Jemino, 2 Eq. Ca. Abr. 525, pl. 7, (Chit. j. 265). Where the acceptance of a bill of exchange became void by the law of a foreign country, and was vacated by a competent court there, a perpetual injunction was granted against proceedings here.

Berkeley v. Brymer, 9 Ves. 355, (Chit. j. 692). Affidavits cannot be read in support of an injunction to restrain the negotiation of a bill; and from Iveson v. Harris, 7 Ves. 257, it appears that an injunction is not binding upon a person not party in the cause; Echilf v. Baldwin, 16 Ves. 267. In the case of a lost bill, Davies v. Dodd, 4 Price, 176, (Chit. j. 996); post, 264, n. (r). In the case of a bill indorsed after it was due, see Goggerly v. Cuthbert, 2 New Rep. 170.

(y) Hodgson v. Marray, 2 Saund. 515.

Where the guaranty is an absolute promise to pay, and not a mere guaranty for collection, and an advance of money is made upon the strength of the declaration of its validity by the guarantor, it seems, that the guaranter would be held liable though there should be no note in existence. Watson v. M'Laren, ut supra.

But in Massachusetts, the words "I guaranty the payment of semi annual interest on this note, as well as principal, were held not to be a negotiable guaranty, nor made so by being on a negotiable note. True v. Fuller, 21 Pick. 140.

A guaranty of payment upon a negotiable note over the signature of the indorser is prima facile evidence that it was written at the time the indorsement made. Gilman v. Lewis, 15 Maine Rep. 453. But where it was written over the name of the payee who had indorsed the note in blank without his knowledge or consent, parol evidence was rejected to charge him as indorser-and such a note was held inadmissible under the money counts. Smith v. Frye, 14 Maine Rep. 457.

A guaranter " for debt and costs without demand or notice," though not liable for the expenses of a protest, is so for the costs of a suit against the maker. Gilman v. Lewis, ut supra

A delay in the presentment of a bill; does not discharge the guarantor. Sinclair v. Barrett, 1 Irish Law Rep. 46. }

(1) Where the payee of a note, which ought to have been delivered up to the maker, sold and transferred it to a third person, who afterwards sued the maker thereon and recovered judgment; it was held that an action of trover would lie by the maker against the payee to recover the amount of the note; and that, if said judgment had any effect on the rights of the parties, an exemplification of the record ought to have been produced to show that such a judgment had been rendered. Buck v. Kent, 3 Verm. Rep. 99. 1,0

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own account at his bankers, with intent to appropriate the proceeds, and, II. Of Acbefore the bill is due, draws upon such account (though not specifically on tions of the credit of the bill,) and his draft is honoured, an action of trover may be and Bills in commenced against him before the bill is due, but not an action for money had Equity to and received (z). And where the drawer of a bill of exchange deposites it restrain with a creditor, giving him authority to receive the proceeds, and apply them tion, &c. in a specified way, if the creditor, after an act of bankruptcy by such drawer, gives up the original bill to the acceptor (taking another bill in lieu of it), this is a conversion by the creditor, and the assignees of the drawer may support trover(a).

So, where R. being employed to procure a bill of exchange to be discounted for the plaintiff instead of doing so, indorsed it, and placed it in the hands of the defendant, who was clerk to a creditor of R.; and the defendant carried the bill to R.'s account with his creditor, and though afterwards apprised of the circumstances under which R. held the bill, refused to restore it; it was held that the defendant was liable to the plaintiff in trover(b).

*At law, except in the instance of warrant of attorney(c), there is no ju- [*252] risdiction to order the security to be vacated, and the contracting party must, at the risk of losing the evidence which might establish his defence, wait till the party who holds the security thinks fit to try the validity of the instrument in an action, and should he be nonsuited, he will still be at liberty to proceed de novo upon his security; but a court of equity will often decree instruments to be delivered up to be cancelled, although the objection to their validity might be taken advantage of at law, for fear that the evidence to impeach them might be lost, or a vexatious use made of them (d). where a bill of exchange has been negotiated by means of a forgery of the name of the payee as indorser, a court of equity will restrain even a bona fide holder of the bill from suing the acceptor, and will direct the forged instrument to be delivered up to be cancelled (e). As, however, the party apply-

(z) Atkins v. Owen, 4 Ad. & El. 819; 6 Nev. & M. 309; 2 Har. & W. 59, S. C. As to granting new trial in case of nonsuit for not producing bill, see ib. note (b); 4 Nev. & Man. 123, S. Č

(a) Robson v. Rolls, 1 Mood. & R. 239.

(b) Cranch v. White, 1 Bing, N. C. 414; 1 Scott, 814; 3 Dowl. 377; 1 Hodges, 4; 5 Car. & P. 767, S. C. In such case R. is a competent witness for the plaintiff, (independently of 8 & 4 Will. 4, c. 42,) as standing indifferent between the parties; Fancourt v. Bull, 1 Bing. N. C. 681; 1 Scott, 645, S. C., infra, note; and see post, Part II. Ch. V. s. iv. Evidence-Competency of Witness.

Where to a count in detinue, on the bailment of a promissory note, to be re-delivered on request, the defendant pleaded, that the plaintiff had deposited the note with him, to be kept as a plodge and security for the repayment of a loan of 501.; and the plaintiff replied a tender of the 501.; it was held, on special demurrer, that such replication was good, and no departure; Gledstane v. Hewitt, 1 Crom. & J. 565. And in trover for a bill, defendant having pleuded that plaintiff indorsed the bill in blank; that R. became the holder, and that defendant believing that R. had authority to dispose of the bill took it of him as a pledge to secure the payment of a debt; a replication that at the time of taking the bill from R. the defendant knew that he had not authority to pledge was held suffi-

cient; Hilton v. Swan, 5 Bing. N. C. 418; 7 Scott, 398, S. C. Where in trover for a bill the defendant plended that the drawer, being lawfully possessed of the bill, indersed it to P., and that P. for good consideration indersed to defendant, to which the plaintiff replied that there was no good consideration for P.'s indorsing the bill; and the jury found for the plaintiff on that replication; the court refused to arrest the judgment or award a repleader, on the ground of the issue raised by the replication being immaterial, for that the plaintiff's property in the bill being admitted by the plea it was not sufficient to divest him of that property without alleging either that P. or the defendant took the bill for valuable consideration; Fancourt v. Bull. 1 Bing. N. C. 681; 1 Scott, 645, S. C. A party who being employed by the plaintiff to procure a bill to be discounted, lodges it instead with the defendant as a security for a debt doe to the defendant, is a competent witness for the plaintiff in an action of trover for the recovery of the bill; i.l. ibid.

(c) When equity will not relieve against execution, see Nayler v. Christie, 8 Price, 534. But see Whittingham r. Bouroyne, 3 Anst. 900; anle, 99, note (h).

(d) Id. ibid. and see other cases in Newland on Cont. 493, 494.

(c) Esdaile v. La Nauze, 1 Younge & Col. 394.

Trover, Equity to restrain Negotiation, &c.

II. Of Ac- ing for relief seeks equity, he must observe it, and therefore the court, in affording relief, will compel him to pay what may be justly due, and will and Bills in impose on him such equitable terms as the justice of the case may require (f). Where an action is brought against the plaintiff in equity for damages for not accepting certain bills of exchange according to contract, and the bill prays an account and discovery of certain matters to aid the plaintiff's desence to the action at law, and an injunction in the mean time; if discovery is made, the defendant in equity is entitled to have the injunction dissolved; and the court cannot refuse to dissolve the injunction in order to see the result of the account, and to enable the plaintiff to set off the account against the damages, equitable set off being equitable relief, and requiring to be specifically prayed by the bill(g).

*Section III .- Of the Loss of Bills, Notes, &c. .

III. Of the Loss of Bills. Notes, &c.

by Loser (ħ).

In case the holder of a bill, note, bank note, or check, has lost the same, either by accident or felony, he ought immediately to give notice of his loss as explicitly and extensively as possible, in order to prevent persons ignorant of the loss from taking it(i); and also in cases of felony to lead to the appre-Course to be pursued hension of the offender (k) tand it has even been considered, that the negligence of the loser in this respect will prejudice, if not preclude him from recovering the instrument or its value from a person who had not had actual notice of the loss, though he himself had not used due caution in taking it, and the latter might defend, on the maxim, potior est conditio possidentis, at least, the neglect of the loser has so prejudiced a jury as to induce them to find against him, and the court refused a new trial (l). A written notice, stating the numbers, dates, sums, names and residences of the parties, and other terms of the securities, the particulars of the time, place, and mode of loss, description of the supposed felon, and reference to one or more persons who will make any further communication, should be framed, and with or without a promise of reward, to be paid on delivery up of the securities, if lost, or on the apprehension and conviction of the felon if stolen(m). Care, however, must

> (f) Byne v. Vivian, 5 Ves. 604; Newland on Cont. 494, 495; Fitzroy v. Gyllim, 1 T. R. 153; Hindle v. O'Brien, 1 Taunt. 413; Benfield r. Solomon, 9 Ves. 84.

(g) Rawson v. Samuel, 3 Juris, 947.
(h) See in general Lettre de Change perdue, 1 Pardess. 432 to 436.

(i) Per cur. in Beckwith v. Corrall, 3 Bing. 445; 11 Moore, \$35, (Chit. j. 1291); post, 257; Poth. pl. 132.

(k) Beawes, pl. 179. (l) Per Best, C. J. in Snow c. Pencock, 3 Bing. 408, 411; 11 Moore, 286, (Chit. j. 1280); and see Beckwith v. Corrall, id. 445; 11 Moore,

335, (Chit. j. 1291).
(m) In Bridger r. Heath and another, K. B. Sittings at Westin. Middlesex, A. D. 1828, cor. Lord Tenterden, C. J. and a special jury, MS. post, 258, note (2), the following was the form of advertisement inserted in the several news-

Twenty-five Guineas Reward .- Lost or · stolen, from the person of a gentleman, at the Russell Street entrance into the pit of Drury Lane Theatre, on Monday night last. a Bank of England note value 2007., numbered 7071, and dated 3d February, 1827. When lost it was divided into halves. Whoever will bring the same to Mesers.

—, law stationers, Royal Exchange, if lost, or if stolen will give such information as shall lead to a conviction of the offenders, shall receive the above reward."

Hand bills also containing the like advertisement were stuck up about London, and left at most of the banking houses and police offices, and were also circulated at Newmarket, Doncaster, Plymouth, Dover, Portsmouth, and several other places; and see a description of bills,

antc, 97, note (k).

With respect to the party entitled to the reward, in a very recent case, where a party who had been robbed of bank notes put forth a hand bill, wherein it was stated that "whosoever would give information whereby the same might be traced, should, on conviction of the parties, receive a reward of 201.," it was held that the only person entitled to the reward, was he who first gave information by which the notes were traced to the robbers, so as to ensure their conviction, and that it was not necessary that such information should be communicated to the par-

be observed in framing the notice of the loss not to introduce any statement III. Of the that can be treated as libellous; it may and ought, consistently with the facts, Loss of Bills, to state in direct terms the fraud, embezzlement, felony, and even forgery, Notes, &c. but there should be no necessary intendment of any individual in particular, unless it be a clear case of guilt in a particular individual, when the statement of his name and description may be absolutely essential for the purpose of leading to his apprehension(n).

*This notice should immediately be forwarded to all the parties, to the se- [*254] curities (o), to the Bank of England, and all banking houses, to whom the securities might possibly be tendered; printed copies of such notice, in case of felony, should be left at Bow Steet and other public police offices, and inserted in the Hue and Cry, (a paper circulated by order of the Secretary of State for the Home Department, to announce the perpetration of offences,) and in the Gazette, and in all the principal London newspapers. The like notice should also be circulated in hand-bills and placards about the metropolis, and at all the expected principal races, fights, large fairs, and places where it is usual for stolen or lost bank notes and bills to be attempted to be circulated. when the loss has been considerable, or has taken place in the country, then the like notice should be circulated in the country newspapers, and communicated to all the country bankers, and at the markets and fairs in the neighbourhood by placards and otherwise(p); and if the securities were bank notes, or of a nature likely to be transmitted to the Continent, the like notice, in French and English, should immediately be given to the bankers and other commercial agents in the principal towns on the continent, and also inserted in their public papers (q). An advertisement stating the loss of a pocketbook, and that the contents were of no use to any but the owner, and not describing the lost bill, has been considered as misleading and improper, and on that account the jury found against the loser(r). So the notice should be immediate, and if the party cannot instantly ascertain the particulars of the securities, he must give the best description he can, and as soon as possible afterwards obtain the particulars, and then give a second fuller notice; and where a party having been robbed of a bill eight days before it was due, gave no notice till the day before it was due, it was held that he could not recover in trover against a party who discounted the security six days after the loss(s).

Where a person having lost a bill of exchange, which he supposed to have

ty robbed, if it was given to a person authorised to receive it, and to act upon it in the apprehension of the offenders, as to the constable. Lancaster v. Wulsh, 4 Mec. & Wels. 16.

(n) See form, ante, 97, note (k), and form in Bridger v. Heath, supra, n. (m); and Stock-

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ley v. Clement, 4 Bing. 162.
Stockley v. Clement, 4 Bing. 162; 12 Moore, An advertisement in a news-paper was as follows: "To bill brokers and others. Caution. Reward.-Whereas information has been given to me, that attempts have been made to obtain the discount of a bill of exchange, bearing date, London, May 26, 1825, and purporting to be drawn by one John Stockley upon, and to be accepted by, the Dowager Lady P. Turner for 6000l. with interest, payable twelve months after date to the order of the said J. Stockley: I do hereby give notice on behalf of the Dowager Lady P. T. that she has not ac-cepted such bill, and that if her name should appear on any such instrument, the same has

been forged, or her hand-writing to the said acceptance of the said bill if genuine has been obtained by fraud, in total ignorance on her part of the intended effect of the signature. Any person who will give positive information to me of the party in possession of the said instrument, shall be handsomely rewarded. Thomas Binns." This was held not a libel on Stockley, at least without innuendo and proof that he was the person designed to be charged with having forged Lady P. Turner's name.

(a) Poth. pl. 132.

(p) See Snow v. Pencock, 8 Bing. 406; 11 Moore, 286, (Chit. j. 1280).

(q) See the expediency of this step also in De la Chaumette v. Bank of England, 9 Bar. &

(r) Beckwith r. Corrall, 2 Bing. 445, 446;

11 Moore, 335, (Chit. j. 1291). (s) Beckwith r. Corrall, 2 Car. & P. 261; post, 257, note (h).

III. Of the been stolen, went before a magistrate and related the circumstances of the loss, and the magistrate granted his warrant to apprehend A. B. on a charge Bille, Notes, &c. of having "feloniously stolen, taken, and carried away" the bill of exchange, (language which the complainant did not use when he laid his information,) and upon subsequent investigation of the case it turned out to be no felony, it was held that an action on the case would not be supported for maliciously procuring the magistrate to grant his warrant, because, to sustain the averment of malice, the charge must be wilfully false(t),

Conse quences of Loss, and where a Right acquired.

If the holder of a foreign or inland bill of exchange, check, bank-note, or other note, transferable by mere delivery, (which we have *seen may be when the bill was originally payable to bearer, or when the first indorsement has been in blank(u), lose or be robbed of it, and it get into the hands of a [*255] person not aware of the loss(x) or robbery, bona fide, and for a sufficient consideration, previously to its being due(y), such person, notwithstanding he derived his interest in the instrument through the person who found or stole it, may maintain an action against the acceptor or other parties; and the original holder who lost it, will consequently forfeit all right of ac-[*256] tion(z)(1); and a bank *note cannot in general be recovered by the legal owner

(t) Cohen v. Morgan, 6 D. & R. 8.

(u) Anie, 225, 226.

(x) See in general Chitty's Eq. Dig. tit. "Deeds lost," 311; 1 Pardess. 427, 432, 476, tit. "Perde da la Lettre de Change" per tot.

(y) Good v. Coe, cited in Boehm v. Stirling, 7 T. R. 427, (Chit. j. 593); Glover v. Thom-son, Ryan & Mood. C. N. P. 403, (Chit. j. 1806); et ante, 215, 216, as to time of transfer.

(z) Anon. Ld. Raym. 738, (Chit. j. 202); Anon. 1 Salk. 126, (Chit. j. 208); Anon. 3 Salk. 71, (Chit. j. 222); Exors. Devaller v. Herring, 9 Mod. 47; Miller v. Race, Burr. 452, (Chit. j. 346); Grant v. Vaughan, Burr. 1516, (Chit. j. 365); ante, 198, note (i); Pencock v. Rhodes, Dougl. 633, (Chit. j. 403); ante, 227, note (x); Hinton's case, 2 Show. 235, (Chit. j. 166); Lawson v. Weston, 4 Esp. R. 56, (Chit. j. 640); Lee r. Newsam, Dow. & R. C. N. P. 50.

Anon. Lord Raym. 738; (Chit. j. 202); 1 Salk. 126, (Chit. j. 208); 3 Salk 71, (Chit. j. 222). B. lost a bank bill payable to A. or bearer; C. found it, and assigned it for a valuable consideration to D. who got a new bill for it from the Bank. Trover was then brought against D., for the first bill; but by Holt, C. J. the action will not lie against him, because he took it for a valuable consideration, though it would against C. as he had no title; but pay-ment to C. would have indemnified the Bank."

Miller v. Race, Burr. 432, (Chit. j. 346). A bank note, payable to William Tinney or bearer, was stolen out of the mail in the night of the 11th of December, 1756, and on the 12th came to the hands of the plaint if for a full and valuable consideration, in the usual course of his business, and without any knowledge that it had been taken out of the mail; he

afterwards presented it to the Bank for payment, and the defendant, being one of the clerks, stopped it, upon which an action of trover was brought; and upon a case reserved upon the point, whether the plaintiff had a sufficient property in the note to entitle him to recover, the court was clear in opinion that he had, and that the action was well brought.

Lawson r. Weston, 4 Esp. Rep. 56, (Chit. j. 640). A bill for 500l. had been lost, and the loser had advertised it in the newspapers. and it was discounted by plaintiff, a hanker. for a stranger, who, on being required, wrote a name upon it, whereupon no further question was asked, and it was held by Lord Kenyon at nisi prius, that plaintiff was entitled to recover; he said, "I think the point in this case his been settled by the case of Miller r. Race, in Burrow. If there was any fraud in the transaction, or if a bon't file consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover, but to adopt the principle of the defence to the full extent stated, (namely, that the bill being for so large a sum. further inquiries ought to have been made). would be at once to paralyse the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiff. The plaintiff might or might not have seen the advertisement. It would be going a great length to say, that a banker is bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for 101. as 10,0001. With respect to the evidence offered, of the usage of other banking-houses, I cannot admit it; it depends on their mode of doing business

⁽¹⁾ Where a negotiable promissory note, indorsed in blank by the payee, has been fraudulently or feloniously taken from the true owner, and that fact is shown at the trial, the person into whose hands it passes, cannot recover upon it against the maker, unless he show himself to

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from a bona fide holder for valuable consideration, who received it without III. Of the notice of the lossor robbery (a); for it may be laid down as a general principle, that whenever one of two innocent persons must suffer by the act of a Rilla, Notes, &c. third, he who has enabled such third person to occasion loss must sustain it (b). And if a person who has not given a consideration for a lost or stolen bill transferable by mere delivery, present it to the drawee at the time it was due, and he pay it before he has notice of the loss or robbery, such drawee will not in general be liable to pay it over again to the real owner(c).

The rule thus established, and which we shall presently see still prevails, was afterwards qualified by more modern decisions(d).

or on their funds. This could not affect others who acted on different principles but with equal integrity. That which had been called the usage of trade depended on the different degree of confidence different men possessed, and not on any settled or regular rules. The magnitude of the bill has been pressed as a ground of suspicion by the defendant's counsel; I do not feel it of such importance. A person going to the country, and having occasion to bring a sum of money, might prefer bringing it in that way rather than in money. I therefore see no misconduct imputable to the plaintiff, but I think he is bound under the circumstances of the case to prove the value actually paid for it." The plaintiff proved the consideration paid for it, and had a verdict.

King v. Milsom, 2 Campb. Rep. 5, (Chit. j. 764); per Lord Ellenborough, "It would greatly impair the credit, and impede the circulation of negotiable instruments, if persons holding them could, without strong evidence of fraud, be compelled by any prior holder to disclose the manner in which they received them." See also Rees v. Marquis Headfort, 2 Campb. 274, S. P. (Chit. j. 823).

Lee v. Newsum, Dow. & Rv. C. N. P. 50.

A tradesman having, in the course of business, received a bunker's check which had been stolen from the payee, and given the difference to a strunger, who presented it in payment of an article purchased, brought assumpait against the drawer for the umount; it was held, in the absence of fraud and negligence on his part, that the action was maintainable.

Negligence, though gross, not now sufficient to defeat claim; there must be mala fides. Goodman v. Harvey, 4 Ad. & El. 870; 6 N. & M. 372, S. C.; post, 257, note (n).

(a) Lowndes v. Anderson, 13 East, 180; 1 Rose, 99, (Chit. j. 810).

(b) Per Ashurst, J. in Lickbarrow v. Mason, 2 T. R. 70.

(c) Post, Ch. IX. s. ii. Of Payment—To whom; Poth. pl. 168, 169; 1 Pardess. 477.
(d) Id. ibid.; Patterson v. Hardacre, 4
Taunt. 114, (Chit. j. 836). Where a bill has

Taunt. 114, (Chit. j. 836). Where a bill has been lost, or fraudulently or feloniously obtained from the defendant, the holder who sues must prove that he came to the bill upon good consideration.

Solomons v. Bank of England, 13 East, 185; 1 Rose, 99, S. C. (Chit. j. 811); Lowndes v. Anderson, 1 Rose, 99, (Chit. j. 810). The

be an innocent and bona fide holder for a valuable consideration. The Fulton Bank v. The

Phænix Bank, 1 flall's Rep. 562.

The Phænix Bank of the City of New York issued a post-note payable in sixty days after date, to J. G. or order on demand. This note being indorsed to J. G. was put into the mail at Charleston in the State of South Carolina, to be transmitted to New York; but the mail being robbed it never renched the hands of the true owners, but passed into the possession of Prime, Ward, King & Co. who deposited it in the Fulton Bank and received credit for a like amount, in account with that bank. The plaintiffs presented the note to the Phænix Bank for payment, and it was refused, upon the ground that the note had been stolen from the true owners, who had requested the defendants not to pay it. The amount of the note although passed to the credit of P. W. K. & Co., by the Fulton Bank had never been drawn out by them, and upon action brought by the Fulton Bank, against the makers to recover the amount of the note, it was held, that the more act of giving credit to P. W. K. & Co. for that amount, by the Fulton Bank upon their books, did not constitute them bona fide holders of the note for a valuable consideration. Ibid.

Bank post notes, over due, are not to be regarded as subject to all the rules applicable to ordinary promissory notes, but they become assimilated in their character to ordinary bank notes. Thid.

Where a person takes a promissory note transferable by delivery and not over due or otherwise apparently dishonored, for a valuable consideration, in the course of business, and without actual or constructive notice that the holder has no right to receive it, his title thereto is valid, though the note may have been lost by or stolen from the true owner. Wheeler v. Guild, 20 Pick. 545.

A notary, though the agent of the plaintiff, is a competent witness to prove the loss of a note in an action for the recovery of it against a broker who bought it from the notary's clerk. Nicholson v. Patten, 18 Louis. Rep. 218. In an action for the recovery of a lost note, when the fact of the loss, is proved the defendant must show that he came in possession of it in the course of trade, and that he acquired it in good faith, and for a valuable consideration. Ibid. }

III. Of the Loss of Bills,

It was considered that the decision of Lord Kenyon in Lawson v. Weston before referred to(e), encouraged robberies, by the facility the doctrine in Notes, &c. that case (viz. that a person is not bound to make inquiries before he takes a bill or note) had given to the disposal of stolen property; and accordingly, in Caution to be observed. Gill v. Cubitt (f), where the plaintiff sought to recover the amount of a stoled in taking en bill, which he had discounted without making any inquiries, Lord Tentera Bill. &c. den directed the jury to find for the defendant, if they thought the plaintiff had not used reasonable caution, and had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man. This doctrine of Lord Tenterden's was soon adopted by the other judges, and became the rule applicable to every description of negotiable security, whether bills or notes payable after date or on demand, Bank of England notes, bankers' notes and checks on bankers; and in all these cases, after the plaintiff had proved his loss of the instrument, the question for the jury was, whether the party who took the lost or stolen instrument, took it under circumstances which ought to have excited the suspicion of a prudent and careful man(g)? 1 *257] Sometimes also another question *was made, viz. whether the loser of the in-

strument used due diligence in giving due, explicit, and immediate notice of his loss? and in one case, where a jury found a verdict against the loser, on the ground that he had not given due notice, the court refused to grant a new But this was by no means a settled point(i), and in general, if the party receiving the instrument ought not to have taken it, the want of due immediate notice from the loser would not give the taker a better title, and therefore the first was considered the true and proper question. Nor was the rule thus laid down confined to cases of loss and robbery, but became extended to all cases of fraud; such as the fraudulent dispositions by bill brokers and others of bills and notes entrusted to them for the purpose of getting discounted, or to be otherwise specially applied.

A difficulty, however, was felt in the application of this rule, and some of the judges of the present day have expressed themselves unable to understand what is meant by a party's taking a bill 'under circumstances which ought to have excited the suspicion of a prudent man.' The first case in

holder of a bank note is primit facie entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, unless evidence be given to bring it home to his privity. But where a bank note for 500l. had been fraudulently obtained by some person unknown, and on its being presented for payment some time afterwards by un agent of a foreign principal, information was given of the fraud, and the principal was desired to inform the Eank how he came by it; but the only account he would give of it was that he had received it in payment of goods from a man dressed in such a way, of whom he knew nothing; and it was further proved, that bank notes of so large a value were not usually circulated in that foreign country; this was held to be sufficient evidence to be left to a jury of a principal's privity to the original fraud, in an action of trover brought by his agent to recover it from the Bank, who had detained it under the original owner, to whom it properly belonged. And the question was not altered by the agent, who received it on account, having, after notice, made payment for his principal, which turned the balance in favour of such

agent; De la Chaumette r. Bank of England, 9 B. & C. 208, S. P.; Dans. & L. 319; 2 Bar. & Ad. 385, (Chit. j. 1419, 1542).

(e) Ante, 255, in note.

(f) 3 B. & C. 466; 5 D. & R. 324; 1 Car. & P. 163, (Chit. j. 1237)

(g) Egan v. Threlfall, 5 D. & R. 326, note. See Down v. Halling, 4 B. & C. 330; 6 D. & R. 455, (Chit. j 1262); and see the following cases, Snow v. Peacock, 3 Bing. 406; 11 Moore, 286; 2 Carr. & P. 215, (Chit. j. 1280); Beckwith r. Corrall, 3 Bing. 444; 11 Moore, 335, (Chit. j. 1291); Snow v. Sadler, 3 Bing. 610; 11 Moore, 506, (Chit. j. 1296); Strange r. Wigney, 6 Bing. 677; 4 Moore & P. 470, (Chit. j. 1504); Slater r. West, 3 Car. & P. 325; 1 Dans. & L. 15, (Chit. j. 1376); De la Chaumette v. Bank of England, 9 B. & C. 208: Bridger v. Heath, K. B. MS.; post, 258, note

(h) Beckwith v. Corrall et al. 3 Bing. 444; 11 Moore, 335, (Chit j. 1291).

(i) See Easley v. Crockford, 3 Moore & S. 700; 10 Bing. 243, S C; Buckhouse r. Harrison, 5 Bar. & Adol. 1038, 1104; 3 Nev. & M. 188, S. C.

which this doctrine was shaken is that of Crook v. Jadis(k), where a bill bro- III. Of the ker had fraudulently disposed of a bill delivered to him for the purpose of Loss of getting discounted, and Lord Denman directed the jury to find for the plain- Notes, &c. tiff, who had discounted the bill, if they thought he had not been guilty of gross negligence; and the jury having found a verdict for the plaintiff the be observcourt refused to grant a new trial on the ground of misdirection. In the ed in taking subsequent case of Backhouse v. Harrison (l), which was the case of a lost a Bill, &c. bill, the same principle was adopted; and it was held, that although it was a good defence that the plaintiff took the bill fraudulently, or under such circumstances that he must have known that the person from whom he took it had no title, or that the plaintiff was guilty of gross negligence in taking it; yet it was no defence that he took it under circumstances in which a prudent and cautious man would not have taken it. In Foster v. Pearson(m) also, the Court of Exchequer seemed to consider that the want of due care and caution is not sufficient to defeat the right of a bona fide holder for value, and that the want of such care and caution is only material as affecting the bona fides and honesty of the transaction. And the case of Goodman v. Harvey(n) has since finally decided that even gross negligence is not alone enough to destroy the title of a holder for value, but that a case of MALA MALA FIDES on the part of such holder must be made out in order to defeat his FIDES ne-So that the doctrine of Lord Tenterden is now completely explod-defeat ed, and the old rule of law, "that the holder of bills of exchange indorsed claim of in blank, or other negotiable securities transferable by delivery, can give a holder. title which he does not himself possess to a person taking them bona fide for value," again re-established in its fullest extent.

Inasmuch, however, as the question whether a bill or note has been taken Instances bona fide involves the question whether it has been taken with due caution (p), of Want of it may be proported patient of the instances # f and f due Cauit may be proper to notice shortly some of the instances *of want of due tion in takcaution which have been decided upon; thus—Taking a bill from a person ing Bills, whose features were known, but name unknown, without making any inquiry &c. (o). of him how he came by it(q). Taking a check for 50l. five days after its [*258] date, from an unknown person, in exchange for goods under 10l. and delivering the difference in money(r). Taking a 500l. bank note, in exchange for a banker's own country notes, from a respectable looking stranger who had just arrived by the mail, and stated his name, but without making further inquiry(s); and perhaps taking a 50l. Bank of England note from a stranger at one of the principal races, in payment of bets won, without inquiry, or taking the number of the note, so as to distinguish that taken from others(t). So a country banker cashing a 100l, bank post bill for a stranger, who said he was on a journey,, and wrote his name thereon in an illiterate hand, but without inquiring at what inn he was staying. (u). Taking a bill of exchange in London, in part payment for goods, from a person who represented himself to be a tradesman from the country, and recommended by a named customer, and sending the goods at a fixed hour to a public-

house, not an usual booking-office, without making any inquiries, excepting

(k) 5 B. & Ad. 909; 3 Nev. & Man. 257; 6 C. & P. 191, S. C.

(1) 5 B. & Ad. 1098; 3 N. & M. 188, S. C. (m) 1 C. M. & R. 849; 5 Tyr. 255, S. C. (n) 4 Ad. & El. 870; 6 N. & M. 372, S. C. see post, \$20, (34).

(o) As to the degree of caution required from a banker in taking bills from a broker, see Cunliffe v. Booth, 5 Scott, 17; 3 Bing. N. C. 821,

(p) Per Holroyd, J. in Gill v. Cubitt, 3 B.

& C. 477; and see per Bayley, J. ib. 475, 476. and per Lord Mansfield in Peacock v. Rhodes, 2 Dougl. 636.

(q) Gill v. Cubitt, 3 B. & C. 466. (r) Down v. Halling, 4 B. & C. 330. (s) Snow v. Peacock, 3 Bing. 406; 11 Moore, 286; 2 Car. & P. 215, S. C.
(1) Snow v. Sadler, 3 Bing. 610; 11 Moore,

506, (Chit. j. 1296).

(u) Strange v. Wigney, 6 Bing. 677; 4 M. & P. 470, (Chit. j. 1504).

Loss of Notes, &c. der(y). Bills, in taking

Bills, &c.

III. Of the as to the respectability of the acceptor(x). Exchanging a bank note for a large sum in France, without particular inquiries as to the right of the hol-Exchanging at a country banker's, on the day of a prize fight, a bank note for 2001, which had been divided in halves, for a stranger, who of want of called twice on that day, and gave his name and address in London, but due cantion without further inquiries (z);—were all held irregular transactions.

So though it had been intimated, that no inquiry need be made when the holder was well known(a), yet that suggestion was to be received with this qualification, that the possession of the particular bill was consistent with the situation and circumstances of the party; and therefore where a bank note for 10001. was taken by a money broker from a person with whom he was well acquainted, but who was then in pecuniary difficulties, and he changed it, by giving bills which had some time to run, and cash, deducting a commission, without asking any questions of the holder how he came by it, the jury and court held, that the loser was entitled to recover the value from the broker by action of trover (b).

Proper Ingested.

It was considered that where a stranger presented a bill or note in payquiries sug- ment or exchange, especially when to a considerable amount, particular inquiries should be made of him, and he should be required to call again, until the truth of his statement in some respect had been ascertained, which course of conduct would, if he were not a bona fide holder, probably deter [*259] him from completing his fraudulent purpose, or *lead to his apprehension and conviction; as in the case where the party represented himself to have just arrived, he might have been required to state the mode of conveyance; the place he came from; his permanent residence; the inn or his lodgings in the place; his profession or business; names of some of the persons with whom he was acquainted; where he was going to; persons known to him there; the object of his journey; how long he was going to stay, and when he intended to return; how he came by the security, and for what purpose he wished it changed; and he should be required to write his name and residence on the note. Such inquiries might lead to seeming hesitation or contradiction, and if not, still the party should be told, that inquiry at the inn, and of the coachman and guard, and passengers, would be immediately made; and that, if all was satisfactory, at an appointed time the security would be exchanged, and which in the mean time might be deposited whilst An honest man ought not to be offended by this such inquiry is making. A thief might take alarm, and his immediate apprehension, or precaution. at least the stoppage of the instrument, might be effected. At all events, if the party returned, the inquiries might lead to the apprehension of the offender, and thus the banker or other party would perform his duty to himself, to the real owner, and to the public(c). These and other like inquiries, though not now strictly essential to the holder's right of recovery, will at

& Lloyd, 15, (Chit. j. 1876).

(z) Bridger v. Heath and another, K. B. Sit-

(x) Slater v. West, 3 Car. & P. 325; Dans. tings at Westminster, Middlesex, A. D. 1825, Lloyd, 15, (Chit. j. 1376). MS.; ante, 253, note (m).

(a) Per Lord Tenterden, in Gill v. Cubitt, 8 B. & C. 466; 5 D. & R. 324; 1 Car. & P. 163, (Chit. j. 1237); and see Snow v. Peacock, 8 Bing. 415; 11 Moore, 286, (Chit. j. 1280).

(b) Egan v. Threlfall, 5 D. & R. 526, note. (c) See different observations in the several cases, especially in Snow v. Peacock, 3 Bing. 410 to 421; and 11 Moore, 286, 288; 2 Car. & P. 215, (Chit. j. 1280).

⁽y) With respect to Bank of England notes, several cases have occurred; Miller v. Race, 1 Burr. 452, ante, 255; Solomone v. The Bank of England, 13 Esst, 185; 1 Rose, 99, S. C.; Snow v. Peacock, 2 Car. & P. 215; 3 Bing. Bnow v. reacock, 2 Car. & P. 215; 3 Bing. 406, S. C.; Egan v. Threlfall, 5 D. & R. 326; De la Chaumette v. The Bank of England, 9 B. & C. 208; Dans. & L. 319; 2 Bar. & Ad. 385, (Chit. j. 1419, 1542).

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once furnish an answer to any case of mala fides set up on the part of the III. Of the

So, on the other hand, although the loser's remedy will not be destroyed Notes, &c. by the want of due publication of the loss, where the holder has taken the bill, &c., mala fide, yet immediate and public notice thereof is always proper, because it may occasion notice in fact, and prevent persons from taking the instrument, and also lead to the apprehension of the felon; though, generally speaking, care is taken to transfer the instrument long before any notice of the loss can be given, and, consequently, it can rarely be of any avail in preventing the circulation of the security.

If a banker or other party, after notice of the loss, discount a bill drawn Conseon a customer, and by the acceptance made payable at his bank, and after- Notice of wards debit his customer with the amount, and write a discharge on the bill, Loss. and deliver it up to the customer; this is an illegal assumption of the property, and such a conversion as will enable the loser to support trover against such banker without any previous demand (d).

In remitting bank notes or bank post bills, it is expedient to divide them, Halves. and send them by different conveyances; and it should seem, that if one part should be lost, stolen, or misapplied, no person but the real owner can acquire a right to or lien upon the same, however bond fide his conduct may have been, because, as the instrument was not perfect when be received the same, he had no right to rely on the authenticity of the transaction, and can look only to the party from whom he received it; and the real owner may recover from him the half in an action of trover, if it be withheld after demand(e); though he could *not recover from the acceptor or maker without [*260] producing both the halves, and being able to give them up(f)(1). have seen how far the circumstance of an overdue bill or note, payable on demand, in circulation many days after its date, will be considered a fact that ought to excite suspicion, and require a party to make inquiries(g).

The halves of country bank notes sent in a letter are considered in law as goods and chattels, and a person who steals or embezzles them is indictable for such larceny or embezzlement (h).

After notice of the loss, the acceptor of a bill must not pay it without ade-

(d) Lovell v. Martin, 4 Taunt. 799, (Chit

(f) Mayor v. Johnson, 3 Camp. 324, (Chit. j. 883); ante, 154, 155; post, 265, note (x). (g) Ante, 216, 217.

(e) Per Lord Tenterden, at Guildhall, A. D. 1828; and see Mossop v. Eadon, 16 Ves. 430, (Chit. j. 786); post, 269.

(h) Rex v. Mend, 4 Car. & P. 535.

Where a bank note has been divided for transmission, and one of the parts is lost, the holder may recover on presenting the other part, as the parts of a divided bill are not separately negotiable. Patten v. Bank S. Car., 2 Nott & M'Cord, 464. Martin v. Bank of U. S., 4 Wash. Cir. Rep. 253. U. S. Bank v. Sill, 5 Conn. Rep. 106. Farmer's Bank v. Reynolds, 4 Rand. Rep.

The holder of bank bills cut in two parts for the purpose of safe transmission by mail, is entitled to recover of the bank the amount of the bills, where it appears that the bills were actually mailed, and that only one set of the halves came safe to hand. The Bank of Orange v. Hinsdale mailed, and that only one set of the halves came safe to hand. & others, 6 Wend. Rep. 378.

Such recovery may be had under the common money counts. Ib.

⁽¹⁾ The bona fide owner of a bank note who has transmitted one half thereof by the mail. cannot, on the loss of that half, demand payment from the bank of any part of its amount in consequence of holding the retained half merely; but he is entitled to demand the whole amount of said note on satisfying the bank of the truth of the facts, or establishing them by the judgment of a court of Equity, and giving in either case a satisfactory indemnity to secure the bank against a future loss from the appearance of the other half. Bank of Virginia v. Ward, 6 Munf. 169.

III. Of the quate indemnity; but we have seen, that if the acceptor or maker of a lost bill or note pay the same at maturity, not having had notice of the loss, such Notes, &c. payment will be valid(i)(1). The premature payment of a check the day before it bore date, which had been lost by the payee, was held to be invalid, and that the banker was liable to repay the amount to the loser, it being proved to be contrary to the usual course of business(k) to pay drafts before the day on which they are dated (l)(2).

In an action by the holder of a bill, &c. when it is proved on the trial that the instrument has been lost, or fraudulently or feloniously obtained from the defendant, it is incumbent on the plaintiff to prove that he came to the possession of the instrument bon? fide, and for a sufficient consideration(m).

In a very strong case of suspicion cast upon the holder, the loser of the bill need not give so strict evidence of the actual loss, and it would suffice for him to prove that the bill was at one time his property (n); indeed it does not seem necessary in any case to give direct evidence of the loss, and it suffices if such circumstances are shown as satisfy the jury of the fact of the loss(o). And positive evidence of the possession and loss of the identical bill will not be required, and what the loser does and says at the time of the alledged loss, will, upon proof by other evidence of his previous possession, Where A. lost a 201. bank note, which was found by be admissable (p). B., who took it to C. to get it changed, and C. changed it accordingly; and B. being afterwards taken up on a charge of stealing the note, gave A. 71. as part of the change; in an action of trover brought by A. against C. to recover the value of the note, it was held, that the action was maintainable, and that the acceptance of part did not affirm the act of B. or waive the tort, but that it only went in mitigation of the damages (q).

For gery of In-&c.

When a bill is assignable only by indorsement, as no interest can be conof inbe obtained through a forgery, any person getting possession of it by a forged indorsement will not acquire any interest in it, although he was not aware of the forgery(3); and consequently the original holder in such case may, [*261] when he has regained possession of the *bill, recover against the acceptor

> (i) Ante, 254, 255. (k) This was much relied on in Grant r. Vaughan, 3 Burr. 1516, (Chit. j. 365); and Peacock v. Rhodes, Doug. 611, (Chit. j. 408); Miller v. Race, 1 Burr. 432, (Chit. j. 346). See Gill v. Cubitt, 3 Bar. & Cres. 475; ante, 258, n. (q); per Bayley, J.; and in Snow v. Peacock, 2 Car. & P. 222, Best, C. J. said, that the course of business must require the usual and ordinary manner of conducting it, a proper and reasonable degree of caution necessary to preserve the interests of trade."

(1) De Silva v. Fuller, Sittings at London, Easter, 1776, Sel. Ca. 238, MS. (Chit. j. 392); post, Ch. IX. s. ii. Payment—To whom.

(m) See the cases ante, 254, 255, 256; Paterson v. Hardacre, 4 Taunt. 104.

(n) Down v. Halling, 4 Bur. & Cres. 330; 6 Dow. & Ry. 455, (Chit. j. 1262). (v) Holiday v. Sigel, 2 Car. & P. 176, (Chit. j. 1275); Bridger v. Heath, MS. ante,

258, note (z). (p) Bridger v. Heath, MS. ante, 258, n. (z). (q) Burn v. Morris, 2 Crom. & M. 579.

(2) And if a bank pay to a bona fide holder a forged check, it cannot recall the payment. Levy v. Bank of the United States, 4 Dall. Rep. 234. S. C. 1 Binn. Rep. 27.

There is an implied warranty in the transfer of every negotiable instrument that it is not forged.

^{(1) {} It is no ground of defence by an acceptor, that the payee has written to him that the bill was lost, and not to pay it to any one but himself. Lambeth v. Rivarde, 16 Lonis. Rep.

Herrick v. Whitney, et al. 15 John. Rep. 240. (3) { A bank is entitled to recover against the second indorser of a note discounted by the bank, a though the indorsement of the name of the payee is a forgery, and although the note was offered for disco int by the maker, and not by the second indorser. The State Bank v. Fearing, 16 Pick. 533. }

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and drawer, although the acceptor may have paid the bill; (1) and if the per- III. Of the son attempting to derive an interest under such indorsement, sue the accep- Loss of tor, he will be permitted to prove that the indorsement was not made by the Bills, Notes, &c. person entitled to make it(r). Where a promissory note made and delivered by the defendant to the plaintiff, payable to the plaintiff's order, was sto-Forgery of Indorselen from the plaintiff by his clerk, who, after forging the plaintiff's indorse-ment, &c. ment, obtained payment of the defendant's banker, and the banker handed the note to the defendant, it was held, that the plaintiff, to whom no negligence was imputed, was entitled to recover the amount at the hands of defendant in an action of trover, notwithstanding six weeks had elapsed before the plaintiff discovered and gave the defendant notice of the loss of the And where the original indorsement of the payee's name on a bill of exchange is a forgery, a real indorsement by the payee after the bill arrives at maturity will not give the holder any title(t). Bankers who pay a forged acceptance or check of their customers must bear the loss, and not the customer(u). And in a late case where the holder of a check substituted a larger sum for that originally mentioned in it, without the knowledge or

(r) Smith v. Chester, 1 T. R. 654, (Chit. j. 439); Cheap r. Hanley, cited in Allen v. Dundas, 3 T. R. 127; Mead v. Young, 4 T. R. 28, (Chit. j. 467); ante, 198, note (e); Gibson v.

Minet, 1 H. Bla. 607, (Chit. j. 479). Cheap v. Hanley, cited 3 T. R. 127. In this case, tried before Buller, J. it appeared that the defendants, who had a house in America as well as in London, drew two bills of exchange there, the first and second of the same tenor and date, on their house here, payable to the plaintiffs; one of them being lost, came into the hands of a third person, who forged an indorsement of the payees, and received the amount of it from the defendants here, and afterwards the real payees brought their action upon the other bill, and recovered.

Smith, assignees of Bagnall and Hand v. Sheppard, London Sittings after Hilary Term, 16 Geo. 3. The defendant was indebted to Bagnall and Hand, the bankrupts, in 80% for goods sold October, 1774. Comberstall, the bankrupts' servant, brought a bill of parcels in the same handwriting that all their former bills had been, and fraudulently said his master was in want of cash, and desired he would accept a bill of exchange, which C. immediately drew, signed with his own name, payable to Bagnall and Hand or order, and gave a receipt on the bill of parcels. The defendant accepted the bill, and C. afterwards carried it away. The bill was brought to the defendant by Spencer, who had it in payment for goods. The name of Bagnall and Hand were indorsed on the bill, and defendant poid it, but, that independent and defendant paid it; but that indorsement was a forgery. It was the bankrupt's practice to deliver in their bills at Christmas; but at Christmas, after this transaction, no bill was delivered to defendant. No evidence appeared in whose hand-writing the indorsement was, but it did not appear to be like the bankrupts' or Comberstall's. Lord Mansfield said, " Each party is innocent; the question is on whom the loss must fall? It should be on him who is most in fault. It is admitted that Comberstall used to receive money, but not draw bills. Here is a bill that does not trust Comberstall at all, for it is to pay to the order of the bank-rupts; in this case, if he had been used to draw bills, that would not vary the case, because it is not pretended that the indorsement was by Comberstall; then he that takes a forged bill must abide by the consequence, for the man whose name is forged knows nothing of it. If a bill payable to bearer be lost, and found by another person in the street, who carries it to a banker who drew it, and he pays, it is a good payment, for it is the owner's fault that he lost it. In this case, the name of Bagnall and Hard is forged; it could not be paid without their hand, and the defendant has been negligent in inquiries whether it was their hand or not. The ground which defendant relies on is, that the bill was not delivered at Christmas, as usual; but that is of no weight, because it had been delivered before in October." Verdict for plaintiff. MS. of Mr. Serjeant Bond, in Sel. Ca. 243.

(s) Johnson v. Windle, 3 Bing. N. C. 225; 8 Scott, 608, S. C.

(t) Esdaile v. La Nauze, 1 Y. & C. 394; and see the same case, ante, 252, note (e), as to relief in equity.

(u) Hall v. Fuller, 5 B. & C. 750; 8 D. & R. 464, S. C. See per Lord Ellenborough, in Forster v. Clements, 2 Camp. 17, and post, Ch. IX s. ii. In Smith v. Mercer, 6 Taunt. 74; 1 Marsh. 453, (Chit. j. 923), it was held, (Chambre, J. dissentiente,) that bankers who paid a forged acceptance of one of their customers, made payable at their house, could not recover the money of the bond fide holders of the bill to whom the payment was made, on the principle that it was the duty of the bankers to have as-certained the authenticity of the order before they obeyed it. Vide also Price v. Neal, 3 v. Windle, 3 Bing. N. C. 225, supra. When not, Young v. Grote, 4 Bing. 253; Morrison v. Buchanan, 6 C. & P. 18; post, 262, note (y). III. Of the consent of "the drawer, and the bankers paid the larger sum, they were held liable to bear the loss(x). But where the drawer of a check himself permit-Notes, &c. ted the check to be so drawn as to enable the party fraudulently to alter the sum, it was decided that he must bear the loss, and not the bankers (y).

Liability of Postmas-

It is settled, that no action can be supported against the post master general ter-Gener- for the loss of bills or bank-notes stolen out of letters put into the post-office(z); but a deputy post-master may be sued for neglect in not delivering letters in due time(a). Unless, indeed, the plaintiff, by due diligence, might have prevented the damage arising from such neglect (b).

Carriers.

With respect to the liability of carriers for the loss of bills and notes, &c. exceeding 101., the 11 Geo. 4 and 1 Wm. 4, c. 68, s. 1, enacts, "that no mail contractor, stage-coach proprietor, or other common carrier byl and, for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following; (that is to say) gold or silver coin, &c. bills, notes of the Governor and Company of the Banks of England, Scotland, and Ireland, respectively, or of any other Bank of Great Britain or Ireland, orders, notes, or securities for payment of money, English or Foreign, slamps, &c. contained in any parcel or package which shall have been delivered either to be carried for hire, or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package, shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stagecoach proprietor, or other common carrier, or to his, her, or their book-keeper, coachinan or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." It is provided, however, that the act shall not affect special contracts; nor extend to loss by the felonious acts of the servants of the carrier (c).

It is incumbent also on the party who has thus lost the bill, even though Necessity of applying it has been destroyed, to make application at the time it is *due for payment, ment, &c. and to give notice to all the parties of the refusal of the drawee to pay the same, of lost Bill.

&c. when due.

(x) K. B. June 10th. 1826, Hall v. Fuller, [*263] 5 Bar. & Cres. 750; 8 Dow. & Ry. 404, (Chit. j. 1294).

Abbott, C. J. "It was the duty of a banker to take care that he did not pay away his customer's money, without a sufficient authority for that purpose; and if he paid to a forged order, he must bear the loss, and it was immaterial whether the order was forged wholly or in part. Here the defendants had paid a sum of money belonging to their customer, which the latter had never authorised them to pay, and therefore they could not charge him with the loss. Under these circumstances, the defendant was entitled to judgment." Bayley, J. concurred. "The banker was bound to pay only to his customer's order, and if he unfortunately paid a forged order, he alone must bear the loss. It is the banker's duty to see that a check is genuine in all respects." Judgment for the plaintiff.

(y) Younge v. Grote, 4 Bing. 253; 12 Moore, 484, (Chit. j. 1344); and see Morrison v. Buchanan, 6 C. & P. 18, S. P., post, Ch. IX. s. ii. Payment by Mistake.

(z) Lane v. Cotton, I Salk. 17; Whitfield r. Lord Le Despencer, Cowp. 754, (Chit. j. 938). (a) Rowning v. Goodchild, 8 Wils. 443; 2 Bla. Rep. 906; 5 Burr. 2711.

(b) Horden v. Dalton, 1 Car. & P. 181, (Chit. j. 1204). It was there held, that if a post-master has agreed to deliver letters in a particular mode, and by mistake does not deliver one for two days, and that letter contained a returned bill, he is not liable in damages for the amount of the bill, if the plaintiff could give notice of dishonour in time, if he sent a special messenger, though too late to do so by

(c) See this act with notes, Chit. & H. Stat. tit. Carriers.

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for otherwise he will lose his remedy against the drawer and indorsers (d). III. Of the It is said by Marius (e), that the holder of a bill which has been lost, should, Lose of in the presence of a notary and two witnesses, acquaint the acceptor with the Notes, &c. loss, and signify to him that at his peril he pay it to none but himself or his order; and the same writer says, that no person should refuse to pay a bill which he has accepted, to the loser, on the ground of its having been lost, if he have sufficient security and indemnification offered to him; and that if he do, he will be liable to make good all loss, re-exchange, and charges (f). The drawee, however, has always a right to insist on production of the bill before he pays it, and may legally defend an action if it be not produced, it being part of his contract to pay only on presentment of the bill(g). If the loser and holder contest the right, the acceptor must require indemnity, or file a bill of interpleader, or apply to the court under the recent act, 1 & 2 Will. 4, c. 58, s. 1(h).

We shall hereafter see that the fraudulent misapplication by bankers and Embezzleagents of bills and notes entrusted to their care, is punishable by recent stat- ment and ute as a misdemeanor(i). Other statutes have provided, that to steal or take how punby robbery any bills, bank-notes, or promissory notes, shall be felony (k). is bed.

In France, it has been long established, that the drawer and indorsers of a Loser's bill shall be compellable to give the holder of it another of the same tenor, in require ancase the original bill, or the accepted part, has been lost(1). In this coun-other Bill, try no such general rule prevails in the case of inland bills. There is, how-&c. ever, a proviso in the stat. 9 & 10 Will. 3, c. 17, s. 3, by which it is enacted, "that in case any such inland bill shall happen to be lost or miscarried within the time before limited for the payment of the same, then the drawer of the said bill is and shall be obliged to give another bill of the same tenor with that first given; the person to whom they are delivered giving security, if demanded, to the drawer, to indemnify him against all persons whatsoever, in case the said bills so alleged to be lost or miscarried shall be found again(m)." It should seem, that from the word "such," the statute does not extend to all bills of exchange, but only to the particular bills therein mentioned, namely, such as are expressed to be for value received, and payable after date(n); but it has been observed, *that the equity of the statute [*264] would comprehend indorsements also, and that the 3 & 4 Ann. c. 9, which gives the like remedies upon notes as were then in use on inland bills, would extend the statute of William to notes (o).

(d) Thackray v. Blackett, 3 Campb. 164, (Chit. j. 849). (e) Page 77.

(f) Mar. 10; Beawes, pl. 182, 185; Tercese v. Geray, Finch's Rep. 301, (Chit. j. 164); Vin. Abr. tit. Bills, R.

(g) Hansard v. Robinson, 7 B. & C. 90; 9 Dow. & Ry. 860, (Chit. j. 1340); post, 266, n. (a).

(h) See this act with notes Chit. & H. stat. title "Interpleader."

(i) See the 7 & 8 Geo. 4, c. 29, s. 49, post, Part III. Ch. II.

(k) See repealed statutes, post, Part III. Ch. II.; and the cases and precedents relative to this offence, 3 Chitty's Crim. Law, 2d edit. 932; 3 Maule & S. 539; 2 Leach, 1103; and the recent act, 7 & S Geo. 4, c. 29, s. 5. As to stealing half bank-notes, see Rex v. Mead, 4 Car. & P. 535, ante, 260, note (h).

(1) See the modern regulations, 1 Pardes. 432 to 436; Pailliet Man. 950, whether in case of the loss of a single bill, or of the accepted part of a foreign bill in sets. The delivery of a duplicate by the drawer, and of the indorsements, can there only be enforced by resorting to a tribunal, and on giving indemnity against the claim of a bond fide holder; which indemnity is only to be in force three years, although the time of limitation, in France, as to the instrument itself, is five years; 1 Pardes. 432, 436; Palliet, 850.

(m) It is not unusual to declare specially in assumpsit, for not giving a fresh bill; sed quere

as to the remedy at law; post, 265.

(n) Sed quære; see Walmsley v. Child, 1
Ves. sen. 346, 347, (Chit. j. 323); Leftly v.
Mills, 4 T. R. 170, (Chit. j. 473); 2 Campb.

(o) Powell v. Monnier, 1 Atk. 613, (Chit. j.

Bills,

Loser's Remedy

III. Of the I It is perfectly clear, that in case of the loss of a bill, &c. whether before or after it was due, or when it is payable on demand, and might by possible Notes, &c. lity be in the hands of a bona fide holder, a court of equity has jurisdiction to enforce payment of the amount upon a sufficient indemnity being given; and if such indemnity has been tendered, the defendant will in general have Remedy in Court of to pay the costs in equity (p) And although it has been held, that when the Equity. Instrument is not negotiable, or has been specially indorsed, and there is a remedy at law, a bill in equity is not sustainable (q); that determination seems questionable, for, in another case it was held, that the indorsee of a bill of exchange which has been lost, has a remedy against the acceptor by bill in equity, and that although he might have recovered on the bill at law, and although the bill was merely to accommodate the drawer, and plaintiff might have applied before; or though the drawer has since become insolvent; nor is plaintiff in such case bound to file the bill within any particular time(r). A mutilated bill or note of an old date, and part of which has been lost, may also be established in equity(s). Where a bill is filed by an indorsee of a [*265] lost bill against *the acceptor, it is not necessary to make the drawer or prior indorsers parties(t). The right to prove under a commission of bankrupt, in

> 293; Walmsley r. Child, I Ves. sen. 346, 347; 2 Campb. 215, in notes.

(p) Walmsley v. Child, 1 Ves. sen. 338, 344; Toulmin v. Price, 5 Ves. 288, post, 268, 269; Tercese r. Geray, Finch's Rep. 301, (Chit. j. 164); Vin. Abr. tit. Bills, R.; Ex parte Greenway, 6 Ves. 812, (Chit. j. 674); Mossop v. Eadon, 16 Ves. 430, (Chit. j. 678). As to the mode of proceeding in equity, 1 Ves. 34; 5 Ves. 338; 6 Ves. 112; Davies v. Dodd, 4 Price, 176, (Chit. j. 996).

(q) Mossop v. Eadon, 16 Ves. 430, (Chit. j. 678), post, 269.
(r) Davies v. Dodd, 4 Price, 176, (Chit. j.

996)

(s) Hawkes v. Hawkes, Vice-Chancellor's court, 6th June, 1832. Sir E. Sugden said "that the bill in this case was filed for the purpose of charging the real estate of a testator with a promissory note amounting to 4801. under the following circumstances:-Mr. William Hawkes died in the year 1813, leaving his real estates to his eldest son, but subject to several debts and liabilities, among which was the promissory note in question. By the death of the son the note came into the possession of the next brother, who shortly after died, leaving his brother, the present plaintiff, his executor. The note had been accidentally torn, and the whole question in the case turned upon the fact whether the hand-writing of the testator was proved to the satisfaction of the court, and whether such a note had actually been given by the deceased." The note was then handed in as evidence, and inspected by the court. It consisted of two fragments, the note appearing to have been torn into three, and the middle piece lost. One of the pieces contained the name of "Hawkes," but the Christian name was written on the piece which was lost. Mr. Richards then read the evidence of several persons, who swore they had seen such a note in the successive possession of the two brothers, and ultimately in the hands of the plaintiff, unmutilated. Evidence was also produced of the hand-writing of the testator; and likewise that he was

indebted for the precise amount of the note, at the time of his death, to the party to whom it was given. The plaintiff therefore prayed that it might be referred to the Master to take an account of the real and personal estate of the testator. Mr. Pepys, for the defendant, rested his case upon the many glaring improbabilities in the statement made by the plaintiff. The promissory note was made in the year 1812, and the testator died in 1813. It was therefore a most suspicious circumstance, that the note had passed into the hands of three parties, neither of whom had asserted his claim on the estate of the testator; and that it was not until the year 1830, that the bill was filed, at which period the plaintiff alleged the note had been torn by accident a short time before. The learned counsel then called the attention of the court to the note itself, which, he said, was evidently torn into three pieces for the purpose of destroying it. Had it been merely torn in half, it might have been occasioned by accident; but an instrument of this description could not have been torn in three pieces (and the most important piece, containing the Christian name of the ma-ker of the note lost) but for the purpose of cancelling it altogether. The evidence of the tertator's widow was then read, stating that no such note was ever drawn by him, and that the note in question was not his hand-writing.

The Vice-Chancellor was of opinion, that the evidence produced by the plaintiff most satisfactorily proved the hand-writing of the testator. And from the abundant proof which had been given that such an instrument was seen in the possession of three different parties, he entertained not the slightest doubt in his own mind that the note was given by the testator. He should therefore decree a reference to the Mas-

ter, as prayed by the plaintiff's bill."

(t) Davies v. Dodd, 4 Price, 176, (Chit.) 996); Macartney v. Graham, 2 Sim. 285. (Chit. j. 1394); tamen ride Lloyd r. Gurdon, 2 Swanst. 180; Foley r. Carlon, 1 Younge, 373, ante, 99, note (1).

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respect of a bill alleged to be lost, will be considered in the Chapter on III. Of the

Bankruptcy (u).

When the defendant himself wrongfully obtained possession of, and with Notes, &c. holds the bill or note, it is clear he may be sued at law(x). And in an action against the acceptor of a bill, which could not be produced at the trial, When Remedy at it having been proved by the plaintiff's attorney, that he had drawn the Law, but præcipe against the defendant from the original bill in his office and that he in general went out, leaving both on his desk, and that on his return the bill was mis- not. sing; and a clerk proved, that during the attorney's absence, the defendant called to ask for time, and was shown into the attorney's office where the bill was left, and that he remained there a short time, and then left; and it having been proved, that a diligent but unsuccessful search had been made for the bill, and notice served on the defendant to produce the same, it was left to the jury to presume whether or not the defendant had taken it away; and the plaintiff recovered without the production of the bill, and on proving its contents by the draft of the præcipe(y).

But in general no action at law can be supported against a party to a bill of exchange, note, or check, indorsed in blank, so as to be transferable to a bonâ fide holder, and even in halves, and lost before or on the day it is due, although a bond of indemnity has been tendered to the defendant(z); and if the bill be

(u) Post, Part II. Ch. VIII. s. iv. What Bills may be proved.

(x) Smith v. M'Clure, 5 East, 477, (Chit. j. 699); Pierson v. Hutchinson, 2 Campb. 212; 6 Esp. Rep. 126, (Chit. j. 776); infra, n. (z).

(y) Dark v. Hanks, cor. Abbott, C. J. at Westminster, 14th Dec. 1820; Marryatt and Chitty for plaintiff; Hunt, attorney.

(z) Pierson v. Hutchinson, 2 Campb. 211; 6 Esp. Rep. 126, S. C.; Powell v. Roach, ib. 76; Selw. N. P. 9th edit. 339.

Pierson v. Hutchioson, 2 Campb. 211; 6
Esp. Rep. 126, (Chit. j. 776); cited Hansard
v. Robinson, 7 Bar. & Cres. 92; 9 Dow. &
Ry. 860, (Chit. j. 1340). This was an action by the indorsee against the acceptor of a bill of exchange. Lord Ellenborough: "If the bill were proved to be destroyed, I should feel no difficulty in receiving evidence of its contents, and directing the jury to find for the plaintiff. Even on a trial for forgery, the destruction of the instrument charged by the indictment to be forged is no bar to the proceedings. I remember a case before Mr. Justice Buller where the prisoner had destroyed a bank-note he was accused of having forged, by swallowing it. He was acquitted on the merits: but the learned Judge who presided, held, that he might have been convicted without the production of the bank-note; and this doctrine was approved of by the whole profession. Here, however, the instrument is not destroyed. It is lost after be-ing indorsed by the payee. It may now be in the hands of a bona fide indorsee for value, who might maintain an action upon it against the defendant. This brings it to the indemnity. But whether an indemnity be sufficient or insufficient, is a question of which a court of law cannot judge. There are dicta to be sure, that upon the offer of an indemnity, the indorsee of a lost bill may recover at law; but these are so contrary to the principles on which our judicial system rests, that I cannot venture to proceed upon them. Since the plaintiff can neither

produce the bill, nor prove that it is destroyed, he must resort to a court of equity for relief.' The Attorney-General said, "they could show that the bill had been discounted for the defendant's accommodation, and that the money had come into his hands." But Lord Ellenbo-rough, observed, "that would not alter the case; for if the plaintiff were allowed to recover on the money counts, the defendant might still be compelled to pay the sum a second time to a bona fide holder of the bill." Plaintiff nonsuited; and see Dangerfield r. Willey, 4 Esp. Rep. 159, post. 267, note (c).

Mayor v. Johnson, 3 Campb. 324, (Chit. j. 883). A traveller received a country banknote payable to tearer in a provincial town, which he cut in two, and sent the halves on different days by the post, addressed to his employers in London; one of these was stolen from the mail coach, and they received the other. It was held, that under these circumstances they could not maintain an action against the makers of the note, on producing that half of it which reached them safely. Lord Ellenborough said, "I am of opinion, that this action cannot be maintained. It is usual and proper to pay upon an indemnity, but payment can be enforced at law only by the production of an entire note, or by proof that the instrument or the part of it which was wanting has been actually destroyed; the half of this note, taken from the Leeds mail, may have immediately got into the hands of a bon't fide holder for value, and he would have as good a right of suit upon that, as the plaintiffs upon the other half which reached them; but the maker of a promissory note cannot be liable in respect to two parties at the same time." Plaintiffs non-

N. B. This case is distinguishable from that of Mossop v. Eadon, 16 Ves. 430, (Chit. j. 786), post, 269, n. (r), because in that case the notes were not payable to order or negotiable, whereas, in the above case, they were

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III. Of the transferable by indorsement, *and is indorsed in blank or transferable by Loss of delivery, it should seem, that even if it were lost after it became due, and Bills.

Notes, &c. even after action brought(a), the same rule prevails(b); nor is the defend-

payable to bearer.

In the case of a commission of bankruptcy, if an undue bill be lost after its production by the petitioning creditor, and after the party has been adjudged a bankrupt, the commission may, however, proceed and be supported on the trial of an action at law. Polly r. Milliard, 9 Law J. Exch. E. T. 1831; post, Part II. Ch. VIII. 8. iii. Bankruptcy—Petitioning Crelitor's Debt.

(a) Hansard v. Robinson, 7 B. & C. 90; 9 Dow. & Ry. 860, (Chit. j. 1340); Ryan & M. 404, in note. The holder of a bill cunnot, by the custom of merchants, insist upon payment by the acceptor, without producing and offering to deliver up the bill; and therefore it was held, that the indorsee of a bill having lost it, could not, in an action at law, recover the amount from the acceptor, although the loss was after the bill became due, and the indorsee offered an indemnity; and although the defendant, on being applied to after the bill was due, required time, and promised payment. The court said, "It is not necessary to say whether any special action could have been framed and maintained upon the particular facts and the defendant's promise, because the declaration in the present cause is not founded upon such facts, but upon We would the bill itself in the usual way. not, however, be understood to give any encouragement to such an action, and we think the special facts cannot be properly considered as affording a satisfactory ground for decision in this case; but the case must be considered generally as an action brought upon a lost bill, and introducing the general question whether such an action can be maintained.

"Upon this question, the opinions of Judges, as they are to be found in the cases quoted at the bar, have not been uniform, and cannot be reconciled to each other. It is not necessary to advert again to the cases. Amid conflicting opinions, the proper course is to revert to the principle of these actions on bills of exchange, and to pronounce such a decision as may best conform thereto. Now the principle upon which all such actions are founded, is the custom of merchants. The founded, is the custom of merchants. general rule of the English law does not allow a suit by the assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes in this case an exception to the general rule. What then is the custom in this respect? It is, that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and upon receipt of the money, deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge pro tanto in his account with the drawer. If upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer or retain his money? And if this be the right of an acceptor, ready to pay at the maturity of the bill, must not his right remain the same if, though

not ready at that time, he is ready afterwards, and can his right be varied if the payment is to be made under a compulsory process of law? The foundation of his right, his own security, his voucher, and his discharge toward the drawer remain unchanged. As far as regards his voucher and discharge towards the drawer, it will be the same thing whether the instrument has been destroyed or mislaid. With respect to his own security against a demand by another holder, there may be a difference. But how is he to be assured of the fact, either of the loss or destruction of the hill? Is he to rely upon the assertion of the holder, or to defead an action at the peril of costs? And if the bill should afterwards appear, and a suit be brought against him by another holder, a fact not absolutely improbable in the case of a lost bill, is he to seek for the witnesses to prove the loss, and to prove that the new plaintiff must have obtained it after it became due? Has the holder a right, by his own negligence or misfortune, to cast this burthen upon the acceptor, even as a punishment for not discharging the bill on the day it became due? We think the custom of merchants does not authorize us to say that this is law. Is the bolder then without a remedy? Not wholly so. He may tender sufficient indemnity to the acceptor, and if it be refused, he may enforce payment thereupon in a court of equity; and this is agreeable to the mercantile law of other countries. In the modern Code de Commerce of France, liv. 1, tit. 9. Art. 151, 152, this is distinctly provided. And this provision is not new in the law of that country, but is found also in the Ordonnance de Commerce of Lewis the Fourteenth, tit. 5, art. 19. The rule for entering a verdict for the plaintiff must therefore be discharged." See Davis v. Dodd, 4 Taunt. 602, post, 267, note (d). But see post, 268, when bill destroyed.

(b) Poole v. Smith, Holt's C. N. P. 144, (Chit. j. 950). In an action by the indersee of a bill of exchange against the acceptor, it appeared that after action brought, and solice of trial, the bill, which was indersed in blank, had been lost, and it was held, that although the bill had been drawn more than six years, the plaintiff was not entitled to recever, without producing it at the trial; and per Gibbs. C. J. "Upon the ground of non-production of the bill, I think I am called upon to nonsuit the plaintiff; the rule is an extremely splutary one, and ought not to be relaxed." See also Powell v. Roach and others, 6 Esp. Rep. 76, S. P. (Chit. j. 731).

But in Brown r. Messiter, 3 Maule & S. 231, (Chit. j. 915); after judgment by default, the court referred it to the master to see what was due for principal and interest upon a bill of exchange, upon the production of a copy of the bill verified by affidavit of the plaintiff attorney, the original having been stolen out of his pocket, and no tidings of it gained. See further on this point, post, Part II. Ch. III. Judgment by De-

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ant liable to be *sued on the consideration of the bill(c); and even an ex- III. Of the press promise, without any new consideration, cannot be enforced at law(d); Loss of Bills, though *if there be a new consideration for the promise, as the executing Notes, &c. of a bond of indemnity to the defendant, he may be sued thereon(e).

[***26**8]

(c) Bevan v. Hill, 2 Campb. 381, (Chit. j. 788). A check given for the stock sold was lost by the vendor in going home from the Stock Exchange; the purchaser was immediately informed of this fact, but refused to pay without an indemnity; four months after, the bankers, on whom the check was drawn, stopped payment, with sufficient money of the drawer's in their hands to answer it; held, that under these circumstances, an action would not lie for the price of the stock. Lord Ellenborough said, "It is certainly possible, that this check may have got into the hands of a person who might maintain an action upon it. The very day it was lost, it might have been passed for value to a bont file bolder without notice; I therefore think the defendant was entitled to an indemnity; he could not without this have safely withdrawn the money from Walpole and Co before their bankraptcy; he then ceased to be liable upon the check, but the money was gone; besides, the bankruptcy of Walpole and Co. may not be sustainable, and the defendant is not to be exposed to the risk of the commission being superseded." Plaintiff nonsuited. Cited 7 B. & C. 92.

Dangerfield v. Wilby, 4 Esp. Rep. 159, (Chit. j. 648). Payee against the maker of a promissory note. The declaration contained the usual money counts. At the trial no note was produced in evidence, nor was there any evidence that the note declared upon had been destroyed; or that it was not in existence; but it was merely stated that the note had been lost, and proved that the defendant on the amount of the note being demanded had apologized for its non-payment. The plaintiff's counsel therenpon abandoned the note and proposed to go into evidence of the consideration, viz. money lent. Lord Ellenborough said, he was of opinion the plaintiff was not entitled to go into the consideration of the note, for as the note, for any thing that appeared in evidence, was in existence, it might be still in circulation, and the defendant be liable to be called upon to pay it, so that he might be subjected twice to the payment of the same demand; it was therefore incumbent on him to show it to be destroyed, so that the defendant should not be again subjected to the payment of it(1). As to any de-mand therefore on account of the note, he thought the plaintiff not entitled to recover. The plaintiff was nonsuited; and see Pierson v. Hutchinson, ante, 265, note (z).

Champion v. Terry, 3 Brod. & B. 295, 7 Moore, 130, (Chit. j. 1144). The defendant being indebted to plaintiff for goods sold gave him a bill of exchange not due, (drawn and accepted by two other persons) to a greater amount than the price of the goods, and plaintiff gave defendant the difference in money. De-

fendant indorsed the bill in blank. Plaintiff having lost the bill, it was held that he could not sue defendant for the price of the goods or on the lost bill. Aliter, where the bill not indorsed; Rolt v. Watson, 4 Bing. 273, post, 268, note (h).

(d) Davis v. Dodd, 4 Taunt. 602, (Chit. j. The plaintiff declared upon a bill of ex-876). change for 961. 9s. drawn by Allen to his own order, and accepted by the defendant, and in-dersed by Allen to the plaintiff. There were also the usual money counts. Upon the trial, at Maidstone Summer Assizes, 1812, before Lord Ellenborough, C. J. it was proved that the witness had lost the bill out of his pocket, whereupon, when the bill became due, he applied to the defendant, stating the circumstance, and requesting him to pay the bill, which until the time of action had never been presented for payment by any other person: and defendant repeatedly and expressly promised to pay it. Lord Ellenborough was of opinion, that as the plaintiff had not presented the bill for payment to the defendant, and as the bill was not produced at the trial, the plaintiff could not recover in this action, and directed a nonsuit. Best Serjeant, moved to set aside the nonsuit, and have a new trial; he contended that the express promise to pay the bill was upheld by the consideration of the moral obligation to which the defendant was subject to pay the sum due on his acceptance. The court denied that there was any moral obligation on the defendant to pay this sum to the plaintiff, who, by his negligence, had exposed the defendant to the danger of being compelled to pay the bill when produced in the hands of another holder. It was quite clear that the plaintiff could not recover in this action; if he could recover at all upon this promise, which they much doubted, it must be in an action upon the special undertaking; the party might have proceeded to enforce the giving of a new bill under the statute, and that seemed to be his only course. The promise contained in the bill is the equivalent given for the consideration paid for the bill, and no new consideration had been subsequently paid to sustain this new promise, and which was therefore nudum pactum, and could not be enforced. Rule refused. Hansard v. Robinson, 7 B. & Cres. 90, S. P., ante, 266, note (a).

(e) Williams v. Clements, 1 Taunt. 523. Special assumpsit, alleging that the defendant was indebted on a bill of exchange, and the plaintiff having lost the same, had, at the request of the defendant, given him a bond acknowledging payment and conditioned to indemnify him against the bill, in consideration whereof defendant undertook to pay the money on request. On motion in arrest of judgment it was held, that such count, stating a new con

⁽¹⁾ The same point was ruled in the same manner in Holmes v. De Camp, 1 John. Rep. 34. Angel v. Felton, 9 John. Rep. 149. Cumming v. Hackley, 8 John Rep. 202. Pintard v. Tackington, 10 John. Rep. 104,

III. Of the Loss of Bills, Notes, &c.

Destruction of Bill, &c.

It seems, however, that if it can be distinctly proved that the bill has been destroyed, the party who was the holder may recover at law(f); so if the bill was not negotiable (g) or has not been indorsed at all (h); or if it was only specially indorsed, the party who lost it may proceed by action on such bill, and secondary evidence of the contents may be admitted (i)(1). And if the

sideration, viz. the execution of the bond, was sufficient. In Hansard r. Robinson, 7 Barn. & C. 90, the defendant had promised to pay. See note 266 page (a)

ante, 266, note (a).
(f) Per Parke, J. in Woodford v. Whitely,
Mood. & M. 517, (Chit. j. 1508); Pierson v.
Hutchinson, 2 Camp. 212; 6 Esp. Rep. 126,

Hutchinson, 2 Camp. 212; 6 Esp. Rep. 126, S. C.; ante, 265, note (2); Dangerfield v. Wilby, 4 Esp. Rep. 159, ante, 267, n. (c). But see the observation of the court in Hansard v. Robinson, 7 B. & C. 90, 95, ante, 266, note (a).

(g) Mossop v. Eadon, 16 Ves. 439, (Chit. j. 768), post, 269, note (r).

(h) Rolt r. Watson, 4 Bingh. 273; S. C. 12 Moore, 510; 5 Law J. C. P. 172, (Chit. j.

1312, 1346).

The defendant had accepted a bill at three months for goods purchased. The seller lost the bill, not having inderset it, and became bankrupt. No demand was ever made on the defendant in respect of the bill; and it was held, that the acceptance of this bill was no defence to an action for the value of the goods; nor, per Best, C. J. "Under the statute 9 & 10 W. 3, the holder of a lost bill could not in a court of law compel the acceptor to give him a new bill upon receiving an indemnity for such a purpose; he must resort to a court of equity. The question for us therefore is, whether the bill which the defendant in this cause has accepted, be an instrument which can never rise in judgment against him? Now the jury have found ex-

pressly, that the bill was unindorsed, and though payable three months after date, it has not been heard of from 1825 to 1827. There is no decision in which the party has been held to be responsible in respect of an outstanding bill unindorsed. In all cases in which a defendant has been holden to be discharged in respect of a supposed liability on a bill, the bill has been in such a state as to be likely to be used against him, as in Champion v. Terry, 3 B. & B. 295, ante, 267, u. (c), where the defendant paid for goods by a bill which he had indorsed in blank. The bill having been lost, it was holden be could not be sued for the value of the goods. The defendant is not liable to be called on in the present case, and therefore this rule must be discharged." And see Wain v. Bailey, 2 Per. & Dav. 507, post, Ch. IX. s. ii. Of Payment.

(i) Long v. Bailie, 2 Campb. 214, in note; cited in Hansard r. Robinson, 7 B. & C. 90, ante, 266, note (a); Mossop v. Eadon, 16 Ves. 430, 434, post, 269, n. (r); Selw. N. P. 9th

edit. 33J.

Long r. Baillie, Guildhall, 13th December, 1805, coram Lord Ellenborough, 2 Campb. 214. This was an action against the acceptor of a bill of exchange, payable to the order of the drawer, and by him specially indersed to the plaintiff. It was proved that a person took the bill to have it compared with the affidavit to hold to bail, that a copy was then taken, and the bill was afterwards atolen from such person. The correct-

Though the holder of a negotiable promissory note, over-due, which is not produced at the trial, in an action against the maker, is not bound to prove its absolute destruction, yet he must give such proof as shows that the defendant cannot afterwards be compelled to pay the amount to a bona fide holder. Swift v. Stevens, 8 Conn. Rep. 431.

But direct and positive evidence on this subject is not required. Ib.

Therefore, where the plaintiff in an action against the maker of a promissory note, payable to bearer, proved, by the cashier of a bank, to whom the note had been confided for safe keeping, that he had made diligent search for it, but was unable to find it; that he had never delivered it to any person; and that he had no doubt, and verily believed, it had been, by accident, destroyed; it was held, that this was proper evidence to go to the jury to prove the destruction or non-existence of the note. Ib.

So where, on the trial of an action on such note, it appeared, that more than four years had clapsed from the time it fell due, and that there had been two former trials of the same action without the production of the note; it was held, that these circumstances were entitled to great

consideration on the question of its destruction. Ib.

Where a note payable on demand had been lost or destroyed, and it did not appear that it was negotiable, or if negotiable, that it had been negotiated, the payee was allowed to recover on the note. Pintard v. Tackington, 10 John. Rep. 104. But a recovery cannot be had upon a note merely lost and not destroyed, if it had been indorsed before it was lost.—Ibid. But see Freeman v. Boynton, 7 Mass. Rep. 483, and Anderson v. Robson, 2 Bay's Rep. 495.

There may be a recovery against the acceptor on a bill of exchange, indorsed to the plaintiff, and lost or mislaid; and the existence of the bill being once established, the plaintiff may prove the loss of it by his own oath. Meeker et al. v. Jackson, 8 Yeates' Rep. 443. See, as to the

evidence in the case of lost note, Peabody v. Denton, 2 Gallis. Rep. \$51.

⁽¹⁾ Where the existence and amount, and loss or destruction of promissory notes are shown and it does not appear affirmatively that the notes were negotiable, the plaintiff is entitled to recover on the lost notes. M'Nair v. Gilbert, 3 Wend. Rep. 344. And see Rowley v. Ball, 3 Cowen's Rep. 303.

defendant has suffered judgment by default, and thereby admitted his liability III. Of the to the action, the amount of the principal and interest may be referred to the Bills. master, on production of the verified copy of the lost bill(k). But the mere Notes, &c. circumstance of the statute of limitations having run on the bill before the loss will not enable the loser to sue(l).

In Walmsley v. Child (m), it seems to have been considered, that a party who had lost a bill payable on demand might proceed at law; and in Hart v. King(n), where a bill of exchange was protested, and afterwards lost, the plaintiff recovered, but it does not appear in what character the plaintiff sued, and it is probable that the bill had never been indorsed. In Ex parte Greenway (o), Lord Chancellor Eldon said, "That when he was Chief Justice he tried an action in the Common *Pleas upon a bill alleged to be lost, which had been previously indorsed by the payee, an indemnity was offered by bond, but that he nonsuited the plaintiff; that the counsel objected strongly upon the offer of indemnity, and it came before the court on motion for a 'new trial, and there was a long discussion on the nature of these indemnities in a court of law; that the court had not come to a decision upon it when he left them, and he did not know the result. But that he could never understand by what authority courts of law compelled parties to take the indemnity(p)." It seems quite clear courts of law have no such authority(q).

In the case of Mossop v. Eadon(r), where a bill was filed in equity for payment of a promissory note, which had been cut in two parts, one of which was produced, and the other alleged to be lost, and offering an indemnity, the bill was dismissed on two grounds; the first, that only half the bill was lost; and secondly, that it was not payable to order, and consequently an action at law was sustainable; and it being urged that the jurisdiction of the court of equity is not destroyed by the courts of law assuming a jurisdiction in such cases, the Master of the Rolls said, "It is very clear that an action would have laid upon the note had the loss been proved. The single question is, whether the indemnity you offer is not a ground for coming here? of law could not take notice of it and give a conditional judgment; but equity gives that relief at the same time that it orders payment of the money. other half of the note may be in your possession; therefore it is fit that you should indemnify them against the possibility that the two parts may be brought together and passed into another hand." Upon a further hearing, the counsel for the plaintiff insisted, that the mere loss of the instrument gives the court of equity jurisdiction, and that it does not depend on the

was proved, and the plaintiff had a verdict.

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(k) Brown v. Messiter, 3 Maule & S. 281, (Chit. j. 915); anle, 267, n. (b). See further, post, Part II. Ch. III. Judgment by Default.
(l) Poole v. Smith, Holt's C. N. P. 144,

(Chit. j. 950); ante, 266, note (b).
(m) Walmsley v. Child, 1 Ves. sen. 341, &c., (Chit. j. 323).

(n) Hart v. King, 12 Mod. 310; Holt, 118, (Chit. j. 212); Dehers v. Harriott, 1 Show. 163, (Chit. j. 495).

(0) Ex parte Greenway, 6 Ves. 812, (Chit. j. 674).

(p) See also Tonmlin v. Price, 5 Ves. 238; Bromley v. Holland, 7 Ves. 19, 20, 249.

(q) Id.; Davies v. Dodd, 4 Price, 176, (Chit.

(r) Mossop v. Eadon, 16 Ves. 430, (Chit. j. 768). This case has been argued as overruled

ness of this copy and the special indorsement even in equity by Hunsard v. Robinson, 7 B. & C. 90. See Macartney v. Graham, 2 Simons' Rep. 285, where it was held by the Vice Chancellor, that a bill will lie by the last indorsee of a lost bill to recover the amount from the acceptor, and that prior indorsees need not be made parties to the suit. But note, that case is very distinguishable from Mossop v. Eadon, where the lost note had been cut in two, and was not payable to order, and therefore could not have got into the hands of a bona fide holder. In Macartney v. Graham the lost bill had been indorsed in blank, and though there was a subsequent special indorsement in full, that might be erased, and a bonû fide holder might have sued. The same reason also distinguishes Mossp v. Eadon from Mayor v. Johnson, 3 Campb. \$25, (Chit. j. 883); ante, 265,

Jose of

III. Of the right to require an indemnity, observing that there was no distinction whether . a note was negotiable or not. But the Master of the Rolls said, "This ar-Bills, Notes, &c. gument is in direct contradiction to that of Lord Hardwicke, who, in the case of Walmsley v. Child, assumes that this court has no jurisdiction, except for the purpose of ordering an indemnity where indemnity is necessary(s). I am unwilling to turn the plaintiff round, thinking the merits are with him, but at the same time I am afraid of breaking in upon the rules established as to the jurisdiction of the courts, that where a party can recover at law, he ought not to come into equity." In some cases a court of equity will relieve without an indemnity being given, by injunction restraining proceedings Relief in equity need not be applied for within any limited at law(t). time(u).

It is now settled, that whether the bill or note was lost before or after it became due, or after actual demand of payment and even an *express promise [*270] to pay, still no action at law can, if it were negotiable, be sustained, though it was contended that a distinction ought to be taken between an undue and an overdue bill, and that the promise to pay ought to bind(x). It was urged, that when a bill, &c. has been lost before is was due, unless the party proceed under the statute 9 & 10 Will. 3, c. 17, s. 3, it may be proper that he should be confined to a court of equity for relief; for as a transfer before a bill is due, though made by a person not entitled thereto, may give a bona fide holder a right of action thereon, it is but just that the parties called upon to pay should be previously sufficiently indemnified, and the sufficiency of an indemnity can be more correctly ascertained in a court of equity than at law(y). But it was contended, that where a bill has been lost after it became due, and that fact be clearly proved, there seems to be no reason why the party who lost it should not be permitted to proceed at law, and indeed without offering an indemnity, inasmuch as the law itself would in such case indemnify all the parties to the bill from any liability to a person who became holder of it after it was due; because(z), a person taking a bill by transfer after it becomes due, holds it subject to all the objections which affected it in the hands of the party who first became wrougfully possessed of it, or who tortiously transferred it, and consequently, he could not sustain an action thereon against any of the parties to the bill; and there is an additional reason why this should apply as to the drawer and indorsers of a bill, and the indorsers of a note, namely, that they must have been discharged from liability to any subsequent holder, by the want of notice from such holder, of the default in payment by the drawee(a). But the answer to this reasoning is, that it is part of the contract of an acceptor of a bill or maker of a note, to pay on the presentment of the instrument to him for that purpose, and that he has therefore a right to have the instrument delivered to him as his voucher. Besides, though he may have a good defence against a subsequent holder he may be put to risk, trouble and expense, in establishing ii(b).

It is said(c) that if one part of a foreign bill of exchange, drawn in sets,

⁽s) And see Davies v. Dodd, 4 Price, 176, (Chit. j. 996).

⁽t) Id.; anie, 264, note (r).

⁽u) Id. (x) Hansard v. Robinson, 7 Bar. & C. 90; ante, 266, note (a).

⁽y) Ex parte Greenway, 6 Ves. 812, (Chit. 674); Pierson v. Hutchinson, 2 Campb. 212; 6 Esp. Rep. 126, S. C.; ante, 265, note (2).

⁽z) See Tinson to Francis, 1 Camp. 19; ante, 217, note (m).
(a) Post, Ch. X. s. i. as to Notice of Non-

payment.

⁽b) Hansard v. Robinson, 7 Bar. & C. 90; ante, 266, in notes.

⁽c) Beawes, pl. 188; Mar. 121; Bul. N. P. 271; ante, 263.

be lost by the drawee, or be by his mistake given to a wrong person, or if by III. Of the any other means the holder cannot have a return of the bill, either accepted Bills, or not accepted, the drawee must give to the holder or to his order a pro- Notes, &c. missory note for payment of the amount of the bill on the day it becomes due, on delivery of the second part, if it arrive in time; if not, upon the note, and if the acceptor refuse to give the note, the holder must immediately protest for non-acceptance, and when due must demand the money, though he have neither note nor bill, and if payment be refused, a protest must be regularly made for non-payment. In all cases, if a bill of exchange be lost, and a new bill cannot be had of the drawer, a protest may be made on a copy (d).

The loser of a bill or note must take care, at the time it becomes due, to observe precisely the same conduct as if he had it in his possession. *He [*271] should demand payment, and give immediate notice of the terms of the refusal to the drawer and all the indorsers, and tender each an indemnity.

But the loss of a bill only suspends the remedy at law, and even a tender of payment to the loser, if he will give up the security, will not be equivalent to payment; and therefore if the bill be afterwards found, the loser may sue all the parties, and the circumstance of an agent of one of the parties having made such tender, and afterwards failed with the money in his hands, will afford no defence (e).

(d) Dehers v. Harriot, 1 Show, 168, (Chit. (e) Dent v. Dunn, 3 Campb. 296, (Chit. j. j. 485); post, Ch. X. s. i.

*CHAPTER VII(a).

OF PRESENTMENT OF BILLS FOR ACCEPTANCE, AND OF ACCEPTANCES.

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On delivery of a bill of exchange to the payer, or any other person who becomes holder by transfer, it is in some cases necessary, and in all advisable to present it for acceptance. On such presentment, the drawee either complies with the drawer's request, by accepting the bill, or refuses to do so: in which latter case, it is in general incumbent on the holder to give notice to the various other persons who became parties to the bill antecedently to himself; after which, any person not originally a party, may accept it supra protest for the honour of the drawer or indorsers; and in some cases the holder may protest a bill for better security. In the present Chapter we will consider the law as it relates, First, to presentments for acceptance; and Secondly, to acceptances.

I. OF PRESENTMENT OF BILLS FOR ACCEPTANCE.

The holder of a bill always has a right to present for and insist on accept-

ance, even so late as the day before the bill falls due(b). When a bill of ex-

I. Presentment for Acceptance.

change is made payable within a specified time after sight, or after demand, it is absolutely necessary, in order to fix the period when it is to be paid, to pre-

1st. When necessary or advisable.

(a) As checks, promissory notes and bills, when payable on demand, are never presented for acceptance, or accepted, the observations in this Chapter in regard to presentment for acceptance, will, in general, be inapplicable to those instruments. It seems, however, that sometimes bankers, who hold a check for a cus-

tomer, present it to the bankers on whom it is drawn, who mark it, which binds them to pay it the next day; Robson v. Bennett, 2 Taunt. 388, (Chit. j. 794); see post, Ch. Xl. as to

Checks.
(b) 1 Pardess. 383.

(c) Per Eyre, C. J., in Muilman v. D'Egui-

sent it to the drawee for acceptance(c), for otherwise the time of payment would I. Of Pronever arrive(d); but in other cases *it is not necessary to present the bill sentment before it is due(e)(1); and even a banker's deposit-note, payable "with for Acceptance. interest on the day of acceptance," need not be presented otherwise than for immediate payment(t). In Bristol, it is said that the practice is not to pre-1st, When sent a bill for acceptance or to accept(g). It is, however, certainly most necessary or advisable. advisable in all cases to endeavor to get the bill accepted (h)(2), as by that |*273|means the holder obtains the additional security of the drawee upon the bill itself, and which consequently becomes more negotiable(i); and if the drawee refuse to accept, the drawer and indorser in this country may immediately be sued(k). And it is said, that it is incumbent on the bearer of a bill, when he is but the mere agent of the person entitled to it, and on the payee, when he is directed by the drawer to do so, to present it for acceptance as soon as possible, because it is only by acceptance that the person on whom the bill is drawn becomes debtor, and responsible to the holder; and if the affairs of the drawer should be deranged, an agent who has neglected to present the bill for acceptance, might be answerable in damages and interest to the person who employed him(l). If a person be holder of a bill which is

no, 2 Hen. Bla. 365, (Chit. j. 549); but if a bill be on an insufficient stamp, no presentment

seems necessary, ante, 124.
(d) Holmes v. Kerrison, 2 Taunt. 323, (Chit. j. 791); Thorpe r. Booth, Ryan & Mood. 389, (Chit. j. 1293). And see Dixon r. Nuttall, 1 C. M. & R. 307; 6 C. & P. 320, S. C.; post, Ch. IX. s. i. Presentment for Payment-When necessary

(e) Per Gibbs, C. J. in O'Keefe v. Dunn, 1 Marsh. 616, 621; 6 Taunt. 305, and 5 Maule & S. 28, in error, (Chit. j. 937); Selw. 9th edit. 332, 333; Goodall v. Dolley, 1 T. R. 713, (Chit. j. 440); Blesard v. Hirst, Burr. 2670, (Chit. j. 384); per Lord Ellenborough, in Orr v. Magennis, 7 East, 362, (Chit. j. 726), acc.; Mar. 46; Com. Dig. tit. Merchant, F. 6, semb.

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The 3d & 4th Anne, c. 9, s. 7, enacts, that if the holder do not take his due course to obtain . payment, by endeavouring to get the bill accepted and paid, and make his protest for nonacceptance or non-payment, the taking the bill shall be considered a payment; but the statute does not appear to require a presentment for acceptance, when it would be unnecessary at com-mon law. There is a similar enactment in the Irish Act 9 Geo. 4, c. 24, s. 6.

Molloy, B. 2, c. 10, s. 16. If a bill is drawn upon a merchant in London, payable to J. S. at double usanco, J. S. is not bound in strictness of law to procure an acceptance, but only to tender the bill when the money is due.

Beawes, pl. 266, p. 453. There is no obliation to procure an acceptance of a bill payable at a day certain, as the time goes on, whe-

ther accepted or not; but it is otherwise with bills payable at so many days sight. See also Marius, 12, 13; Philpot v. Bryant; 3 Car. & P. 244, (Chit. j. 1387).
(f) Sutton v. Toomer, 7 Bar. & C. 416; 1

Man. & Ry. 125, (Chit. j. 1852).
(g) Johnson r. Collins, 1 East, 99, (Ch. j. 633).

(h) Mar. 48; Poth. pl. 143. The Bank of England, in consequence of a bye law made by them under one of the Bank Acts, never accept bills for a customer in respect of deposites made by him. Still, however, if a bill payable after sight be presented, they will mark it to denote

the day of sight and pay at maturity.

(i) Mar. 4th edit. 12; Beawes, pl. 266; Claxton r. Swift, 2 Show. 496, (Chit. j. 167, 168, 171); Selw. Ni. Pri. 9th ed. 331.

(k) Ballingalls r. Gloster, 3 East, 181, (Chit. j. 673); Allan v. Morson, 4 Campb. 115, (Chit. j. 920), post, Ch. VIII s. i. Proceedings on

Non-acceptance—Liability of Parties.
(1) Poth. pl. 82, 128; Mar. 12, 46; Beawes, pl. 49; 1 Pardess. 380, 381, 424. In Scotland. where an agent employed to get a bill accepted neglected to do so for four days, during which the drawer failed, and then the drawee refused to accept, he was found liable on that account for the bill, subject to a deduction of a dividend from the drawer's estate, Dunlop v. Hamilton, 1 Bell, 320, n.; Thompson on Bills, 437. In England he would be liable in damages, Van Wart v. Woolly, 3 Bar. & C. 439; 4 Dowl. & R. 374; Mood. & M. 526, (Chit. j. 1235); post, Ch. VIII. s. i.

^{(1) {} Bills of exchange payable after date, are not required to be presented for acceptance, as between the holder and endorsors. It is only necessary to have bills payable after sight presented for acceptance; and the object of this is to give them a date. Crosby v. Morton, 13 Louis.

^{(2) {} The drawer of a bill, or the indorser of a note, is not discharged by the omission of the holder to make presentment or demand; or to give notice of non-acceptance or non-payment where it is clearly shown that he has sustained no damage in consequence of such omission. Damage bowever will be presumed, until rebutted by proof. Commercial Bank of Albany r. Hughes, 17

sentment for Ace ceptance.

L Of Pre- not addressed to any particular individual, but is accompanied with a letter of advice, mentioning the person on whom the bill is drawn, it is said that the bill should be presented to the person mentioned in the letter of advice, who may thereupon accept the bill, and that if he refuse to do so, it may

1st, When be protested for non-acceptance (m).

necessary or advisable.

In cases where it would otherwise be necessary to present a bill for acceptance, the holder may, as will be seen hereafter, excuse his neglect to do so, by proving that the drawer or other person insisting on the want of it as a defence, had no effects in the hands of the drawce, or had given no consid-

[*274] eration for the bill(n). It seems that though the *drawer require the drawer not to accept the bill if presented for acceptance, yet the holder must present the bill for acceptance in order to render the drawer liable(0).

But if the holder has once presented a bill for acceptance, and it be refused, and he give due notice to the drawer, who thereupon states, that if the plaintiff would again present the bill to the drawee he would accept it, the holder need not present it again, but may immediately sue the drawer on the bill, or for the goods for which it was delivered to the holder, producing the bill unaccepted at the trial (p).

2dly, Who The presentment for acceptance should in general be made by the rightto present ful holder. But it is stated, that if a wrongful holder should present for acceptance the drawee should nevertheless accept the bill, and may do so without risk; and if he refuse, it is said that a valid protest for non-acceptance may be made, and which will enure to the benefit of the party entitled to the bill(q).

8dly, To (r).

The bill should necessarily be presented to the drawee as described in whom Pre- the address of the bill, and if he be not found after diligent inquiry, and the senument to be made bill has been addressed to another person, "au besoin, &c." then to that If the bill has been addressed to two or more persons not in partnership, it is said that it must be presented to each(s). The presentment must be made to the drawee, or to some agent authorised by him to accept, and though, in the case of a presentment for payment, it may suffice to demand payment at the residence of the acceptor, yet, in case of a presentment for acceptance, the holder must endeavour to see him personally; and therefore where, in an action against the drawer, on a refusal to accept, it appeared that the witness had carried the bill to a place which was described to him as the drawee's house, and that he offered it to a person in a tan-vard, who refused to accept it; and the witness did not know the drawee's person, nor could he swear that the person to whom he offered the bill was he, or represented himself to be so; it was held, that this evidence did not amount to proof of a demand upon the drawee(t).

4thly, Time of Present ment

With respect to the time when bills payable at or after sight should be presented for acceptance, the only rule, whether the bill be foreign or inland, and whether payable at sight, or at so many days after sight, or in any

(m) Mar. 142, 143; Gray v. Milner, 3 Moore,

90, (Chit. j. 1022, 1052).

(n) De Berdt r. Atkinson, 2 Hen. Bla. 336, (Chit. j. 526); Terry c. Parker, 1 N. & P. 752; 6 Ad. & El. 502, S. C. And see post, Ch. IX , X.

(o) Hill v. Heap, Dow. C. N. P. 57; Prideaux v. Collier, 2 Stark. R. 57, (Chit. j. 989).
(p) Hickling v. Hardy, 7 Taunt. 812; 1

Moore, 61, (Chit. j. 983).

(q) 1 Pardess. 444. See order in Bankruptcy, Appendix, 811.

(r) See further, post, 278, Mode of Presentment.

(s) 1 Pardess. 383.

(t) Per Lord Ellenborough, in Cheek v. Roper, 5 Esp. Rep. 175, (Chit. j. 702); post, 278, ٧

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other manner, is, that they must be presented within a reasonable time(u); I. Of Preand, as the drawer may sustain a loss by the holder's keeping it any great sentment for Aclength of time, it is advisable in all cases to present it as soon as possible; opptance. but he is not obliged to send it by the first opportunity (x). According to the French law, bills payable at or after sight must be presented for accep- 4thly. Time of tance within certain specified periods according to the places at which they Presentare drawn(y); and the French law has also provided against a purposely hasty ment. presentment and demand of acceptance before the drawee can have received advice, and that the holder must allow as many days as there are five *leagues or fifteen miles between the place of drawing and place in which [*275] drawn(z).

In the case of a foreign bill payable after sight, it has been decided, that it is no laches to put it into circulation before acceptance, and to keep it in circulation without acceptance, as long as the convenience of the successive holders may require; and it has even been laid down, that if a bill drawn at three days sight were kept out in that way for a year, this would not be laches; and that if a bill were payable in India sixty days after sight, it would not necessarily be laches to omit presenting it for acceptance for twenty-six days after its arrival; but that if, instead of putting it into circulation, the holder were to lock it up for any length of time, this would be deemed laches(a). *However, in a more recent case, where in an action by the holder [*276]

- (u) Per Eyre, C. J. in Muilman v. D'Eguino, 2 Ilen. B. 569, (Chit. j. 549). See also Selw. 9th edit. 331.
 - (x) Poth. pl. 143.
- (y) 1 Pardess. 434, 435; Code de Commerce, No. 160; 2 Pardess. 391. (2) 1 Pardess. 382.
- (a) In Muilman v. D'Eguino, 2 Hen. Ela. 565, (Chit. j. 549.) In debt on bond conditioned to pay certain bills drawn on India at sixty days after sight, in case they should be returned protested, defendant plended that they were not presented for acceptance within a reasonable time after the drawing. They were drawn and indorsed by defendant to plaintiffs, 5th March, 1793, who procured them for a house at Paris; that plaintiffs sent immediate advice to the house at Paris, and, on receiving their directions, on the 30th of April, sent them to India, where they arrived on the 3d of October. On the 5th of October, the bolder wrote to the drawce, who was from home, requesting acceptance, and on the 17th of October, he sent an answer of refusal; some of the bills were thereupon protested the 29th of October, and the rest the 18th of November. Eyre, C. J. left the case to the jury, but told them that he thought the bills had been sent to India in time, as as they were put up here for negotiation, and were therefore liable to be delayed, and that they were presented in India in time after their arrival. The jury found for the plaintiff, and on a rule for a new trial and cause shown, the court expressed satisfaction with the verdict, and plaintiff had judgment. Eyre C. J. said, "it is not necessary to lay down any new rule as to bills of exchange payable at sight, or within a given time afterwards; if it were, I should feel great anxiety not to clog the negotiation of bills circumstanced like these. It would be a very serious and difficult thing to Goupy c. Harden, 7 Taunt. 159; 2 March. say, that a person buying a foreign bill, in the

way these were brought, should be obliged to transmit it by the first opportunity to the place of its destination. There would also be a great difficulty in saying at what time such a hill should be presented for acceptance; the courts have been very cautious in fixing any time for presenting for acceptance an inland bill, payable at a certain period after sight, and it seems to me more necessary to be cautious with respect to a foreign bill phyable in that manner. I think, indeed, the holder is bound to present the bill in a reasonable time, in order that the period may commence from which the payment is to take place, but the question, 'what is reasonable time,' must depend on the particular circumstances of the case; and it must always to for the jury to determine, whether any laches are imputable to the plaintiff." Per Buller, J. "The only rule I know of, which can be applied to the case of bills of exchange is, that due diligence must be used. Due diligence is the only thing to be looked at, whether the bill be forcign or inland; and whether it be payable at sight, or at so many days after, or in any other manner. But I think a rule may be thus far laid down, as to laches, with regard to bills payable at sight or a certain time after sight, namely, that they ought to be fut in circulation; and if a bill drawn at three days sight were kept out in that way for a year, I cannot say that there would be laches; but if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say that he would be guilty of laches; but further than this no rule can be laid down." Per Heath, J. "No rule can be laid down as to the time for presenting bills payable at sight, or at a given time afterwards." In the French ordinances of 1673, in Postlethwayt and Marius, it is said that n bill payable at sight or at will is the same thing.

I. Of Pre- against the drawer of a bill of exchange addressed to the drawees at Rio de sentment for Acceptance.

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Time of

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Janeiro, payable at sixty days after sight, it appeared that the plaintiff purchased it in the market and kept it in his own hands nearly five months before he resold it, the rate of exchange having fallen after he had bought it; and before the bill was presented to the drawer at Rio de Janeiro he had become insolvent; it was held that the jury were properly directed to consider whether, looking at the situation and interests of both the drawer and holder, there had been unreasonable delay on the part of the holder in forwarding the bill for acceptance, or putting it in circulation, although it was contended that the correct question for the jury was, whether due diligence in forwarding or circulating the bill had been used by the holder with reference to the interests of the Where bills were drawn on 5th March, 1793, in India, and put in circulation, and presented for acceptance in October following, this was held not an unreasonable delay; and where a bill, payable thirty days after sight, dated in London, 12th May, 1315, on Lisbon, and was circulated in France, and not presented for acceptance till the 22d August 1815, this was held not an unreasonable delay(c). But where a bill of exchange was drawn in duplicate on the 12th August at Carbonear in Newfoundland, payable ninety days after sight, on S. and Co. in England, for the freight of a voyage from Liverpool to Carbonear, and the bill was not presented for acceptance to S. and Co. until the 16th November; and it appeared that Carbonear was twenty miles from St. John's, with a daily communication between those places, and that from St. John's there was a post office packet three times a week to England, the average voyage being about eighteen days; it was held, that the jury had properly found that the bill was not presented for acceptance within a reasonable time, no circumstances being proved in explanation of the de-

454; Holt, C. N. P. 342, (Chit. j. 971). Indorsee of two bills of exchange drawn in London, 12th of May, 1815, upon Gould and Co. of Lisbon, at thirty days after sight, pumble to defendants, and by them indorsed in London, and transmitted by them to the plaintiffs in Paris, and afterwards indersed by the plaintiffs to Ricci and Sons, who further negotiated them. It was proved that the drawces paid their bills to the thirtieth June, 1815, but the bills were not presented to them for acceptance until the twenty-second August in the same year, when they were refused, and protested for non-acceptance. In this action against the defendants as such indorsers, it was objected that there had been laches in not presenting the bills for acceptance; that the bills were payable at thirty days after sight. If they had been sent to Gould and Co. with due diligence, and they had refused to accept upon notice of the dishonour to the defendants, they might have recovered against the house of De Franca and Co. the drawers, who continued solvent more than two months from the date of the bills, but instead of transmitting the bills in the ordinary way to Lisbon, they are sent in general circulation, and the defendants hear nothing of the transaction till five months after the indorsement. Per Gibbs, C. J. on the trial, "The distinction is between bills payable at a certain number of days after date. and bills payable at a certain number of days after sight. In the former, the holder is bound to use all due diligence, and to present such bill

at its maturity; but in the latter case, he has a right to put the bill into circulation before he presents it, and then of course it is uncertain when it will be presented to the drawee. It is to the prejudice of the holder if he delays to do it, and he loses his money and his interest. There are dicta that it ought to be done in a reasonable time." Verdict for the plaintiffs.

(b) Mellish v. Rawdon, 2 Moore & S. 570;

9 Bing. 416, S. C.
(c) See ante, 275, note (a).
(d) Straker v. Graham, 4 Mee. & Wels. 721. In this case Williams, J., before whom the cause was tried, intimated an opinion in favour of the plaintiff, but the jury, after a deliberation of twenty-four hours, found for the defendant. After argument on the rule for a new trial, Abinger, C. B., said, "Here the bill was drawn at Carbonear on the 12th August and (which is very material) drawn in duplicate, it appears that there was a daily communication from Carhonear to St. John's, and a post-office packet from thence to England three times a week, the voyage being about eighteen days; yet the bill was not presented for acceptance until the 16th November, by which it was made to run at least two months longer than was necessary. No evidence was given to account for this delay; and for aught that appeared, the captain might have had it in his pocket for a considerable time after his arrival in this country. At all events, the bill being drawn in sets, the plaintiff might have transmitted another set of it by St. John's. I

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The holder of an inland bill payable after sight is not bound instantly to I. Of Pretransmit the bill for acceptance, he may put it into circulation, and if he do not sentment circulate it, he may take a reasonable time to present it for acceptance, and for Acceptance, the keeping it even an entire day offer he received in and a label and ance. the keeping it even an entire day after he received it, and a delay to present until the fourth day a bill on London, given within twenty miles thereof, is not 4thly, unreasonable (s)

And *it seems to have been considered that a disjusting of Time of And *it seems to have been considered that a distinction Presentunreasonable(e). may be taken as to the the nature of the bill, and whether it was intended for ment. immediate payment, or to be kept some time in circulation, as is the case of [*277] bills after sight, drawn by country bankers on London bankers, and put in circulation by the former, especially if the party objecting to the delay has himself kept the bill in his possession for some days (f).

think, therefore, that the verdict was perfectly right, and ought not to be disturbed. The other judges, Parke and Alderson, B.'s, expressed themselves of the same opinion. Rule discharg-

(e) Fry v. Hill, 7 Tannt. 397, (Chit. j. 992). Action for goods sold. The defendant, early on Friday, 9th of the month, delivered at Windsor to the plaintiff's servant, a bill, to which the defendant was no party, drawn by the defendant's bankers upon their corresponding banker in London, at one month after sight, for 140l. The bill was presented for acceptance on Tuesday the 13th of the same month, and the country bankers having failed on the same day, acceptance was refused. Shepherd, Solicitor-General, contended, that as well by this course of dealing which the plaintiff himself had elect-ed, as by his laches in presenting the bill, he had made the bill his own, and was paid for the goods. The jury found for the plaintiff. The Solicitor-General now moved to set it aside, and enter a nonsuit, renewing the same objections. He insisted that it was the duty of the plaintiff, receiving a bill payable at a certain soon as he conveniently could: If the plaintiff had forwarded this bill for acceptance on the Friday, Saturday, Sunday, or Monday he would thereby have enabled the defendant to withdraw his funds from his banker's hands. The necessity is more urgent to present for acceptance a bill payable after sight, than a bill payable after date, because, by deferring it, the holder pro-tracts the period of that payment, whereby the drawer proposes to withdraw his effects from the hands of the drawee. Secondly, it was for the plaintiff's own convenience of remittance, that instead of taking a check for the sum which the defendant proposed to pay, he had commuted it for a bill, and this was strongly evinced by his taking a bill not for 1341. 18s., but for 1401. paying the difference, and by blending his own property with this payment, he had rendered the bill completely his own, and was paid for his goods. On motion for a new trial, Gibbs, C. J. "The defendant's argument on the first point would go to the extent that the holder of a bill payable after sight, is bound to transmit it for acceptance, without putting it into circulation at all. But even if it were a case in which it was required to give instant notice, it has been repeatedly determined that the holder of a bill is not bound to send it on the same day that he receives it; and there was no post to London

on the Saturday. He might have sent it on the Sunday. But I do not go upon that ground. The holder must present a bill payable after sight in a reasonable time; but it is in the power of the holder to postpone the day of payment by postponing the day of the presentment for acceptance, and he certainly may put the bill into circulation if he will. In the recent case of Goupy v. Harden, the bills were put into circulation; here it does not appear what was done with the bill in the interval. The question on these bills drawn at sight certainly is left very loose by the cases. The result of the cases undoubtedly is that which I have stated; and Eyre, C. J. says, in Muilman v. D'Eguino, 2 Hen. Bla. 565, that it is, under all circumstances, a question for the jury to determine whether such a bill was presented in a reasonable time. Buller, J. in the same case, rather narrows that doctrine, and though he agrees that if it were in circulation a twelvemonth, there would not be laches; yet he says, that if, instead of putting it into circulation, the holder were to lock it up for any length of time, he would be guilty of laches. Is this, therefore, a case in which the plaintiff can be said to lock up this bill for any length of time? If we were to grant a new trial, the result would come at the last to this: it would be a question for the jury, whether there has been a default to present a bill within a reasonable time. That question has already been left to the jury, and they have found that the bill was presented in they have round that the bill was presented in a reasonable time. We think, as the matter stands, it is perfectly right." Rule refused.

(f) Shute r. Robins, Mood. & M. 133; 3
C. & P. 80, (Chit. j. 1868). On 17th of No-

vember, plaintiff's traveller received from the defendants, who were bankers at Liskeard, a bill for 100l. at twenty days after sight, drawn by the Plymouth bank upon their London banker. The defendants had kept the bill some days before they delivered it to such traveller. The latter used to transmit weekly to plaintiffs what securities he had received; and he transmitted such bill to plaintiffs, who lived at Bristol, on the 24th of November. It did not reach Bristol till after post-time on Monday, 25th. Plaintiff sent it to London on Monday, 28th, and it was presented for acceptance on the 29th. The Plymouth bank stopped on the 24th, and none of their bills were honoured by the London house after the 26th. Acceptance was re-fused, and the defendants insisted they were discharged by the plaintiff's neglect to present I. Of Prefor Accept-

4thly, Time of Presentment.

*It has been said that the question, what is a reasonable time, must depend sentments on the particular circumstances of the case; and that it must always be for the jury to determine whether any latches are imputable to the plaintiffs(g): and this rule appears to have adopted in some of the cases applicable to this subject(h); but from other cases it should seem, that reasonable time is to be taken as a question of law dependent upon the facts(i). It was said by Lord Mansfield(k), that what is a reasonable time for giving notice of the dishonour of a bill is partly a question of fact and partly of law; it may depend in some measure on facts, such as the distance at which the parties live, the course of the post, &c.; but that whenever a rule can be laid down with respect to this reasonable time, it should be decided by the court, and adhered to for the sake of certainty (1); and in the case of Shute v. Robins (m), Lord Tenterden stated it to be a mixed question of law and fact.

Hour of the day.

Presentment should in all cases be made during the usual hours of business(n); a presentment to a tradesman need not be made during banking hours; a presentment to him at eight in the evening would suffice (o); and a presentment at any time in the day or evening is sufficient, if an answer be given by an authorized person (p).

Delay in making a presentment at a proper time may be excused by illness, or by the circumstance of war having been declared, or from the political state of the country, or by other reasonable cause or accident, not attri-

butable to misconduct of the holder (q)(1).

and obtain an acceptance of the bill, while the bankers in town honoured the drafts of the

Plymouth bank.

Lord Tenterden, C. J. said, "The only question in this case is, whether the plaintiffs or their servant used due diligence in forwarding the bill in question, which is made payable twenty days after sight, for acceptance. is a mixed question of law and fact, and in expressing my own opinion I do not wish at all to withdraw the case from the jury. The bill was certainly a considerable time in the hands of the plaintiffs and their traveller long enough to enable them, if the bill had been imme liately sent to them, and forwarded by them in the regular course of business to London, to get it accepted three or four days before the drawees refused to accept such bills. In considering whether this be an unreasonable delay, we must look to the character of the bill and the course of dealing, as far as we can collect it with respect to such bills. The bill is drawn by bankers in the country on their correspondents in London, and the defendants, who are themselves bankers, held it for some days without sending it to London for acceptance; whatever strictness may be required with respect to common bills of exchange, payable after sight, it does not seem unreasonable to take bills of this nature, drawn by bankers on their correspondents, as not requiring immediate presentment, but as being retained by the holders for the purpose of using them within a moderate time, (for indefinite delay of course cannot be allowed,) as part of the circulating medium of the country, and the conduct of the defendants themselves furnishes some evidence that they are in

point of fact so considered. If this be so, the delay in the present case dees not seem unressonable; this, however, is for the jury to consieler, and as they think it reasonable or otherwise, their verdict must be for the plaintiffs or the defendants." The jury found for the plain-

(g) Per Eyre, C. J. in Muilman r. D'Egaino, 2 Hen. Bla. 569; Boehm r. Stirling, 7 T. R. 425, (Chit. j. 593).

(h) Muilman v. D'Euguino, 2 Hen. Bia. 565; ante, 275, note (a); and Fry r. Hill, 7 Taunt. 397; ante, 276, note (e).

(i) Durhishire r. Purker, 6 East, 12, 13,

(Chit. j. 707). (k) Tindal v. Brown, 1 T. R. 167, (Chit. j. 43ì).

(1) Appleton v. Sweetapple, Bayl. 5th edit. 239, n. 45, (Chit j. 421, 422); see also Dar-bishire v. Parker, 6 East, 12, 13; Parker v.

Gordon, 7 East, 385, (Chit. j. 727).

(m) Mood. & M. 133; ante, 277, a. (f).
But in Fry v. Hill, 7 Taunt. 397, the question was left to the jury; ante, 276, note(e). And see Straker v. Graham, 4 M. & W. 721; ante, 276, note (d).

(n) Mar. 112; Parker r. Gordon, 7 East, 385, (Chit. j. 727); Elford r. Teed, 1 Maule & S. 28, (Chit. j. 879).

(o) Barclay v. Bailey, 2 Campb. 527, (Chit. j 818).

(p) Garrett v. Woodcock, I Stark. Rep. 475. (Chit. j. 979, 981); 6 Man. & Sel. 44, S. C;

Henry v. Lee, 2 Chit. Rep. 124.

(q) Vide post, Chap. VIII. IX. as to what will excuse the want of giving notice of nonacceptance, or not presenting for payment;

⁽¹⁾ No absolute rule can be laid down as to the time when a bill must be presented for acceptance The only rule is, that it must be presented within a reasonable time; and what is a reasonable

A bill should be presented for acceptance at the residence or domicile of I. Of Prethe drawee, without regard to the place where it is drawn payable, because sentiment the former is supposed to be the place where he is to be found to accept, ance. and the place of payment is not material until after acceptance (r). It should seem, however, that if he has removed, or is not to be found, that in EngPlace of land at least diligent inquiry should be made after the drawee, before the bill Presentis treated as dishonoured(s).

The presentment should be to the drawee himself, or to his authorized 6thly, agent, for otherwise the drawer or indorsers will not be chargeable (t). has been said, that ex rigore the drawee ought to accept the *bill immediately on presentment, or refuse to do so, and he is certainly not allowed [*279] three days for deliberation by the custom of merchants (u); as, however, it is but reasonable that the drawee should have an opportunity, before he determines whether he will accept or not, of seeing whether he has effects of

and see Patience v. Townley, 2 Smith's R. 323, cept it; but he did not know Hammond's per-224, (Chit. j. 714)

(r) 1 Pardess. 383; 2 Pardess. 396. As to acceptance supra protest, see post, Ch. VII. s.

(s) Post, 279, 280.

(t) Check v. Roper, 5 Esp. R. 175, (Chit. j. 702). Declaration against drawer of a bill for default of acceptance. To prove the fact of the bill having been presented to Hammond for acceptance, the plaintiff proved that the bill was sent by the witness, who was called, who carried it to the house which was described to him as Hammond's house. He offered it to some person in a tan-yard, who refused to ac-

son, nor could be swear that the person to whom he offered the bill was him, or represented himself to be so. Lord Ellenborough said, " that the allegation respecting the bill was a material one, as the drawer could only become liable on the acceptor's default, which default must be proved. That the evidence here offered proved no demand on Hammond, and was therefore insufficient, so that the plaintiff could not recover on the bill. Some evidence must be given of an application to the party first liable."

(u) Com. Dig. tit. Merchant, F.; Marius, 15, 16; and see Hamburgh Ordnance.

time, depends upon the circumstances of each particular case. Wallace v. Agry, 4 Mason, 336. Murray r. Judah, 6 Cowen, 484. Aymar v. Beers, 7 Cowen, 705. Cruger v Armstiong, 3 Johns. Cas. 5. Conroy r. Wurren, Id. 259. In New York, it has been decided that what is a reasonable time is a question of law under the circumstances of each particular case, and not a question of fact to be submitted to the jury. Aymer r. Beers, ut supra. Bank of Columbia r. Lawrence, 1 Peters, 579, 583. Mohawk Bank v. Broderick, 10 Wend. Rep. 304.

The holder of a check must present it at the bank before he can charge the drawer. Cruger

v. Armstrong, ut supra.

A bill of exchange payable in a given number of days after date, need not be presented for acceptance before the day of payment. Bank of Washington v. Triplett, 1 Peters, 25. Townsley v. Sumrall, 2 Peters, 170. But if presentment is made, and the bill be dishonored, notice must be given. Bank of Washington v. Triplett, ut supra.

A bill of exchange was drawn in the city of New-York, December 12th, 1822, payable at these days sight to be borned by the never who was then at New-York. It Richmond in Vicinia.

three days sight, to be borne by the payee, who was then at New-York, to Richmond in Virginia, where the drawees resided; but in consequence of the ill health of the bearer, the bill was not presented for acceptance until the 10th of January, 1823. When acceptance was refused the drawer had due notice of non-acceptance and non-payment; it was held, under the circumstances, that the delay of presentment was not unreasonable. Aymar v. Beers, 7 Cowen, 705, See Fernandez v. Lewis, 1 McCord, 322.

It seems that a bill of exchange payable in a fixed period from the date, may be presented for acceptance at any time before it becomes due. Thus a bill drawn at Boston upon a merchant in New York, dated April 23, payable in four months from date, and presented for acceptance on July 13, was held to have been presented in due season. Bachellor v. Priest, 12 Pick. Rep.

A bill or note must be presented for acceptance at the place specified on its face. Wolfe v. Jewett, 10 Curry's Louis. Rep. 384.

Although as between the payee and drawer the remedy of the former against the latter is not affected by the omission to make presentment for acceptance of a bill payable a given number of days after date, provided it be made at the maturity of the bill, the same rule does not prevail as between the payee and a broker, or agent with whom the bill is left for collection. He is bound to present the bill forthwith. Allen v. Suydam, 17 Wend. 368. As to reasonable time, see further, Straker v. Graham, 4 Mee. & Wels. 721. Two days after the last day of grace is not in time. Fulton Co. v. Wright, 12 Louis. Rep. 386.

for Acceptance.

6thly, Mode of Presentment.

I. Of Pre- the drawer in his hands, the payee or holder usually may leave the bill with him twenty-four hours, or until the next day after the presentment, unless in the interim he accept or declare a determination not to accept(x); but it is said that this must not be done if the post go out in the interim(y). The practice, however, in all cases, is to allow the drawee till the day after the presentment to determine whether or not he will accept, without regard to the departure of any post; and the drawee is justified in re-delivering the bill on the day after presentment to any person who applies for it and mentions the amount and describes any private mark or number upon it, though it afterwards turn out that such person had no authority to call for or receive it(z).

If the drawee of a bill cannot be found at the place where the bill states [*280] him to reside, and it appear that he never lived there, or has *absconded(a), or the house be shut up and no one there (b), the bill is to be considered as dishonoured; though formerly held, that if he have only removed, it is incumbent on the holder to endeavour to find out to what place he has removed, and to make the presentment there (c)(1); and it is advisable in all cases to

> (x) Ingram r. Forster, 2 Smith's Rep. 243, 244; Bellasis r. Hester, 1 Lord Rayın. 281; Mar. 62, 2d edit. 16; Beawes, pl. 17; Molloy, b. 3, c. 5, s. 1; Com. Dig. tit. Merchant, F. 6; Molloy, b. 2, c. 10, pl. 16. The law in France also allows twenty-four hours, 1 Pardess. 362; Code de Commerce, No. 125; 2 Pardess. 327

> Bellasis v. Hester, 1 Lord Raym. 281, (Chit. j. 204). Per Treby, C. J. The party may have the whole day to view the bill, and that

is allowed him by the law.

Marius, 15. "No three days for acceptance twenty-four hours for acceptance. But if the party to whom the bill of exchange is directed be a merchant well known unto you, and when the bill is presented to him to accept, he shall desire time to consider of it, and so shall intreat you to leave the bill of exchange with him, and to come to him the next day, provided the post do not go away in the interim), and that then he will give you an answer whether he will accept or not, herein he doth demand nothing of you but what is usually allowed between merchants known one to another; fer, according to the custom of merchants, the party on whom the bill is drawn may have four-and-twenty hours time to consider whether he will accept the bill or not; but that time being expired, you may, in civility, demand of the party on whom your bill is drawn, the bill of exchange you left with him to be accepted, if so he pleased; if he then say that he hath not as yet accepted it, and that he would desire you to call for it some other time, or the like, the four-and-twenty hours being expired, it is at your choice to stay any longer or not, and you may then desire a notary to go to the dwelling-house of the party that hath the bill, and demand the bill of exchange of him, accepted or not accepted, and in default of

present delivery thereof you may cause protest to be made in due form. But though this may be lawfully done, yet, notwithstanding, amongst merchants which do know one another, they do not usually proceed so strictly for acceptance, but do leave their bills with the parties, to whom they are directed, to be accepted, sometimes two or three days, if it be not to their prejudice, as namely, if the post do not depart in the interim; but if the post is to depart within two or three days, then it is a very reasonsble thing, and which men that know the custom of merchants will not omit to demand their bills, accepted or not accepted, so that they may give advice thereof by the first post, after the receipt of their letters, unto their friend who sent them the bill, or who delivered the value thereof; for it is to be noted by the way."

Ingram v. Forster, 2 Smith's Rep. 242. Upon the question whether more than twentyfour hours may be allowed to the drawee to determine whether he will accept, the court appear to have considered, that if more than that time be given, the holder ought to inform the

indorsers thereof.

(y) Mar. 62; Com. Dig. tit. Merchant, F. 6.

(2) Morrison v. Buchanan, 6 C. & P. 18. (a) Anon. Lord Raym, 743, (Chit. j. 216). (b) Hine v. Allely, 4 B. & Ad. 624; 1 N. & M. 433, S. C.; post, Ch. IX. a. i. Present-ment for Payment—Where.

(c) Collins v. Butler, 2 Stra. 1087, (Chit. j. 285). The maker of a note shut up his house before the note became due, and in an action against the indorser, one question was, whether the plaintiff had shown sufficient in proving that the house was shut up? And Lee, C. J. thought not; but that he should have given in evidence that he had inquired after the maker or attempted to find him out. See also Bateman v. Joseph, 12 East, 433, (Chit. j. 801);

^{(1) \(\}text{Where the holder of a bill sent a person on the day of its maturity to present it at the place to which it was addressed, who was informed by a woman coming out of the house, (who, as it subsequently appeared was a lodger there), that the acceptor had formerly lived there, but had recently quitted; held, that this was evidence to go to the jury of a presentment to the accept-or so as to charge the indorser. Buckstone r. Jones, 1 Scott, New Rep. 19. }

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make every inquiry after the drawee, and if possible present the bill to bim; I. Of Prealthough it will be unnecessary to attempt to make such a presentment if the sentment for Acdrawee has left the kingdom, in which case it will be sufficient to present the ceptance. bill at his house(d), unless he have a known agent, when it should be presented to him(e). If on presentment it appear that the drawee is dead, the Mode of holder should inquire after his personal representative, and, if he live within Presenta reasonable distance, should present the bill to him(f). When a bill is left ment. for acceptance, and the drawee, after its remaining in his possession twentyfour hours, requires time to consider of it, and the holder grants him that time, or if he offer a conditional acceptance, it is at least advisable, if not necessary, to give immediate notice to the indorsers and drawer, of the particular circumstances(g); and in the latter case their consent to the taking the conditional acceptance should be required.

SECTION II. OF ACCEPTANCES.

Acceptance may be defined to be the act by which the drawee evinces_II. Of Ac-- his consent to comply with, and be bound by, the request contained in the ceptances. bill of exchange directed to him, or, in other words, it is an engagement to 1st, Defipay the bill when due(h); and it may be expressed by merely writing on the Acceptbill the word "accepted." This engagement is made by the drawee of the ance. bill, or by some other person supra protest; and, as regards foreign bills, it may be verbal or in *writing, and is either absolute, partial, qualified, or con- [*281] ditional. We will consider these points in their natural order.

The drawee of a bill, unless he has for adequate consideration expressly 2dly, Of or impliedly engaged to accept it, is not, although he be indebted to the the Obligadrawer in the full amount, or although adequate funds have been remitted to cept, and him for the express purpose, legally bound to accept, nor is he liable to any when or action for the consequences of his refusal; though, according to mercantile not a Drawee usage, such refusal would be deemed very improper(i). In this respect the should ac-

in which Lord Ellenborough left it to the jury whether the plaintiff had used due diligence to find the party's residence, that being a question of fact. See Beveridge v. Burgis, 3 Camp. 262, (Chit. j. 870); Browning v. Kinnear, 1 Gow, 81, (Chit. j. 1054). But see Hine v. Allely, 4 B. & Ad. 624, supra, note (b).

(d) Cromwell v. Hynson, 2 Esp. Rep. 211, (Chit. j. 571). Indorsee against the indorser of a foreign bill. When the indorsement was made, Hynson (a master of a ship) was in Jamaica, where the bill was drawn, but his residence was at Stepney. The bill was presented for acceptance, dishonoured, and protested, and then sent to Hynson's house for payment, with notice of non-acceptance. Hynson was not then in England, but the bill was shown to his wife, and the circumstances stated to her. It was urged, 1st, that notice should have been sent to Januaica; 2dly, that the demand was not sufficient. But Lord Kenyon over-ruled all the objections,

and the plaintiff had a verdict.

The King r. Merton, 4 Maule & S. 48, affords information on this subject. In order to establish a settlement by apprenticeship, it was proved that the indenture was only of one part, and that upon application to the pauper, who

was then ill, and soon afterwards died, to know what had become of it, he declared, that when the indenture was given to him he burnt it; and it was also proved, that inquiry was made of the executrix of the master, who said she knew nothing about it; and it was held, that this proof was sufficient to let in proof of parol evidence of the contents of the indenture. Lord Ellenborough, C. J. " The making search and using due diligence, are terms applicable to some known or probable place or person, in respect of which the diligence may be used." See also Starke v. Cheeseman, Carth. 509; 1 Lord Raym. 538; 1 Salk. 28, (Chit. j. 209); Carth. 509; and post, Part II. s. ii. as to notice of non-payment.

(e) Id ibil.; Phillips v. Astling and ano-

ther, 2 Taunt. 206, (Chit. j. 777).

(f) Molloy, b. 2, c. 10, s. 34; Poth. pl. 146.

(g) Ingram v. Forster, 2 Smith's Rep. 243, 244; anic, 279, n (x); Molloy, b. 2, c. 10. pl. 16; 1 Pardess. 382, 362; Code de Commerce, No. 125; 2 Pardess. 327.

(h) Per Lawrence, J. in Clarke r. Cock, 4
East, 72, (Chit. j. 676).
(i) 1 Pardess. 384, 388, 389, 466.

2dly, Of the Obligation to accept, and when or not a Drawee should accept.

II. Of Ac- situation of an ordinary debtor or agent differs from that of a banker, who is ceptances. liable to an action if he should refuse, having sufficient money in hand to honour the check of his customer(k); and, in case of refusal, the holder (though the drawer may withdraw the funds, or sue the drawee for the debt) has not in this country any remedy at law against the drawee or the funds in his hands (l). However, in commercial transactions, frequently from prior intercourse and dealings between the parties, an engagement to accept may be inferred(m); and it should seem, that when funds have been remitted to a drawee for the express purpose of providing for a bill drawn upon him, and he receives and retains the same without objection or returning the amount, an engagement to accept may be implied. If the drawee has expressly or impliedly promised the intended drawer to accept the bill, to be drawn on him for a valuable consideration, and afterwards should refuse to perform such contract, then the drawer (but not any other party) may certainly sue him, and recover re-exchange and other damages occasioned by the dishonour of the bill(n); and where the drawee has money in hand, very slight evidence, as previous commercial transactions, will support the presumption of a contract to accept(o): and a promise to give notice to a party when he might draw a bill, amounts to an undertaking to accept the bill when drawn in pursuance thereof (p).

Precaucepting.

The drawee, before he accepts, should, upon presentment for acceptance, tions to be assure himself most carefully that the signature of the drawer is genuine, and before Ac- that there has not been substituted for payment a larger sum than that really required by the drawer(q); the *frequency of frauds in this respect gave rise to the usage of letters of advice. If the drawee accept a forged bill, or a bill with a larger amount than that fixed by the real drawer, he will nevertheless be liable to pay the bona fide holder, and will have no claim upon the supposed drawer(r). And although the true sum be expressed in the

> (k) Marzetti r. Williams, 1 Bar. & Adol. 415; 1 Tyrw. R. 77, note(b), (Chit. j. 1652). (l) 1 Pardess. 384, 388, 389, 466. In France

> it is otherwise, for there the holder of an unaccepted bill may, when at maturity, sue the drawee in the name of the drawer for the funds in hand, the drawing being considered as equivalent to an assignment and specific appropriation of such funds to the use of the holder. and the drawer's intervening failure does not defeat the right; 1 Pardess. 429.

(m) 1 Pardess. 389.
(n) See the special declaration and decision in Smith v. Brown, 2 Marsh. 41; 6 Taunt. 440,

(o) Laing v. Barclay, 1 Bar. & C. 398; 2 Dowl. & Ry. 530, (Chit. j. 1170); I Pardess.

(p) Smith v. Brown, 2 Marsh. 41; 6 Taunt. 340, S. C. A. in London, consigned goods to B. at Bristol, and after they were shipped off wrote to B. inclosing the bill of lading, and requesting leave to draw on B in about three months; to which B. replied, "that the moment the goods had arrived, A. might depend on hearing from him, when he might draw upon him, or that B. would send him a banker's draft." The goods arrived, and a bill at two months sight was presented to B. which he, being a creditor of A. refused to accept; and it was held, 1st, that the promise by B. to give notice to A. when A. might draw upon him,

was an undertaking to accept the bill when drawn; 2dly, that the three months were to be reckoned from the date of the letter, and not from the arrival of the goods; 8dly, that the goods were to be considered as in the act of being sent until they arrived, and therefore that the consideration was well stated, as executory, though they were on their voyage; 4thly, semble, that B.'s undertaking left it optional with A. to consider it, either as a promise to accept the bill, or to send a draft; and therefore that it was not necessary to declare on the contract in the alternative.

(q) 1 Purdess. 470, 471. An instance of the necessity for this precaution recently occurred in the case of Bulkely v Butler, 2 Bar. & Cres. 434; 3 D. & R. 625, (Chit j. 1193); post; Ch. IX. s. ii. where a person having obtained from the drawer in Spain two genuine small bills for 141, and 181, payable to his order, and addressed to the plaintiff in error, and such person by some chemical process subtracted the small sums and inserted very large sums in lieu, and then obtained from the defendant in error the substituted amount of the bills, and indorsed them to him, and the plaintiffs in error afterwards, without waiting for letters of advice from the drawer, accepted such bill; it was held, that they were liable to pay the defendant in error the full amount; id. ib.

(r) 1 Pardess. 471, 472. Sec cases of paying altered checks by mistake, Hall v. Fuller,

body of the bill at the time it is accepted, it seems advisable, and sometimes II. Of Acthe practice, to repeat in the acceptance the sum for which the drawee ac- ceptances. cepts; for otherwise he may incur the risk of subsequent alteration of the 2dly, Of sum in the body of the bill, and be exposed to the risk of being obliged to the obliga-pay a larger sum, or at least to the trouble and expence of litigation (s). If cept, &c. the drawer has sent a letter of advice, the drawee must accept for the sum therein expressed; but if the bill is to be accepted or paid without further advice, then if the drawee is deceived by the false introduction of a larger sum, it is said that he may recover from the drawer all he is obliged to pay, because the latter is blameable for not taking better precaution(t): and we shall find, that if the drawer of a check has so carelessly inserted the sum as to have enabled a stranger fraudulently to alter it, such drawer, and not the banker, must bear the loss (u). But if the sum is fraudulently altered after acceptance, then the acceptor is liable only to the extent of the sum for which he really accepted, and the holder, however bon's fide, can recover no more, and must protest as to the surplus (x).

It should seem, that where a bill has been drawn in payment of a debt from the drawer to the payee, the drawee may legally accept the bill after notice of the death of the drawer, such death not revoking the order given in favour of a bona fide creditor (y).

*When the holder of a foreign or inland bill presents it for acceptance, he saly. Who is entitled to insist on such an acceptance by the drawee as will subject him to accept. at all events to the payment of the bill according to the tenor of it(z); and Capacity. consequently such drawee must have capacity to contract, and to bind him- [*283] self to pay the amount of the bill, or it may be treated as dishonoured. competency of the contracting parties in general having been already stated(a), it will be unnecessary here to make any observations relative to the capacity of the acceptor; it may, however, be observed, that if the holder find that the drawee is an infant, femé covert, or otherwise incapable of contracting, he may treat the bill as dishonoured. An acceptance may, as has

5 Bar. & C. 750; 8 Dowl. & R. 464, (Chit. j. 1294); Younge v. Grote, 4 Bing. 353; 12 Moore, 484, (Chit. j. 1344).

(s) 1 Pardess. 472.

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(t) 1 Pardess. 473, 474.

(n) Younge v. Grote, 4 Bing. 253; 12 Moore, 484, (Chit. j. 1344); post, Ch. IX. s. ii. Of Payments by Mistake.

(x) 1 Pardess. 467.

(y) Tate v. Hilbert, 2 Ves. jun. 115, 116, (Chit. j. 510); ante 75; Hammonds r. Barclay, 2 East, 227, 235, 236; (Chit. j. 646); post, Ch. IX. s. ii. Of Payment. But as this point is not settled in this country, it would be prudent in such case for the drawee to pause before he accents.

It was held, in America, in Cutts v. Perkins, 12 Mass. Rep. 206, that a drawee may legally accept and pay after notice of the death of the drawer. Abbott, the master of a vessel at London, bound for Boston, and having on board goods consigned to Perkins, drew a bill in fayour of one of his (Abbott's) creditors upon Perkins for the amount of the freight to be paid by him. Abbott died, and his estate was insolvent; and after his death, which was known to Perkins, he accepted and paid the bill. Abbott's administrator then sued Perkins for the amount

of the freight, but the court held that the draft was an assignment of the money that might become due for the freight, and that Abbott's death was not a revocation of the request on the drawee to accept; Cutts v. Perkins, 12 Mass. Rep. 206, Bayl. 5, American edition.

If the drawing of a bill is to be considered as a mere bare authority that is revocable, then the death of the drawer would determine the authority of the drawee to accept or pay, but if it is an authority coupled with an interest in favour of a payee or indorsce, then death would be no countermand. In one case, Hotham, B. said, " a bill in its own nature amounts to nothing more than an authority;" Gibson v. Minet, I Hen. Bla. 586, (Chit. j. 479). But in other cases it is more properly treated as an assignment; per Eyre, C. J. id. ibid. 602; per Heath, J. in Stock r. Mawson, 1 B. & P. 291; per Eyre, C. J., Walwyn c. St. Quintin, 1 B. & P. 654; 2 Esp. Rep. 515, (Chit. j. 578). In France, the drawing a bill is considered such an assignment or appropriation as to give the indorsec a right to the funds in the hands of the drawee; 1 Pardess. 313, 429, 442,

- (2) Mar. 2d edit. 22.
- (a) Ante, 18.

II. Of Ac been already observed in a preceding Chapter(b), be made by an agent; but in such case it will be incumbent on the agent, if required, to produce his 3dly, Who authority to the holder, as, if he do not, the holder may consider the bill as to accept. dishonoured, and act accordingly (c). If a bill be accepted by a person acting as agent, per procuration, for a supposed principal, the party receiving it must ascertain the extent of the supposed agent's authority, and if he neglect to do so he will have no claim on the supposed principal if it should turn out that the assumed agent had no adequate authority (d). And it may per-Agent. haps be doubtful whether the holder is in any case bound to receive an acceptance by agent, as it multiplies the proof which he will be obliged to ad-

Partner.

The act of one partner, as has been before shown (f), being considered as the act of both, acceptance by one for himself and partner, or in the name of the firm, will in general be a compliance with the request of the drawer; but if the bill be drawn on two, not being partners, and it be only accepted by one, it should be protested (x).

duce in case he should be compelled to bring an action on the bill(e).

How many.

There cannot be a series of acceptors of the same bill; it must be accepted by the drawee, or, failing him, by some one, addressed "au bewin," or for the honour of the drawer, &c.(h); and therefore, if a bill of exchange be accepted by the drawee, another person, who, for the purpose of guaranteeing his credit, likewise accepts the bill in the usual form, is not liable as an acceptor(i); and unless the consideration of his engagement be expressed on the face of the instrument, *it is questionable whether he would be liable in any form of action(k).

4thly, At what Time may be made.

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A bill, on presentment for acceptance, must be accepted by the drawer within twenty-four hours, or in default thereof, it is liable to be, and indeed should be, treated as dishonoured (l). This space of time, we have seen(m), is allowed the drawee, to give him an opportunity of examining into the accounts between himself and the drawer; if, however, the drawee refuse to accept within the twenty-four hours, it is not incumbent on the holder to wait

(b) Anle, 32. (c) Beawes, pl. 87.

(d) Attwood v. Munnings, 7 B. & C. 278, (Chit. j. 1342); Man. & Ry. 66, S. C.; ante,

(e) Coore v. Callaway, 1 Esp. Rep. 116; Richards v. Barton, id. 269.

(f) Ante, 39, et seq. 57, 59.

(g) Dupays r. Shepherd, Holt, 297; Bul. Ni. Pri. 279. In the case of two joint traders, an acceptance by one will bind the other; but if ten merchants employ one factor, and he draw a bill upon them all, and one accept it, this shall only bind him, and not the rest. Vide also Marius, 2d edit. 16; Beawes, pl. 223;

Molloy, b. 2, c. 10, s. 18; 1 Pardess. 383.

(h) That none but the party to whom the bill is addressed can be liable as acceptor, unless he be an acceptor for honour, see Polhill v.

Walter, 3 B. & Ad. 114, ante, 85, note (1).

(i) Jackson v. Hudson, 2 Campb. 447, (Chit. 799). This was an action on a bill drawn by the plaintiff on I. Irving, and accepted by him, and under his acceptance the defendant wrote "accepted, J.s. Hudson," payable at,

&c. The defendant was sued as acceptor. The plaintiff offered to prove that he had had dealings with Irving, and had refused to trust him further, unless the defendant would become his surety; and the defendant, in order to guarantee Irving's credit, wrote this acceptance on the bill. Lord Ellenborough said, that this was neither an acceptance by the drawee or by any person for the honour of the drawer; that the defendant's undertaking was collateral, and ought to have been declared on as suchalso Clark v. Blackstock, Holt, C. N. P. 474, (Chit. j. 968). See observations on this point, Manning's Index, 63.

(k) Ante, 263, n. (i); Wain v. Walters, 5 East, 10; Saunders v. Wakefield, 4 B. & Ald. 595; Manning's Index, 63; sed vide Ex parte Gardom, 15 Ves. 286; Morris v. Stacey, Holt, C. N. P. 153, (Chit. j. 950).

(1) Ante, 278, 279, in notes; Ingram r. Forster, 2 Smith's Rep. 243, 244; Code de Commerce, No. 125; 2 Pardess. 327; 1 Pardess. 382; Pailliet Man. de Droit Français, 846, 8.

(m) Ante, 278, 279, in notes.

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till the expiration thereof, but he may instantly consider the bill as dishonour- II. Of Ac-And if a drawee has refused to accept, and on the next day accepts, ceptances. notice of the refusal must be given, or the parties will be discharged (o).

4thly, At what Time

Since the 1 & 2 Geo. 4, c. 78, the acceptance of an inland bill made after may be made. the 1st of August, 1821, must be in writing on the bill itself. The very term acceptance seems to suppose a pre-existing bill, and independently of the accept a act alluded to, it seems to be the better opinion, that an acceptance, or a pro-Non-existmise to accept, a non-existing bill, cannot be available as an acceptance in ing Bill not the hands of the drawer(p); and it is at least questionable whether a third an Acceptance. person, who has taken a bill on the faith of such promise, can treat the promise as equivalent to an acceptance, so as to enable him to sue the drawee on the bill (q). It is true, that in Pillans v. Van Mierop (r), it was held, that a promise by the defendant "to accept such bills as the plaintiff should, in about a month's time, draw upon the defendant, upon the credit of a third person," (for whose accommodation the plaintiff had already accepted bills), amounted to an acceptance; but Lord Mansfield afterwards, in the case of Pierson v. Dunlop(s), qualified the doctrine laid down in the above case, and observed, that "a promise to accept *such a bill did not amount to an ac- [*285]

ceptance, unless accompanied with circumstances which might induce a

third person to take the bill by indorsement;" and Lord Kenyon, C. J. in Johnson v. Collings (t), observed, that "he thought that the admitting a promise to accept, before the existence of the bill, to operate as an actual acceptance of it afterwards, even with the qualification last-mentioned, was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not go even beyond the proper boundary." And that case established, that a mere promise by a debtor to his creditor, that

(n) Id. ibid.

(o) Post, Ch. VIII. s. i. Notice of Non-ac-

ceptance when necessary.

(p) Johnson v. Collings, 1 East, 105, (Chit. j. 633). Milne v. Prest, 4 Campb. 893; 1 Holt, C. N. P. 181, S. C. (Chit. j. 951). By the law of France a promise to accept a bill or bills not drawn, is not binding as an acceptance, but if made after the bill has been drawn, it has then the legal effect of an acceptance. See 1 Pardess. 385, where the difference is explained and reasoned upon, and it is shown that the drawer, but not the holder of the bill, may sue the acceptor for the breach of his engagement to accept, when he has received funds or consideration for meeting it, id. ibid. In America a written promise to accept a non-existing bill operates as an acceptance, provided a bill be drawn within a reasonable time afterwards, but not otherwise; Coolidge v. Payson, 2 Wheat. 66; Weston v. Clement, 3 Mass R. 1; Bayl. 105, Amer. edit.

(q) Id. ibid. (r) Pillans v. Van Mierop, Burr 1663, (Chit. j. 372). See this case observed upon in Pierson v. Dunlop, Cewp. 573, (Chit. j. 392); Johnson v. Collings, 1 East, 105, (Chit. j. 633);

Clarke v. Cock, 4 East, 70. Pillans v. Van Mierop, Burr. 1668, (Chit. j. White drew on plaintiffs at Rotterdam for 8001. and proposed to give them credit upon desendant's house in London; plaintiffs paid White's bill, and wrote to the desendants to know, "whether they would accept such bills as they (the plaintiffs) should draw in about a

month upon them for 800l. on White's credit." The defendants answered that they would; but White having failed before the month elapsed, defendants wrote to plaintiffs not to draw. Plaintiffs did, however draw, and on defendants' refusal to pay the bills, brought this action. The jury found a verdict for the defendants; but, upon an application for a new trial, as upon a verdict against evidence, and two arguments upon it, the court was unanimous that the defendants' letter was a virtual acceptance of such bills as the plaintiff should draw to the amount of 8001.; and the rule was made absolute. See also Mason r. Hunt, Dougl. 297.

(s) Pierson v. Dunlop, Cowp. 573, (Chit. j. 392); Johnson v. Collings, 1 East, 106, n. (a),
8. P.; Clarke v. Cock, 4 East, 70, (Chit. j.

676); ante, 280.

(1) Johnson v. Collings, 1 East, 98, (Chit. j. 633); Collings owed Ruff 231. 10s. 6d. Ruff applied for payment, and Collings said, "that if he would draw for it at two months he would pay it." Ruff drew accordingly, and indorsed the bill to the plaintiff, but did not mention to him Collings' promise. The plaintiff now sued Collings, on the ground that his promise to Ruff was virtually an acceptance. But Le Blanc, J. thought, that as it was not made to a third person, nor with circumstances which might induce a third person to take the bill, it was no acceptance, and nonsuited the plaintiff. On a rule nisi for a new trial, and cause shown, the whole court thought it no acceptance, and Lord Kenyon made the observation stated in the conII. Of Ac- if he would draw a bill upon him for the amount of his demand, he should ceptances.

4thly, At what Time may be made.

then have the money, and would pay it, does not amount in law to an acceptance of the bill when drawn, and that an indorsee for a valuable consideration, between whom and the drawee no communication passed at the time of his taking the bill, can neither recover upon a count in the declaration upon the bill as accepted, nor on the general count for money had and received(u). In a more recent case at nisi prius, it was decided by Gibbs, C. J. that a promise to accept a bill of exchange, in a letter written before the bill has been drawn, can only be taken advantage of as an acceptance by a person to whom the letter was communicated, and who took the bill upon the credit of it(x). And in a late case in bankruptcy, where a firm in England sent out an agent to America with authority to draw bills on the firm and sell and discount them, and the firm undertook duly to honour all bills so drawn, and the agent drew and discounted bills accordingly, but the firm became bankrupt before the bills arrived in England; it was held, that no proof could be made by an indorsee of the bills, although he had discounted them upon the faith of the bankrupts' engagement, as the authority of the agent did not amount to an implied acceptance(y). Assuming, however, that where a person was, for a sufficient consideration, engaged in writing, or in some cases even verbally, to accept a bill thereafter to be drawn, such promise may be rendered available as an acceptance when in the hands of an indorsee, yet it must appear that the promise was communicated to the indorsee and that he took the bill upon the credit thereof; and unless so communicated, an action for the breach thereof must be brought in the name of the person to whom the promise was made, and the declaration should be spe-[*286] cial, founded on the agreement. In America, *a written promise to accept a non-existing bill operates as an acceptance, provided a bill be drawn within a reasonable time afterwards, but not otherwise (z)(1).

(u) Id. ibid.; Clarke v. Cock, 4 East, 60, (Chit. j. 676); Wynne v. Raikes, 5 East, 514, (Chit. j. 700), S. P.
(x) Milne v. Priest, 4 Campb. 393; Holt, C. N. P. 181, (Chit. j. 951). It was insisted that the following letter, written by the defendant before the bill was drawn, amounted to an acceptance:-" We acquit you of buying wheat instead of oats; we will however accept the bills for the wheat when we receive notice of its being shipped." The case of Johnson r. Collings was cited for the defendant, to show that a promise to accept a bill not in existence was not binding. Per Gibbs, C. J. "You are within that case, unless they show that the letter was communicated to the plaintiff, and

that he received the bill with a knowledge. A promise to accept, not communicated to the person who takes the bill, does not amount to an acceptance; but if the person be thereby induced to take a bill, le gains a right equiralent to an actual acceptance, against the party who has given the promise to accept.

(y) Ex parte Bolton and others, 3 Mont. & Ay. 367; 2 Deacon, 537, S. C. Sed quere, the bill having been discounted upon the faith of the bankrupt's undertaking. See judgment of Gibbs, C. J. in Milne v. Prest, 3 Campb. 393, last note.

(2) Coolidge v. Payson, 2 Wheat. 66; Weston v. Clements, 3 Mass. R. 1; Bayl. 105, American edit.; ante, 284, note (p).

⁽¹⁾ In Mason v. Hunt, Dong Rep. 296, Lord Mansfield said, "there is no doubt but that an agreement to accept may amount to an acceptance, and it may be couched in such words as to put a third person in a better condition than the drawer. If one man to give credit to another make an absolute promise to accept his bill, the drawer or any other person may show such promise upon the exchange to get credit, and a third person who should advance his money upon it, would have nothing to do with the equitable circumstances between the drawer and acceptor. But an agreement to accept is still but an agreement, and if it is conditional, and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to these conditions." These observations were made in a case, where the bill was drawn after the supposed promise of acceptance was made; and therefore are entitled to be deemed something more than mere obiter dicta. The doctrine here stated has been recognized and suffered in respect to than mere content dieta. In the doctrine here stated has been recognized and enforced in respect to a promise to accept a bill not in esse in Maryland. (M'Kim r. Smith, 1 Hall's Law Journal, 485.) and in the Circuit Court of the United States in Massachusetts District. Payson r. Goolidge, 2 Gallis. 233. The decision in this case, was affirmed, on error, by the Supreme Court. Wheat. 66. And the same doctrine has been recently fully recognized in the same court.

But if the intended drawee merely write his name at the bottom of a blank II. Of Acpiece of paper duly stamped, this will have the operation of an acceptance, ceptances. after the drawer has subsequently drawn the bill and signed his name; and 4thly, At the holder need not prove any custom of merchants thus prematurely to ac- what Time cept an intended bill; and although the declaration state in the usual form may be the drawing of the bill, and that the drawee afterwards accepted, this is considered no variance (a). And it has been decided (b), that an indorsement written on a blank stamp will afterwards bind the indorser for any sum and time of payment which the stamp will admit, and which the person to whom he entrusts it chooses to insert; and that a person signing his name to a blank paper, and delivering it to another person for the purpose of drawing a bill in such manner as he should choose, is bound by such signature as a See post, 821 (35). drawer(c).

An acceptance being an absolute undertaking to pay, may be made even May bo after the time appointed by the bill for payment(d), and even after a prior due.

(a) Molloy v. Delves, 4 Car. & Pay. 492, (Chit. j. 1544), see post, 821, (36).

(b) Russel v. Langstaff, Dougl. 514, (Chit. j. 415); Powell v. Duff, 3 Campb. 182.

(c) Collis v. Emmett, 1 Hen. Bla. 313,

(Chit. j. 461).
(d) Waynne v. Rakes, 5 East, 521, (Chit. j. 700); Jackson r. Pigot, Ld. Raym. 364; Salk. 127; Curth. 450; 12 Mod. 212, (Chit. j. 208). In an action against the acceptor of a bill, the declaration stated, that it was dated 25th March, 1696, payable one month after date, and that in April, 1697, it was shown to the defendant, and he promised to pay it ac-

cording to its tenor and effect. After verdict for the plaintiff, it was moved in arrest of judgment, that the promise was void, because, as the day of payment was past at the time of acceptance, it was impossible to pay the bill according to its tenor and effect: but it was answered for the plaintiff, that it amounted to a promise to pay generally, and the court being of that opinion gave judgment for the plaintiff. Mitford v. Walcot, Ld. Raym. 574; Salk. 129; 12 Mod. 410, (Chit. j. 214); Gregory v. Walcup, Com. R. 75, (Chit. j. 214); to the same effect, Beawes, pl. 224; Selw. 9th edit. 326.

Schimmelpennick v. Bayard, 1 Peters, 283. See Goodrich & Deforest v. Gordon, 15 John. Rep. 6. See also Van Reimsdyke v. Kane, 1 Gall. Rep. 630, and M'Evers v. Mason, 10 John. Rep. 207. Mayhew v. Prince, 11 Mass. Rep. 54. Banorgee v. Hovey, 5 Mass. Rep. 11. And an agreement to accept a bill when drawn, if shown to a shird person within a reasonable time after the agreement was made, and he take a draft on the credit of it, has been held in Mussa-chusetts to be an acceptance. Wilson v. Clements, 3 Mass. Rep. 1. But although it be clear that a verbal acceptance or an acceptance by a collateral paper is good in law; (M'Evers v. Mason, 10 John. Rep. 203.) yet an agreement to accept a non-existing bill, when drawn, will not operate us an acceptance, unless it be in writing, and shown to a third person who takes a draft on its credit, within a reasonable time. Therefore if a person in writing authorize a draft and agree to accept it, a draft drawn two years afterwards, in favor of a person who took it on the faith of the agreement to accept, will not bind the drawee. Wilson v. Clements, ut supra. See also, Coolidge v. Payson, 2 Wheat. 75, note (a).

Where the drawee said to a person not a party to the bill nor acting for a party "that he must pay the bill" or he "would have to pay it,"—held not to be an acceptance. Martin r. Bacon,

2 S. Car. Rep. 132.

A promise to accept a bill thereafter to be drawn, specifying the amount and time of payment, so as to leave no reasonable doubt as to the identity of the bill intended to be accepted, is, if shown to a third person, who, on the faith of such promise, takes the bill for a valuable consideration, in point of law, an acceptance, binding the person who makes the promise. Per Sutherland, J. This doctrine is discussed at large, and fully established, in the following cases. 10 Johns. R. 213; 15 Id. 6; 2 Gallison, 238; 2 Wheaton, 66; 3 Burr. 1666; Cowp. 571; Douglass, 297; 1 East, 98; 4 Id. 57; 5 Id. 514; Milne v. Prest and another, 1 Holt, 181; 4 Campb. 393.

S. C.; 3 Com. Law. R. 17; 1 Atk. 611; 2 Barn. & Ald. 113. Parker v. Greele, 2 Wend. 545. A promise in these words, "I have no objection to accepting for you at 3 and 4 months, for \$2500, on the terms you propose," contained in a letter, is an absolute and not a conditional engagement; and such a promise authorizes a draft for the schole sum at four months, the longest period specified. Id. The judgment of the Supreme Court, in this case is affirmed by the Court of Errors; but the Chancellor and seven Senators voted for its reversal. Greele v. Parker, 5 Wend. Rep. 414.

And see Parsons v. Amer, 3 Peters, 426. Boyce v. Edwards, 4 Idem, 121. Ward, 2 Dana, 95. Ogden & Co. v. Gillingham & Co., 1 Bald. 38. Kennedy v. Leddes, 8 Port, 263; Canollton Bank v. Tayleur, 16 Louis. Rep. 490. }

may be made.

II. Of Ac- refusal to accept(e), so as to bind the acceptor, though it would discharge the drawer and indorsers, unless due notice of the prior non-acceptance or of non-payment were given (f); and in such case the acceptor would be li-4thly, At of non-payment were given (f); and in such case the acceptor would be limbar Time able to pay the bill on demand (g), though in pleading, his liability may be stated to have been to pay according to the tenor and effect of the bill(h). It has been observed(i), that the drawee, although he have effects of the drawer's, ought not to accept bills after he is aware of the failure of the drawer, because after that event, one creditor of the drawer ought not to be paid in preference to another. But payments made to a bankrupt without knowledge of his being so, are protected by the 1 Jac. 1, c. 15, s. 14; 6 Geo. 4, c. 16, s. 82(k); and as an acceptance of a bill for a precedent debt has always been deemed a payment in satisfaction, provided the bill be honoured when due, there is no doubt, and indeed it has been so decided, that

if a person, not having notice of the bankruptcy of the drawer, accept a bill drawn on him after such bankruptcy, he will be justified in paying his acceptance, although he has afterwards heard of *the bankruptcy(l). But where a trader, after a secret act of bankruptcy, consigned goods to a factor, who agreed to advance money thereon, and accordingly accepted and paid bills drawn on him by the trader, and a commission afterwards issued against such trader on such prior act of brakruptcy, after which the factor sold the goods and received the money, it was held, that he was answerable to the assignees for the value of the goods(m). If a person draw a bill of exchange on another, and deliver it to the payee for a sufficient consideration, and the drawer then die, it should seem, that this having been an appropriation of a particular fund for the benefit of payee, the death would be no revocation of the request to accept, and that the drawee may accept and pay(n)(1).

In case of a foreign bill drawn in sets, the drawee should accept only one

part, and insist on that being produced to him before he pays(o).

5thly, Form and Effect of Acceptances.

An acceptance may be considered with reference, 1st, to its form, and 2dly, to its extent or effect.

In France all acceptances must not only be in writing, but also signed(p);

(e) Wynne v. Raikes, 5 East, 514, (Chit. j. 700). The defendants having previously refused to accept, afterwards wrote to the drawers a letter, stating "our prospect of security is so much improved, that we shall accept or certainly pay all the bills which have hitherto appeared," was held to amount to an acceptance. See post, 290, 297.

(f) Mitford v. Walcot, 12 Mod. 410, (Chit. j. 214).

(g) See the cases, supra, note (d).

(h) Id. ibid.

(i) Poth. pl. 96, et vide Pinkerton v. Marshall, 2 Hen. B. 334, and cases there cited.

(k) Since extended to all contracts, &c , by 2 & 3 Vict. c. 29; see ante, 206, 208.
(1) Wilkins v. Casey, 7 T. R. 711; ante,

207, note (h); and see observations in Copland v. Stein, 8 T. R. 208.

(m) Copland v. Stein, 8 T. R. 208. This is altered as to transactions upwards of two months before the date of the commission by 46 Geo. 3, c. 135; 49 Geo. 3, c. 121, and 6 Geo. 4, c. 16, s. 81; and as to transactions before the date of the commission, by 2 & 3 Vict

c. 29; see ante, 206, 208.
(n) Tate v. Hilbert, 2 Ves. jun. 115, 116, (Chit. j. 510); Hammonds r. Barclay, 2 East, 227, 235, 236, (Chit. j. 646); ante, 292, s. (y); post, Ch. IX. s. ii. " Of Payment," sel quære.

(o) Ante, 155.

(p) 1 Pardessus, 390.

A merchant has a right by the usage of trade to draw on effects placed in the hands of the drawee by shipment, and the consignee must pay the bills, if the shipment places funds is hands. Schimmelpennick r. Bayard, 1 Pet. Rep. 264.

⁽¹⁾ And see Peyson v. Hallett, 1 Caines' Rep. 379, and Cutts r. Perkins, 12 Mass. Rep. 206, to the same effect. So also, an order drawn upon an agent in possession of funds, out of which it is to be paid, when accepted, fixes the funds irrevocably, and is a good assignment of the funds; and they do not become assets, upon the death of the drawer. Debesse r. Napier & Co. 1 M'Cord, 106.

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and by the 1 & 2 Geo. 4, c. 78, s. 2, all inland bills accepted in England II of Acmust be accepted in writing on the bill itself; and the same regulation was by ceptances. a subsequent act (9 Geo. 4, c. 24, s. 8,) extended to Ireland(q)(1). But 5thly, as these regulations are merely local, and do not effect foreign bills, even Form and when accepted in this country, it is still necessary to consider the previous Accept.

ances.

The holder might in all cases insist on an absolute acceptance in writing, Holder on the face of the bill, according to the very terms of the bill, and in default may insist thereof might consider the bill as dishonoured (r). And, therefore, where, ceptance in an action on a bill against the drawer of a bill, drawn on Lisbon, "paya- in Terms ble in effective and not in val reals," the drawee had offered to accept it, of Bill, and payable in val denaros, another sort of currency, it was held, that the holder might have refused such acceptance, and protested the bill as dishonoured; and Lord Ellenhorough said, "The plaintiff had a right to refuse this acceptance; the drawee of a bill has no right to vary the acceptance from the terms of the bill, unless they be unambiguously and unequivocally the same. Therefore, without considering whether a payment in denaros might have satisfied the term effective, an acceptance in denaros was not a sufficient acceptance of a bill drawn payable in effective. The drawee ought to have accepted generally, and an action being brought against them on the general acceptance, the question would properly have arisen as to the meaning of the term(s). So in Parker v. Gordon(t), Mr. Justice Lawrence said, "The bolder of a bill may refuse to take a special acceptance payable at a banker's, but if he chose to take it, *he must comply with the terms of it, [*288] and present it there in the usual banking hours, or he will discharge the drawer and indorsers." If, however, he be satisfied with any of these acceptances, each will be obligatory on the acceptor, and if due notice thereof be given to the other parties to the bill, they will also be liable. seems, that according to the French law, the drawee may, in his acceptance, introduce words protecting his own interests, provided they do not qualify the absolute right of the holder to receive payment from him according to the terms of the bill, as "accepté pour payer a moimeme," in which case the holder neither can nor ought to refuse such acceptance or protest on account of it(u); and though the drawee offer an acceptance, "reserving all claims

⁽q) And see per Parke, J. in Mahoney v. 80, (Chit. j. 904).
Ashlin, 2 B. & Ad. 478, 483, that the 1 & 2

Geo. 4, c. 78, s. 2, applies to every part of j. 756). the United Kingdom.

⁽s) Boehm e. Garcias, 1 Campb. 425, (Chit. (t) Parker v. Gordon, 7 East, 385, (Chit. j.

⁽r) Poth. pl. 47; 3 & 4 Anne, c. 9, s. 5; Parker v. Gordon, 7 East, 887, (Chit. j. 727); Gammon v. Schmoll, 5 Taunt. 344; 1 Marsh.

⁽u) 1 Pardessus, 171.

⁽¹⁾ So by the Revised Statutes of New York it is enacted that no person within the State is chargeable as an acceptor on a biil of exchange, unless his acceptance be in writing, signed by himself or his lawful agent; and the holder may require the acceptance on the bill, and a refusal to comply will be a refusal to accept.—An acceptance in writing if not on the bill, will be of no effect except to a person receiving a bill on the faith of it. An unconditional promise in writing to accept a bill before it be drawn is an acceptance in favor of the person who receives the bill on the faith of it for a valuable consideration.

And every drawee who refuses to return a bill within twenty-four hours to the holder, shall be deemed to have accepted it. 1 Rev. Stat. 268, s. 6—11. 3 Kent's Com. 2d cd. 33. { Under the provisions of the Revised Statutes of New York, an acceptance of a bill is not obligatory unless it be in writing, signed by the acceptor or his agent; and if it be written on a separate paper it does not bind the acceptor, unless the fact of acceptance be disclosed to the person taking the bill, and he receive it for a valuable consideration. Bank of Michigan v. Ely, 17 Wood. 508. }

othly, Form and Effect of Acceptances.

IL Of Ac- on the drawer," the holder may receive it, although the drawer has given coptances. express orders not to consent to any reservation against him, and has imposed on the holder the obligation to protest in such case. Premising, as a general rule, that what amounts to an acceptance is a question of law and not of fact(v), the nature of the several acceptances will be considered in their proper order.

Foreign Bille may be accepted verbally, or by a formerly Inland Bills the same.

It was established that a valid acceptance might be in writing on the bill itself, or on another paper, as by a letter undertaking to accept bills already drawn(x), or that it might be verbal(y); although an inland bill could not have been protested for non-payment, unless it had been accepted in writseparate ing(z). And this is still the law as to joreign pins(a). By the statute of Paper, and 1 & 2 Geo. 4, c. 78, s. 2, it is enacted, "that from and after the 1st day of ing(z). And this is still the law as to foreign bills(a). By the statute of August, 1821, no acceptance of any INLAND bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or if there be more than one part of such bill, on one of the said parts;" and the 9 Geo. 4, c. 24, s. 8, contains a similar enactment as to inland bills made in Ireland. Upon these acts it has been decided, that a bill drawn in [*289] Ireland on England is not an inland but a foreign bill, and therefore *an acceptance by letter is sufficient (b)(1). As these acts only relate to inland

> (v) Sproat v. Matthews, 1 T. R. 182, 186, (Chit. j. 433).

> (x) Clarke v. Cock, 4 East, 71, (Chit. j. 676); Ex parte Dyer, 6 Ves. 9; Holt, C. N. P. 83, 84; Selw. 9th edit. 326. In Crutchley e, Mann, 1 Marsh. 29; 5 Taunt. 529, (Chit. j. 908); it seems to have been doubted whether an engagement on another paper to accept a foreign bill already drawn must not be stamped, but this it should seem, cannot be necessary.

There is no stamp on acceptances.

(y) Clarke v. Cock, 4 East, 67, (Chit. j. 676); Ex parte Dyer, 6 Ves. 9; Lumley v. Palmer, R. T. Hardw. 74; Stra. 1000, (Chit. j. 275); Clayvy v. Dolbin, R. T. Hardw. 278, (Chit. j. 280); Dupays v. Shepherd, Holt, 297; Mar. 65. See 3 & 4 Ann. c. 9, s. 5.

Cox v. Coleman, Mich. 6 Geo. 2, cited arguendo, Ann. 75, (Chit. j. 274). A foreign bill drawn on defendant was protested for nonacceptance, and returned, and afterwards de-fendant told the plaintiff, "if the bill comes back I will pay it," and this was held a good acceptance.

Lumley r. Palmer, Stra. 1000; R. T. Hardw. 74, (Chit. j. 275). In an action against the defendant as acceptor of a bill the acceptance appeared to be parol only; which Lord Hard-wicke; C. J. ruled to be sufficient, that being good at common law, and by the statute 3 & 4 Ann. c. 9, sects. 5 and 8, which requires an acceptance to be in writing, in order to charge the drawer with damages and costs, having a proviso that it shall not extend to discharge any remedy that any person may have against the acceptor. But Eyre, C. J. of the Common Pleas, having ruled it otherwise in Rex v. Maggott, 7 Geo. 2, an application was made for a

new trial, and the court, to settle the point, ordered it to be argued; upon the argument the court held Lord Hardwicke's direction right, and Eyre C. J. waived his opinion and agreed with the Court of King's Bench, and this determination is referred to and approved of in Julian v. Scholbrooke, 2 Wils. 9; Powell v. Monnier, 1 Atk. 612; and in Pillans v. Van Mierop, Burr. 1662, Lord Mansfield says, "a verbal acceptance is binding," and in Sproat v. Mathews, 1 T. R. 182, it was taken for granted by the court and bar, that a parol acceptance was good. See also Stra. 817, and see Windle r. Andrews, 2 Barn. & Al. 696, (Chit. j. 1062). (z) Fairlie v. Herring, 3 Bing. 625; 11 Moore, 320, (Chit. j. 1300).
(a) 9 & 10 Will, 3, c. 17.

(b) Mahoney r. Ashlin, 2 B. & Ad. 478, (Chit. j. 1550). But the 1 & 2 Geo. 4, c. 78, s. 2, (as well as the 9 Geo. 4, c. 24, s. 8,) applies to bills drawn in Ireland upon persons there, id. ibid.

The court, in giving judgment, referred to the statute of William the Third, regulating the acceptance of inland bills of exchange, which applied only to England, Wales, and Berwickon-Tweed; and as none of the subsequent Acis of Parliament had extended the description of an inland bill, so as to include a bill drawn in Ireland upon England, their lordships were of opinion that the Act of Union could make no alteration in that respect, and consequently this must be considered as a foreign bill. The letter, therefore, was a sufficient acceptance, and the plaintiff was entitled to recover. See Chaters v. Bell, 4 Esp. R. 48, (Chit. j. 636); and anle,

⁽¹⁾ The same doctrine was recognized in M'Evars v. Mason, 10 Johns. Rep. 207. Wilson v. Clement, 3 Mass. Rep. 1.

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bills, it will be necessary to consider the decisions as still affecting foreign II. Of Ac-

The current of decisions in the English courts establishes, that a verbal 5thly. acceptance of a foreign bill already drawn is sufficient(c); and this is still Form and the law in England as to such foreign bills (d); though the law of France re-Acceptquires the acceptance to be signed, and consequently there it must be in ances.

It is also established by a current of English decisions, that with respect to FOREIGN bills, it is not necessary that the acceptance should be on the bill itself, it may be on another paper (f), and this is the law in France (g).

In Johnson v. Collings(h), Lord Kenyon, C. J. observed, "that it is much to be lamented, that any thing has been deemed to be an acceptance of a bill of exchange, besides an express acceptance in writing; but he admitted that the cases had gone beyond that line, and had determined that there might be a parol acceptance." And in Clark v. Cock(i), Lord Ellenborough, C. J. observed, "that if the law in this respect were to be framed de novo, it might, perhaps, be desirable to have nothing else taken as an acceptance, than an acceptance in writing on the bill itself, that every one to whom it passed might see on the face of the instrument itself whether or not it was accepted; but that it is now much too late to recur back to that, after the various decisions in the times of Lord Hardwicke and Lord Mansfield;" and he also observed(k), "that it might be for the convenience of mercantile affairs, that a bill might be accepted by a collateral writing without the bill itself coming to the actual touch of the acceptor, which would sometimes create great delay." And therefore in Clarke and others v. Cock(l), where A. in consideration of having commissioned B. to receive certain African bills payable to him, drew a bill upon B. for the amount, payable to his own order, and B. ackowledged by letter the receipt of the list of the African bills, and that A. had drawn for the amount, and assured him that it would meet with due honour from him; this was holden an acceptance of the bill by B.; and the purport of such letter having been communicated by A. to third persons, who, on the credit of it, advanced money on the bill to A., and who indorsed it to them, it was also holden that B. was liable as acceptor to an action by such indorsees, although after the indorsement, in consequence of the African bills having been attached in B.'s hands, who was ignorant of his letter having been *shown, A. wrote to B., advising him not to accept the bill when tendered [*290] to him, which, as between A. and B., would have been a discharge of B.'s acceptance, if the bill had still remained in A.'s hands. And in Wynne and another v. Raikes and others (m), it was holden, that a letter from the drawees of a bill in England to the drawer in America, stating, that "their prospect of security being so much improved, they should accept or certainly pay the bill," is an acceptance in law, although the drawees had before refused to accept the bill when presented for acceptance by the holder who resided in England, and again, after the writing such letter, refused payment

⁽c) See cases, ante, 288, note (η) . (d) See Fairlie v. Herring, 8 Bing. 625; 11 Moore, 320, (Chit. 1300).

⁽e) 1 Pardess. 390; Manuel de Droit Frangais, 845, edit. A. D. 1818.

⁽f) Clarke v. Cock, 4 East, 57, (Chit. j. 676); Wynne v. Raikes, 5 East, 514, (Chit. j. 700); Ex parte Dyer, 6 Ves. 9.

(g) Man. de Droit Frang.; 1 Pardes. 390.

It is not indispensable that the acceptance

should be written on the bill, and see the reason, id. ibid.

⁽h) Johnson v. Collings, 1 East, 103, (Chit.

j. 633); ante, 285, note (t). (i) Clarke v. Cock, 4 East, 67, (Chit. i.

⁽k) Id. ibid.; 4 East, 71.

⁽¹⁾ Id. ibid.; 4 East, 57. (m) Wynne r. Raikes, 5 East, 514, (Chit. j. 700); ante, 286, notes (d) and (e).

11. Of Ac- of it when presented for payment, and although such letter, written before, was not received by the drawer in America until after the bill became due.

othly, Form and Effect of Acceptances.

In Fairlie v. Herring, bills having been drawn on the defendants by their agent, and with their authority, in respect of a mine which they afterwards transferred to A., they requested A. to place funds in their hands to meet the bills when due, saying, "it would be unpleasant to have bills drawn on them paid by another party." A. placed funds accordingly, but when the bills were left with defendants for acceptance, no acceptance was written on them. A.'s agent having complained to one of the defendants on the subject, he said, "What, not accepted! We have had the money, and they ought to be paid, but I do not interfere in this business, you should see my partner." And it was holden, that all this amounted to a parol acceptance of the bills, on which the defendants were liable to an indorsee, between whom and A. there was no privity, and that the indorsee was not precluded from suing, by having made a protest in ignorance of this acceptance(n).

*But the verbal or written engagement in another paper must import a [*291] direct and positive engagement to accept or to pay; and therefore a letter,

(n) Fairlie v. Herring, 3 Bing. 625; 11 Moore, 520, (Chit. j. 1203). Best, C. J. " We are all agreed that there has been a good acceptance of this bill, and therefore have declined entering into the points as to money had and received. If the facts of this case are understood, it appears to me no man can doubt that both in point of justice and in point of law the plaintills are entitled to recover. From Mornay's testimony we ascertained that he had been in America as the agent of the defendant, for the purpose of exploring a mine. He made an arrangement with the Mexican Company, in the course of which the present defendants had the benefit of the money for which the action is brought. bill on which the defendants are sued was drawn by Exeter, the sub-agent of Mornay, who was the agent of the defendants. The bill, therefore, was created by the defendants for their own benefit, they have had the advantage of it in their dealings with the Mexican Company, and they are the persons who in point of justice ought to pay. The business on the part of the Mexican Company being also under the management of Mornay, Powles, one of the defendants, applies to Mornay, and desires that he will consent to the defendants having the money in question, for the express purpose of paying these bills, complaining it would be a hardship if their bills were paid by any other house, that it would being discredit on their house, that they who had trusted the Company ought in turn to be trusted for such a sum of money as this Here is the most distinct promise to pay that could be made. My brother Wilde does not deny the promise to pay the bill, but says it is distinguishable from all similar cases in this, that it is not a promise made to one of the parties to the bill. I consider it is a promise made to one of the parties to the bill.
Who is the drawer? Exeter Exeter is the subagent of Mornay. I consider Exeter and Mornay the same. There is, therefore, a promise to pay to these persons, and as was said by Mr. Justice Le Blanc, in a case that was referred to in argument, 'If a man premises to pay a bill, he promises to do all the formal part.'

It has been determined, in a great variety of cases, that if a bill comes into a man's hands with a parol acceptance, though the party who receives the bill does not know of that parol acceptance, he has a right to avail himself of it afterwards. It is impossible for any man to doubt, on principles of common sense, that such ought to be the law, for if I take a bill, I take it with every advantage the holder had before it came into my hands. This promise being made to Mornay, and money being obtained on it, amounted to a promise upon adequate consideration to one of the contracting parties. Is there then any thing in the case which has prevented the plaintiffs from availing themselves of that promise? It has been supposed, that by protesting the bill for non-acceptance they have abandoned their claim. At the trial of this cause I put an end to that hy leaving it to the consideration of the jury, whether, at the time that protest was made, the plaintiffs were aware that this acceptance had also been made. The jury expressly found that the protest was made in ignorance of what had taken place between Mornay and the present defendants. If the plaintiffs were ignorant of this, it is quite impossible that that which they have done in ignorauce can prejudice any right which was before vested in them.

Therefore I put the case on the principle contained in the language of Lord Manafeld: "If a man undertakes for the substance, he undertakes for the formal parts: if he undertakes to pay the acceptance, he undertakes to accept." The plaintiffs in this case have done nothing to waive their right on that acceptance; and it would be an opprobrium to the law of England, if, upon a bill drawn by an agent of these gentlemen, and of which they have had the advantage, they could turn round and say, "our agent in America is a person not to be trusted, we will not pay the bill though we have received the money for the purpose." I should be exceedingly sorry if the plaintiffs could be so turned round. I am happy to find in this case that which I find in most others where statutes have not interfered, that the common law will enable us to do justice."

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stating "your bill shall have attention," was holden by the court too ambig- II. Of Acuous to amount to an acceptance, in the absence of evidence to show that in ceptances. mercantile acceptation the phrase amounted to an equivocal acceptance(o). 5thly, And where the drawee said, on presentment of the bill, "there is your bill; Form and take it, it is all right?" that was held to be no accompanied. take it, it is all right," that was held to be no acceptance (p). Accept-

If a party to a bill, on being asked if it be his own hand-writing, answer ances. that it is, and will be duly paid, or if he has paid several other bills accepted in the same hand-writing, he cannot afterwards set up, as a defence, forgery of his name; for he has accredited the bill, and induced another to take

it(q)(1).

An acceptance, in regard to extent or effect, may be either absolute, conditional, or partial, or varying from the tenor of the bill. In regard to these, many of the points in the pages immediately preceding are applica-

An absolute acceptance is an engagement to pay the bill according to its An absotenor. At present, the usual mode of making such an acceptance of an in-lute Acland bill is either by writing on the bill the word "accepted," and subscrib- on the Bill ing the drawee's name; or by writing the word "accepted" only; or it may itself. be by merely writing the name, either at the bottom, or across the bill, though it is not necessary that the acceptance should be signed or subscribed notwithstanding the 1 & 2 Geo. 4, c. 78, s. 2, requires it to be in writing(r). But in foreign bills drawn on France, the holder cannot legally refuse an acceptance made by any other equivalent words, as "je ferai honneur" "je paierai" "j'acquitterai;" but the word "vue" does not absolutely import an acceptance, for it may have been written with a very different intent(s). In addition to the word "accepted," or some equivalent expression, the French law expressly requires that the acceptance shall be signed, and the word "accepted," without signature, notwithstanding any ancient usage to the contrary, is unavailing(t). It is not, however, necessary in that country to repeat *in the acceptance the sum which the acceptor engages to pay, unless [*292] when it varies from the bill, though we have seen that it may be expedient to state the sum to avoid fraud (u). If by the terms of a bill it is to be pay-

(c) Rees v. Warwick, 2 Bar. & Ald. 113, (Chit. 1039), observed upon by Park, J. in Fairlie v. Herring, 8 Bing. 631; 11 Moore, 520, (Chit. j. 1300).

(p) Per Lord Kenyon, Powell v. Jones, 1 Esp. 17, (Chit. j. 509). See further, the cases,

post, 297, &c.

(q) Leach r. Buchanan, 4 Esp. Rep. 226, (Chit. j. 657); Barber v. Gingell, 3 Esp. Rep. 60, (Chit. j. 618); Jones v. Ryde, 1 Marsh. 159, 160, (Chit. j. 906); and Price v. Neal, there cited. See post, 307, note (h).

Leach v. Buchanan, 4 Esp. Rep. 226, (Chit. j. 657). Indorsee against the acceptor of a bill of exchange; the only evidence as to the acceptance was, that the defendant had acknowledged to witness that this acceptance was in his handwriting, and that it would be duly paid. The defendant offered to prove that the acceptance had been forged by the drawer, but Lord Ellenborough held, that unless the evidence given by the plaintiff was wholly discredited, it could not entitle the defendant to a verdict; and as he so accredited the bill, and induced a person to take it, he should hold him liable for the payment; and the plaintiff had a verdict.

(r) Dufaur v. Oxenden, 1 Mood. & M. 90. (s) 1 Pardessus, 391, 392; but see post,

294, note (t).

(t) 1 Pardessus, 392. (u) 1 Pardessus, 890.

^{(1) {} W. accepted certain bills of exchange in the name, but without the authority of his brother J., which bills were dishonored when at maturity. W. was arrested upon another charge of forgery, and while in custody, the holders of the above bills applied. Held, that the written acknowledgment by J. (after the bills had been dishonoured,) that he was responsible for the bills and also that he engaged to pay them in case his brother should fail to do so, was not sufficient to make him liable upon the bills; no antecedent authority having been given to W. to accept the bills, and the subsequent acknowledgment of liability being made to screen his brother from a charge of forgery. Ex parte Edwards Lond. Jurist, 1841, p. 706. }

ceptances. 5thly, Form and Effect of Acceptances.

, II. Of Ac- able at another place than the drawee's residence his acceptance should particularize the house or place, in order that the holder may there present for payment and make protest if necessary, and if he do not, the holder may refuse such incomplete acceptance (v). We have already considered the consequences of a bill or note being drawn or accepted payable at a particular place(x).

> Where a bill, payable at days, usuances or otherwise, after night, is accepted, it is usual and proper to require the drawee to certify or write the day of the presentment and of the acceptance, by which means, in case of dispute, the same evidence which will establish the handwriting to the acceptance itself will also prove the time it was made(y). But it has been decided, that if on production of such a bill an acceptance appears to have been written by the defendant under a date which is not in his hand-writing, the date is evidence of the time of acceptance, because it is the usual course of business in such cases for a clerk to write the date, and for the party to write his acceptance under the date(z). If there be no date, it may be inferred to have been accepted on the date of the bill(a). On a written acceptance by any other person than the drawee, it is said to be essential that the name of such third person should appear(b). By the practice of the London bankers, if one banker who holds a check drawn on another banker, presents it after four o'clock, it is not then paid, but a mark is put on it to show that the drawer has effects, and that it will be paid, and this marking binds the banker to pay on the next day at the clearing-house(c).

By a Partner or Agent.

When an acceptance is made by one partner only, on the partnership account, he should regularly subscribe the name of the firm, or express that he accepts for himself and partner (d); but any mode which indicates an intention to be bound by the terms of the request in the bill will bind the firm(e). And when by an agent for his principal, he must subscribe the name of such principal, or specify that he does it as agent, as otherwise it may, if he be named or described in the direction of the bill, make him personally responsible(f).

Acceptances payable at a particular Place before the Act 1 & 2 Geo. 4, c. 78.

It has been adjudged, that if a bill be made payable in a city or large town generally, it should by the acceptance be made payable at some particular house or place there, and if not, that the holder may protest it, which seems reasonable, as otherwise it would be difficult in many cases for the holder to find out the residence of the drawer (g)(1). Much discussion in modern

(v) 1 Pardessus, 393.

(x) Ante, 151 to 154; and see post, Ch. IX. s. i. Presentment for Payment.

(y) Beawes, pl. 266; 1 Pardess. 392, 393. (z) Glossop v. Jacob, 4 Campb. 227; 1 Stark. Rep. 69, (Chit. j. 944).

(a) 1 Pardessus, 393.

(b) Bayl. 5th edit. 183, 184. (c) Robson v. Bennett, 2 Taunt. 388, (Chit. 794). See further as to checks, post, Ch.

j. 754); unte, 58, note (z). And see Lloydr. Ashby, 2 B. & Ad. 23, 29, ante, 43, note (f).

(f) Ante, 32, 33, 34; Poth. pl. 118; Thomus v. Bishop, 2 Stra. 955, (Chit. j. 277); Macbeth r. Huldimand, 1 T. R. 172. It should seem an acceptance by an agent, not specifying that he accepted as such would render him personally liable, though the drawer knew he acted as agent; Leadbitter v. Farrow, 5 Maule & S. 345, (Chit. 970); anle, 88, note (u).

(d) Ante, 57.
(g) Gregory v. Walcup, Com. 75; Mutford
(e) Mason v. Rumsey, 1 Campb. 384, (Chit. v. Walcot, Lord Raym. 574, (Chit. j. 214).

⁽¹⁾ Where a foreign bill is drawn on persons residing in A., payable in B., without any particular place in the latter city being designated where payment is to be made, the holder may demand acceptance and payment of the drawees, at A., and a protest for non-acceptance or non-payment will be good if made there; or the holder may at his election, if payment is not made at

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times arose upon the effect of an acceptance payable at a particular place, and II. Of Acbefore the recent act, *the following points were settled in the House of Lords, ceptances. in the case of Rowe v. Young(h); it was decided, 1st, That if a bill were 5thly, accepted payable at the house of P. and W. it was a qualified acceptance, Form and restricting the place of payment, and the holder was bound to present the bill Acceptat that house for payment, in order to charge the acceptor; and that ances. if he brought an action against the acceptor, he must in his declaration [*293] aver, and on the trial prove, that he made such presentment; and for want of such averment the declaration was held bad on demurrer. That an acceptor might qualify his acceptance was clearly established by cases including almost every species of qualification; and that if the qualification as to place could not be introduced by the acceptor, it must be on account of some circumstance which belongs to place, and does not belong to time or mode of payment, or any other species of qualification whatever. 3dly, That when a bill is drawn generally, considering that it is an address to the person who is to accept it generally, it is the duty of the acceptor who intends to give a special acceptance, to accept in such terms that the nature of his contract may be seen in the terms he has used, that the acceptance may clearly appear to be qualified or special, which he insists is not general. 4thly, That when the acceptor uno flatu writes the words "accepted payable at such a house," the word "accepted" is not to be taken to express the whole of the acceptor's contract, but the latter words are also to be taken as part of it, and are to be construed distinctly as a direction or expansion of engagement. 5thly, That if an acceptor promise to pay at his banker's in London, and the holder calls upon him in Northumberland, the payment is not the same. He presumes that the demand is to be made at the banker's in London, and the funds are deposited there. But if the acceptor is unexpectedly to meet the demands in a distant place, the cost of the exchange and remittance backwards and forwards must be added. 6thly, That if the law be, that although a bill is drawn generally, it may be accepted specially, it is the effect of the law to impose a duty upon the holder, of giving notice to the

(h) Rowe v. Younge, 2 Bligh, Rep. 391; 2 tains much useful argument and learning on the Brod. & B. 165, (Chit. j. 1084); and Hal-, subject. comb's separate report of that case, which con-

B. at the maturity of the bill, protest the bill there for non-payment. For as no place in B. is pointed out to which the holder might resort, and the drawees reside at A., an attempt to search for them at B. would be without object or effect; and the holder is not bound to go elsewhere, as the bill has directed payment at B.; and he may conform his conduct to the tenor of the bill. And on the other hand it is a sound rule that where no particular place of payment is fixed, a demand upon the drawees personally is good; and a general refusal to pay is a refusal according to the tenor of the bill, and is equivalent to a refusal to pay in B. Mason v. Franklin, 3 John. Rep. 202. Bort v. Franklin, 3 John. Rep. 207.

Where a note is not payable at any particular place, and the maker has a known and permanent residence within the state, the holder is bound to make a demand of payment, there, in order to charge the indorser; but where a note was dated at Albany, and the maker had removed to Canada, a demand of payment at Albany was held sufficient. Anderson v. Drake, 14 John. Rep. 114.

See Galpin v. Hard, 3 M'Cord, 394. If the place of payment of a note be designated in a memorandum at the bottom; or if to the acceptance of a bill of exchange, be added a particular place of payment, with the assent of the holder; such memorandum or qualification becomes a part of the contract; and if only the name of the place be written on the bottom of the note or bill, it is within the province of the jury to determine the object and effect of it. Tuckerman v. Hartwell, 3 Greenl. 147. It seems, that as against the maker of a promissory note, or acceptor of a bill of exchange, payable at a particular place, no averment in the declaration, or proof at the trial, of a demand of payment, at the place designated, is necessary; but as against an indorser of a bill or note, it is in general otherwise. Bank of the United States v. Smith, 11 Wheat. 171, 174.

ceptances. 5thly, Form and Effect of Acceptances.

II. Of Ac- drawer and previous indorsers, if he intend to keep alive their liability. 7thly, That it is not true that an acceptor must be antecedently the debtor. and that all the cases of qualified acceptances show the contrary; and that a man may accept to pay out of the produce of a cargo consigned to him, when that cargo shall arrive in England; and that in the case of a consignee, his acceptance is almost universally qualified. 8thly, That money paid at Torpoint and in London are different things; and if an acceptor of a bill is liable to be called upon at both places, his liability is rendered more inconvenient.

1 & 2 Geo. to acceptances payable at a particular Place.

This decision occasioned the passing of the 1 & 2 Geo. 4, c. 78(i), for 4, c. 78, as England, and the 9 Geo. 4, c. 24, for Ireland, the terms of which enactments we have already considered(k); and we have seen, that to constitute a special acceptance the drawee must express "payable at a banker's house or other place only, and not otherwise or elsewhere." And in an action against the acceptor the omission of these words now prevents the bill from being deemed necessarily payable at the particular place, although in the body of it the drawer requested the drawee to pay there(1). And the [*294] omission to present a bill so drawn or accepted *without those special words, precludes the necessity for a presentment at the banker's, and this although the acceptor has really been prejudiced by the neglect(m). But where a bill is drawn payable at a particular place specified in the body of the bill, and the action is against the drawer, a presentment there is still necessary (n). Nor is it necessary, in order to constitute a special acceptance, that the word "only" should be introduced; if a bill be accepted payable at a particular place, "and not elsewhere," this is a special acceptance(o).

And where a bill has been accepted payable at the house of S. P. and S. and be so declared upon, it is not necessary to aver a presentment to the acceptor himself, or to S. P. and S., the averment and proof of a presentment. at such house suffices(p). So that notwithstanding the terms of the act, an acceptance payable at a particular place has some effect given to it(q).

(i) 1 & 2 Geo. 4, c. 78, called Sergeant Onslow's Act. Per Best, C. J. in Selby v. Eden, 3 Bing. 613; 11 Moore, 511, (Chit. j. 1297).
(k) Ante, 152.

(1) Fayle v. Bird, 6 B. & C. 531; 9 Dow. & Ry. 639, (Chit. j. 1239); 2 Car. & P. 303, and Addenda, ix. S. C.; Turner r. Hayden, 4 B. & C. 1; Ry. & Moo. 215, (Chit. j. 1246). In this case the plaintiff, who was the drawer, in the body of the bill, requested the defendant to pay to his order in London, and the defendant accepted the bill payable at W. Metcalf, Esq. Coal Exchange, London, and the decla-ration averred presentment there. The plaintiff failed in proving any presentment, and was thereupon nonsuited, and it was contended, that as the bill was by the act of the drawer made payable in London, the statute 1 & 2 Geo. 4, c. 78, did not excuse the want of such presentment; but the court, on the authority of the case of Schy v. Eden, 3 Bing. 611; 11 Moore, 511, (Chit. j. 1297); held, that the circumstance of the drawer having himself made the bill payable at a particular place, made no difforence, as the statute declared that all acceptances should be deemed general acceptances, unless the particular words mentioned in the statute were incorporated in the acceptance.

Lord Tenterden, C. J .- " I should certainly have entertained some doubt whether this case fell within the statute 1 & 2 Geo. 4, c. 78, had

it not been for the authority cited on behalf of the plaintiff. It appears that the Court of Common Pleas, in Selby r. Eden, supra, have decided, that the act embraces every bill payable at a banker's or other place, and that there is no distinction between the case where the bill is rendered so payable by the language of the drawer, and the case where it is rendered so payable by the language of the acceptor. It is of great importance that there should be an uniformity of decision in the different Courts of Westminster Hall upon all questions, but particularly upon questions affecting negotiable instruments of this description. Upon the authority of that case, therefore, we are of opinion that the rule for entering a verdict for the plaintiff should be made absolute." Rule absolute. Aliter, if action against drawer; Gibb v. Mather, 8 Bing. 214, infra, note (n).

(m) Turner v. Hayden, 4 Bar. & Cres. 1; Ryan & Moo. 215; 6 Dow. & Ry. 5, (Chit. j. 1246); ante, 153, note (e)

(n) Gibb v. Mather, 8 Bing. 214; ante, 152, note (a), and post, Ch. IX. s. i. Presentment. (o) Siggers v. Nicholls, Bail Court, H. T. 1839; 3 Jurist, 34.

(p) Hawkey v. Borwick, 1 Younge & J. 376; 4 Bing. 135; 12 Moore, 479, (Chit.). 1333). See post, Part II. Ch. II. s. iv. Of the Declaration.

(q) Id. ibid.

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And though an acceptance payable at a particular place is not obligatory on II. Of Acthe holder to present there, and it may be made to the drawee at any other ceptances. place, unless the special words are inserted, yet a presentment at the place 5thly, will always suffice and be proper(r). And where a bill was accepted paya- Form and ble at No. 18, Bishopsgate Street, and the acceptor died before it became Acceptdue, it was held sufficient, in an action against the drawer, to prove present- ances. ment at the specified place, and that it was not necessary to show a presentment at the house of the deceased's representative(s).

With respect to acceptances of inland bills made in England or Ireland, What any writing of the drawee upon the bill which evinces a consent to comply Words with the request of the drawer will constitute an acceptance. Thus the amount to word "accepted," "seen(t)," "presented(u)," the *day of the month(v), an acceptor a direction to a third person to pay the bill(x), written thereon, (or before Inlandthe 1 & 2 Geo. 4, c. 78, on any other paper relating to the transaction(y), Bill. will amount to an acceptance. So, since that act, any words intended as [*295] an acceptance, written on the bill by the drawee, may amount to a valid acceptance, though not subscribed by or with the name of the drawee(z). And though the bill be not addressed to any person, yet if defendant write across it, " accepted, C. N." he will be liable as acceptor(a); nor, indeed, as we have just seen, was it necessary before the act, that the acceptance of inland bills should be in writing (b).

An acceptance may also as to foreign bills (except those drawn on Implied or Construc-France, where a written signed acceptance is required (c), be implied as tive Accepwell as expressed; and it is said that it may be inferred from the drawee's tance of keeping the bill a great length of time, or by any other act which gives cre- Foreign

dit to the bill, and induces the holder not to protest it: or is intended as a surprise upon him, and to induce him to consider the bill as accepted (d).

(r) Ante, 152, note (s).

(s) Philpott v. Bryant, 3 Car. & P. 244; 4 Bing. 717; 1 M. & P. 754, (Chit. j. 1887), but on a different point.

(t) Poth. pl. 45. But see 1 Pardess. 391,

(u) Anon. Comb. 401, (Chit. j. 193). Per Holt, C. J. If the drawer underwrites a bill " presented such a day, or only the day of the month," it is such an acknowledgment of the bill as amounts to an acceptance, and this was declared by the jury to be the common practice; and see Vin Abr. tit. Bills of Exchange, L. 4.

(v) See preceding note.

(x) Moor v. Whitby, Bull N. P. 270, (Chit. j. 381). A bill, drawn by Newton on the defendant, was presented for acceptance; the defendant wrote upon it, "Mr. Jackson, please to pay this note, and charge it to Mr. Newton's account. R. Whitby." It was insisted that this was no acceptance, but only a direction to Jackson to pay it out of a particular fund, and if there were no such fund the money was not to be paid. Per cur. "This is a direction to Jackson to pay the money, and it signifies not to what account it is to be placed when paid; that is a transaction between them only, and this is clearly a sufficient acceptance." Selw. 9th edit. 826.

(y) Wilkinson v. Lutwidge, Stra. 648, (Chit. j. 263). Drawer against acceptor of a bill of

exchange. The question was as to the validity of the acceptance. The bill was drawn in New England, and remitted to the plaintiff's correspondents in London, together with another bill drawn upon the same account, both which were sent to the defendant for his acceptance, who, in his letter acknowledging the receipt of them wrote thus, "the two bills of exchange which you sent me, I will pay them, in case the owners of the Queen Anne do not. and they living in Dublin, must first apply to them. I hope to have their answer in a week or ten days. I do not expect they will pay them, but I judge it proper to take their answer before I do, which I request you will acquaint Mr. Wilkinson with, and that he may rest satisfied with the payment." The defendant insisted that this was only a conditional acceptance, to pay in case the owners of the Queen Anne did not. But Raymond, C. J. held the acceptance an absolute one. See also Pillans v. Van Mierop, 3 Burr. 1663, (Chit. j. 372).

(z) Dufaur v. Oxenden, Mood. & M. 90. (a) Gray v. Milner, 3 Moore, 91; 8 Taunt. 789, (Chit. j. 1022, 1052); ante, 164, note (q). (b) Ante, 287, 288.

(c) Ante, 287, note (p); 289, note (e). (d) Clavey v. Dolbin, Hardw. 278, (Chit. j 280); post, 298, note (g); Peach v. Kay, Bayl. 4th edit. 75; post, 298, note (k); Harvey r. Martin, 1 Campb. 425, (Chit. j. 756); Fernan

ceptances. 5thly, Form and Effect of Acceptances.

II. Of Ac. But it should seem that the mere detention of a *bill for an unreasonable time by the drawee will not amount to an acceptance (e), nor will the drawse's disfiguring, cancelling, or destroying the bill(f), have the effect of an acceptance.

And where a bill was sent by the post to the drawee for acceptance, that having been the course between the holder and drawee, it was holden, that a neglect by the drawee to return it for ten or twelve days, whilst he was waiting to see whether the drawer would send him funds, was no acceptance(g), especially as he kept it at the instance of the drawer, on a promise from him of funds; and it appears to have been considered, that at most the neglect of the drawee had the effect of subjecting him to a special action on the

It has, indeed, been supposed that the drawee's destroying a bill may amount to an implied acceptance(i); and in one case, two learned judges (Lord Ellenborough and Holroyd, J.) were of that opinion; but the other judges (Abbott, J. and Bayley, J.) thought that the destruction of the bill

dey v. Glynn, 1 Campb. 426, (Chit. j. 756); amounted to an acceptance. Poth. pl. 46; post, 296, note (m).

Harvey v. Martin, I Campb. 425, (Chit. j. 756). In an action by the payee and holder of a bill against the defendant as acceptor, it appeared that the bill was drawn in Guernsey, where the drawer and the plaintiff resided, on defendant, who lived in Cornwall, dated 13th of March, 1805, at three months; that within a fortnight after it was drawn, the plaintiff sent it to the defendant, desiring him to accept it, and remit to S. Dobree, the plaintiff's correspondent in London On 13th April, 1805, the plaintiff, finding that the bill had not been sent to S. Dobree, wrote to the defendant, requesting him to accept and send it, stating, that though he considered the keeping of the bill as tantamount to an acceptance, yet that it was not the same to him, as S. Dobree would not give him credit for it until he received it accepted. The defendant, however, did not accept the bill, or remit it, or give any notice of his pefusal so to do. On the 1st of June, the defendant signed a letter, admitting that he had kept the bill, though told by the plaintiff that he considered his doing so as tantamount to an acceptance, as he intended to have paid it, but having no effects of the drawer's refused to pay; and on the 4th of July, when the bill was protested for non-payment, he said he had neglected to write an acceptance upon it, thinking it of no consequence, as he meant to pay it. Lord Ellenborough referred to a MS. case of Trimmer v. Oddy, (see 6 East, 200) in which Lord Kenyon expressed an opinion that a mere keeping of a bill was an acceptance, and said he inclined to entertain the same opinion, but should leave that question to the jury on the custom. Gibbs, however, for the defendant, admitting that he could not answer the case, a verdict was found for the plaintiff. And on an application to Lord Ellenborough to certify for a special jury, his lordship refused, saving, that this was a clear case, but that if it had not been attended with such strong admissions on the part of the defendant, but had been a mere case of a bill kept by the drawer, he should have thought it a fit case for a special jury to decide whether such detention of the bill

See Scaocia de Commerciis et Cambio, folio 383, num. 335, who, in enumerating the different acceptances, mentions that which is made tacite per receptionem et detentionem literarum. See also Poth. Contrat de Change, part 1, chap. 3d, p. 39, who observes, that the ordonnance having directed that an acceptance should be in writing, had rendered inadmissible the acceptation tacite resulting from the drawee's having received and retained the bill. In Thompson on Bills, 369, it is observed, "It has been decided in England that acceptance is implied when the drawee not only detains the bill, but from the whole of his conduct leads the holder to believe that he considered it as accepted;" and he adds, "This appears to have been the true ground of decision in Harvey v. Martin, 1 Campb. 425, and not the mere circumstance of the drawee having detained the bill."

(e) Mason v. Barff, 2 B. & Al. 26, (Chit. j.

(f) Jeune v. Ward, 1 Bar. & Ald. 653; 2 Stark. Rep. 326, (Chit. j. 1021, 1027). In Cox v. Troy, 5 B. & Ald. 474; 1 Dow. & Ry. 39, (Chit. j. 1129); the court held that the drawee might crase his acceptance previous to any communication of his having accepted the bill. In France, the keeping a bill after twentyfour hours may subject the party to damages, but does not amount to an acceptance. Code de Commerce, No. 125; 2 Pardess. 396; 1 Pardess. 383.

(g) Mason and others v. Barff, 2 Bar. & Ald.

26, (Chit. j. 1034).
(h) Id. ibid. And see 1 Pardess. 383; Code de Commerce, No. 125; 2 Pardess. 396. In Thompson on Bills, 369, it is thus observed, "It has been decided in England, that acceptance is implied when the drawee not only detains the bill, but from the whole of his conduct leads the holder to believe that the drawee considered it as accepted," and that this is the true ground of decision in Harvey v. Martin, 1 Campb. 425, (Chit. j. 756); and not the mere circumstance of the drawee having detained the bill.

(i) Bayl. 5th edit. 192.

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was no acceptance, and a doubt was expressed by the latter, whether in any II. Of Accase destruction would do more than subject the party to an action of tro-ceptances. And it has been decided, that if there has been a refusal to accept, 5thly, and the holder submit to that refusal, but omit taking the bill away, a subse- Form and quent destruction of it by the drawee is not necessarily an acceptance(1); Effect of and indeed it seems singular that it should ever have been supposed that the Accepttortious act of destroying a bill, which is calculated to defeat the remedy on the bill, should have been deemed evidence of a contract on the part of the drawee to pay the bill to the holder.

By the usage of trade in London, a check may be retained by a banker, on whom it was drawn, till five oclock in the afternoon of the day on which it is presented for payment, and then returned, though it has been previously cancelled by mistake (m). And constructive acceptances *ought to be watch- [*297] ed with the utmost care, for when a party puts his name on a bill, he knows what he does, and that he thereby enters into a contract: but it is laying down a very loose and dangerous rule when any degree of latitude is given to these cases of constructive acceptances. The cases which have been determined in favour of these constructive acceptances have all been decided upon very special circumstances (n). As far as respects inland bills drawn after the 1st August, 1821, these constructive acceptances have been put an end to by the 1 & 2 Geo. 4, c. 78, requiring the acceptance to be in writing on the bill itself(0). It is not, however, necessary since this act, in a declaration against the acceptor of an inland bill, to aver that it was in writing (p).

A verbal or written promise to accept, at a future period, a foreign bill Promise to already drawn, or that a bill then drawn shall meet due honour(q), or shall be accepted, or certainly paid when due(r), amounts to an absolute acceptance; and a promise of the same nature, as for instance, "leave the bill and I will accept it(s)," and it be proved that the bill was sent or left accordingly(t),

(k) Jeune v. Ward, 1 Bar. & Ald. 653; 2 Stark. Rep. 326, (Chit. j. 1021, 1027).

(1) Id. ibid.

(26) Fernandey v. Glynn, 1 Campb. 426, in notes, (Chit. j. 756); plaintiff paid into the house of Vere and Co. a check on the defendant's house. Vere's clerk took it to the clearing-house to be paid, and put it into the defendant's drawer. Vere's clerk received it back before five cancelled, with a memorandum written under it, "cancelled by mistake." The course was proved to be for the clerks to take the checks from the drawers, and send them to the respective bankers, and those which they will not pay are returned before five o'clock. Lord Ellenborough held that notwithstanding the cancelling, the defendant had till five o'clock to return the check; and having so returned it, it amounted to a refusal to pay. And see Novelli v. Rossi, 2 B. & Ad. 757, as to cancelling an acceptance, post, 309, note (t). See also Turner v. Mead, 1 Stra. 416, (Chit. j. 248); Wilkinson v. Johnston, 5 D. & R. 408; 3 Bar. & Cres. 428, (Chit. j. 1231), where indorsements were cancelled, ante, 243, notes (x) (y).

And see further as to checks, post, Ch. XI.
(n) Mason v. Barff, 2 B. & Al. 35, 36,

(Chit. j. 1034).

(o) See anie, 287, 288. (p) Chalie v. Belshaw, 6 Bing. 529; 4 Moore & P. 275, (Chit. j. 1498).
(g) Clarke v. Cock, 4 East, 69, 70, (Chit.

j. 676).

(r) Wynne v. Raikes, 5 East, 514, (Chit. j. 700); Ex parte Dyer, 6 Ves. 9.

(s) Bul. N. P. 270; Molloy, B. 2, c. 10, a. 20; Mar. 17, acc.; Pierson v. Dunlop, Cowp. 573, (Chit. j. 392). Semb. contra, and quare if this answer would amount to an acceptance, if given within the twenty-four hours which the drawee usually has to accept the bill.

Bul. N. P. 270. A small matter amounts to an acceptance, as saying, " leave the bill with me and I will accept it," for it is giving a credit to the bill and hindering the protest.

Lord Ellenborough, in Clarke v. Cock, 4 East, 69, (Chit. j. 676), said, "It has been laid down in so many cases, that a promise that a bill when due shall meet with due honour, amounts to an acceptance, and that without sending it for a formal acceptance in writing, that it would be wasting words to refer to books on the subject."

Lord Ellenborough, in delivering judgment in Wynne v. Raikes, 5 East, 521, (Chit. j. 700), said, " A promise to accept an existing bill is an acceptance. A promise to pay it is also an acceptance. A promise therefore to do the one or the other, i. e to accept or certainly pay, cannot be less than an acceptance."

(1) Anderson r. Hick, 3 Campb. 179, (Chit. j. 855). A bill drawn upon the defendants was returned unaccepted, but one of the defendants afterwards told the plaintiff, " if he would send it (the bill) to the counting-house again, he would give directions for its being accepted." The plaintiff contended that this promise amounted to an acceptance; but could not prove that the bill was sent back to the defendant's counting-house. Lord Ellenborough said, "This was only a conditional promise to accept, and could

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eeptances.

5thly, Form and Effect of Acceptances.

II. Of Ac- will also amount to a complete and absolute acceptance, in the hands of a bona fide holder, although the drawee had no consideration for the pro-So a letter promising that a bill already drawn shall be paid, will operate as an acceptance, although the letter be not received until after the bill has become due, and although no person has been induced by such promise to take the bill(x). Where the drawee of a bill, on account of a cargo consigned to him, says it will not be accepted till the ship with the wheat arrives, upon arrival it is an absolute acceptance (y). So a verbal promise to accept, though the party expressly defer a written acceptance, yet where he says, "leave the bill and I will accept it," is a complete acceptance(z);

[•298] and a verbal promise to accept a returned bill when it shall come back, *is binding if it be returned(a). But as we have already seen(b), a promise to accept a non-existing bill is not an acceptance, although the party may be sued specially for the breach of his engagement by the drawer, or person to whom it was made, upon adequate consideration(c).

A promise to accept in future, made on an executory consideration, will not bind, while the consideration remains executory, unless it influence some person to take or to retain the bill(d); and in all cases, if the promise to accept in future be obtained from the drawee by any fraud or misrepresentation, it will not bind him, unless it be in the hands of a bona fide holder(e).

To constitute an acceptance there must be some circumstance from whence it may be inferred that the drawee imagined he had induced the holder to consider the bill as accepted (f), and the whole of the circumstances must be taken together, and there must be evidence of a contract to charge a party as acceptor(g). Therefore an express refusal to accept, as, "I will not accept the bill(h);" or an answer given by the drawee when the bill is called

not operate as an acceptance till the bill was sent back to the counting-house;" plaintiff nonsuited. See also Cox v. Coleman, cited R. T. Hardw. 74; 1 Atk. 611.

(u) Pillans v. Van Mierop, 3 Burr. 1669.

(Chit. j. 372). (x) Wynne v. Raikes, 5 East, 514, (Chit. j. 700); ante, 286, notes (d) and (e). And ante, 290.

(y) Miln v. Prest, 4 Campb. 393, (Chit. j. 951); ante, 285, note (x), and post, 302, n.(l).
(z) Molloy, B 2, c. 10, s. 20.

(a) Cox v. Coleman, ante, 288, note (y). And Anderson v. Hick, 3 Campb. 179; ante, 297, note (t).

(b) Anie, 234, note (p); 1 Pardess. 385 to

(c) Smith v. Brown, 2 Marsh. 41; ante, 284, **2**85.

(d) Pillans v. Van Mierop, 3 Burr. 1669, (Chit. j. 372); and see Clarke v. Cock, 4 East, 70, (Chit. j. 676); Wynne v. Raikes, 5 East, 521; Holt, C. N. P. 183, (Chit. j. 700). In Pillans v. Mierop, 3 Burr. 1669, Lord Mansfield says, "it was argued at the trial that this imported to be a credit given to Pillans and Rose, in prospect of a future credit to be given by them to White, and that this credit might well be countermanded before the advancement of any money, and this is so."

(e) Pillans v. Van Mierop, 3 Burr. 1669,

(Chit. j. 872).

(f) Ante, 295, note (d); Bentinck r. Dorrien, 6 East, 201, (Chit. j. 712); post, 309, note (x).

(g) Per Lord Hardwicke, in Clavey v. Dolbin, Hardw. 278, (Chit. j. 280). Action upon an inland bill of exchange against the acceptor, and the evidence of an acceptance was this;the bill having been presented for acceptance, and refused by the drawee, because he had no effects, was returned into the country, and a little while afterwards, the bill being hazardous, plaintiff's agent met the drawee and asked him if he could not help to secure him his debt, and he said he would if he could, for he had now some effects in his hands; whereupon the agent immediately wrote for the bill, and presented it to the drawee, who bid him leave the bill and he would examine into it, and it was left with him eight or ten days, and then the agent called again, and the drawee offered to let him sell some of the effects and pay himself, which the agent refused, and thereupon this action was brought; and per Lord Hardwicke, "Indeed, it has been adjudged, that a parol acceptance will be good, and possibly leaving the bill ten days with the drawee, might of itself be such a consent as to amount to an acceptance. But this is not so, for you must take the whole together, and there must be evidence of a contract to charge the acceptor, whereas it is otherwise upon this evidence." Rees v. Warwick, 2 B. & Al. 113; 2 Stark. 411, (Chit. j. 1039); infra, note (o).

(h) Peach v. Kay, Bayl. 4th edit. 78, infra, acc.; Lumley v. Palmer, Hardw. 75, in notes, (Chit. j. 275), (where a written refusal is said to amount to an acceptance) contra-

Lumley v. Palmer, Hardw. 75, note. (Chit.

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for, "there is your bill, it is all right (i);" cannot be construed into an acceptance II. Of Acunless accompanied by expressions intended to deceive the holder, and to coptances. induce him to consider it as an acceptance(k). And where the drawee, after 5thly, a refusal to accept, on the ground that he had no effects, promised to at- Form and tempt to procure payment for the holder, because he had just received some Accepteffects; on which the bill was presented to him, and he desired the holder ances. to leave it, and said that he would examine into it; whereupon the hill was left with him eight or ten days, and was then called for, on which the *drawee offered to let the holder sell some of the effects, and pay himself; [*299] this conduct was holden not to amount to an acceptance (l). So it has been determined, that if the drawee of a bill say he cannot accept it without further direction from I. S., and I. S. afterwards desire him to accept and draw upon A. B. for the amount, the mere drawing a bill upon A. B. will not amount to an absolute acceptance, nor can become such before the bill upon A. B. is accepted(m). And where the drawee of a bill, on presentment for payment, said, "this bill will be paid, but we cannot allow you for a duplicate protest," and the holder refused to receive payment without the charges of such protest, this was held not to amount to an acceptance (n). So where a drawer of a bill wrote to the drawee, stating, that he had valued on him for the amount, and added, "which please to honour;" to which the drawee answered, "the bill shall have attention;" it was held, that these words were ambiguous, and did not amount to an acceptance of the bill, inasmuch as although an acceptance may be made by a letter to a drawer, still that can only be so where the terms of the letter do not admit of doubt(o)(1).

j. 275). "Underwriting or indorsing a bill thus, I will not accept this bill, is held by the custom of merchants to be a good acceptance," but in Bayley on Bills, 4th edit. 78, it was stated that Lord Mansfield, in Peach v. Kay, Sittings after Trinity Term, 1781, said, "It was held by all the judges, that an express refusal to accept, written on the bill, where the drawee apprised the party who took it away, what he had written, was no acceptance; but if the drawee had intended it as a surprise upon the party, and to make him consider it as an acceptance, they seemed to think it might have been otherwise. The case of the note, "which I promise never to pay," may be assimilated, ante, 131.

(i) Powell v. Jones, 1 Esp. Rep. 17, (Chit. j. 509).

(k) Id. ibid.

(1) Clavey v. Dolbin, Hardw. 278, (Chit. j. 280); ante, 298, note (g); but see Harvey v. Martin, 1 Campb. 425, 426, (Chit. j. 756); ante, 295 in notes.

(m) Smith v. Nissen, 1 T. R. 269, (Chit. j.

(n) Anderson v. Heath, 4 Maule & S. 303, (Chit. j. 986). Where the holders of a foreign bill of exchange, payable sixty days after sight, presented it to the drawees for acceptance, which being refused, they protested it for non-acceptance. and afterwards, on the day it became due, presented it to the drawees for payment, making a charge for the expenses of protesting it; to which the drawees said, "this bill will be paid, but we cannot allow you for a duplicate protest." And the holders refused to receive payment, without the charges; and afterwards

the drawees revoked their offer to pay; held. that they might well do so, for this did not amount to an acceptance of the bill by the drawees. Lord Ellenborough said, "In this cuse the defendants had as it were commenced the work of discharging the bill, and were up-on the very brink of paying it, when the subject of the charge for the duplicate protest was started, which caused them to hold their hand. But at this time neither of the parties were treating about accepting the bill, nor was it ever mentioned or contemplated by them; all that was thought of was the payment of the bill. If therefore this would enure as an acceptance, it would enure against the plain intent of the parties. It is undoubtedly true, that if a merchant, upon being applied to for his acceptance, uses words which import a promise to pay the bill, this will amount to an acceptance; but it is not so where the words are used upon a different occasion, and with a different intent. Now in this case all that was ever contemplated was payment, and as to that the defendant says, if you will take the amount of the bill it shall be paid, but if you choose to insist on having the seventeen shillings, I will not pay it. Not one word passes about acceptance; and the party unfortunately elected to stand upon his claim to the seventeen shillings, but for which he would have been paid." And Le Blanc, J. added, "That to hold this an acceptance, would be to hold it something never intended by the parties." And per curiam, judgment of nonsuit.

(o) Rees v. Warwick, 2 B. & Al. 113; 2 Stark. 411, (Chit. j. 1039). See post 821 (37).

^{(1) {} As to what amounts to an adoption of an acceptance, see Wilkinson v. Stoney, 1 Tebb & Sig. 509. Edwards, Ex parte, 5 Jurist, 706. }

ceptances.

5thly, Form and Effect of Acceptances.

II. Of Ac- Where the drawee said, "if you will send your bill to our counting-house I will give directions for its being accepted," it was held not to amount to an acceptance unless the bill be sent(p). And in all cases when the undertaking is doubtful, the drawee will be at liberty to rebut the presumption in fayour of an acceptance; as where a bill was sent by post to the drawee for acceptance, and he entered it in his bill-book, wrote upon it the number of the entry, and kept it ten days, and on the tenth day minuted the day of the month on it and returned it, saying he could not accept it, it was adjudged that these circumstances did not constitute an acceptance, it being proved that it was the drawee's practice to enter all his bills, whether he meant to accept them or not(q).

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*When accepting a foreign bill, especially for a large amount, and without advice, it seems advisable and a proper precaution, to write, "accepted for the sum of £-," naming the sum in words and figures, so as the better to avoid the risk of alteration (r).

Conditional, partial, or varying Acceptance.

If the drawee of a bill be desirous not entirely to dishonour it, he may make such an acceptance as will subject him to the payment of the money only on a contingency, in which case the acceptance is called conditional(s). This is permitted(t), though we have seen that the bill cannot be drawn payable on a contingency (u). The holder is not bound to receive such an acceptance, but if he do receive it, he must observe its terms(x)(1). He should give immediate notice to the other parties to the bill of the nature of the acceptance offered (y), by which means they will not be discharged from liability to pay the bill, in case it should be returned.

Conduct to conditional Acceptance.

It is clear that if the holder of a bill take a conditional acceptance, or an be pursued acceptance in any respect varying from the terms of the bill, he ought to on offer of a give immediate notice to all the parties, and if he omit to do so he discharges

> (p) Anderson v. Hick, 3 Campb. 179, (Chit. j. 855); Wynne v. Rakes, 5 East, 514; (Chit. j. 700); antc, 297; 1 Atk. 611.

> (q) Powell v. Monnier, 1 Atk. 611, (Chit. j. 283). A bill was sent by the post to the drawee for acceptance; he entered it in his bill-book (which was his practice with all bills he received, whether he intended to accept them or not) wrote upon it the number of the entry, and kept it ten days; on the tenth he wrote upon it the day of the month and returned it, saying he could not accept it. And per Lord Hardwicke, "It has been said to be the custom of merchants, that if a man underwrites any thing, be it what it may, it amounts to an acceptance; but if there were nothing more than this in the case, I should think it of little avail to charge the defendant;" but he decided that a letter the drawee had written amounted to an acceptance. And see Mason v. Barff, 2 B. & Al. 26, (Chit. j. 1034). (r) Ante, 282.

(s) Selw. 9th cdit. 327, 328; Milne r. Prest, Holt, C. N. P. 182; 4 Campb. 393, (Chit. j. 951); Anderson v. Hick, 3 Campb. 179, (Chit. i. 855); Langston v. Corney, 4 Campb. 176,

(Chit. j. 930); Gammon v. Schmoll, 5 Taunt. 341; 1 Marsh. 80, (Chit. j. 904); Swan v. Cox, 1 Marsh. 176; 1 Pardess. 388, 395.

(t) See Smith v. Abbott, Stra. 1152; Julian v. Shobrooke, 2 Wils. 9, and other cases, post,

301, 302 in notes. (u) Ante, 134.

(x) Per Bayley, J. in Sebag v. Abitbol, 4 Maule & S. 466; 1 Stark. Rep. 79, (Chit. j. 942, 947); and per Lord Ellenborough in Boehm r. Garcias, 1 Campb. 425, (Chit. j. 756); "The plaintiff had a right to refuse this acceptance. The drawee of a bill has no right to vary the acceptance from the terms of the bill, unless they be unambiguously and unequivocally the the same;" ante, 287; 1 Pardessus, 394, 395. Gammon v. Schmoll, 5 Taunt. 353; 1 Marsh.

80, (Chit. j. 904). Per curiam. A man is not bound to receive a limited and qualified acceptance; he may refuse it and resort to the drawer; but if he does receive it, he must conform to the terms of it. See also Parker p.

Gordon, 7 East, 397, (Chit. j. 727).
(y) Per Bayley, J. in Sebag v. Abitbol, 4
Maule & S. 466; 1 Stark. 79, (Chit. j. 942.

947).

⁽¹⁾ Trustees of a company accept a bill to be paid when in funds of the Company. The drawer is not liable until they are in funds and demand has been made and notice given. Andrews et al. v. Baggs et al., 1 Minor's Alabama Rep. 173.

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them(z)(1). And it should seem, that the holder ought, in all cases, (ex- II. Of Aocepting perhaps in the instance of an offer to accept absolutely for part of ceptances. the amount), to communicate to all the parties the drawee's offer, and ob- 5thly, tain their consent before he agrees to take a conditional or varying accept- Form and ance, or he may discharge them from liability. There does not appear to Effect of Acceptbe any direct reported decision to this effect, but it should seem that a hold-ances. er cannot assent to the acceptor imposing, by his varying acceptance, different terms on the drawer or indorsers and yet hold them liable according to the terms of the bill. In Scotland, if the holder suffer the acceptance to be qualified, if, for instance, he consent to prolong the day of payment, or to take a conditional acceptance, such as "if provisions come to hand betwixt - day of ---- and the --- day of ---," or, "if goods or bills in hand raise the sum," it imports his consent, so as to preclude him from protesting for non-acceptance, but by such prolongation of the time of payment the drawer cannot be affected if he have not given his consent to it, and therefore, it is laid down in Scotland, that the holder loses his resource upon him, in the event of the acceptor's failure before the bill be-So, before the 1 & 2 Geo. 4, *c. 78, as to the receiving an [*301] comes due(a). acceptance payable at a particular place, some judges held, that if a bill be drawn by a person resident in a town on another person resident in the same town, and payable generally, a holder could not, without the drawer's consent, receive an acceptance payable at a distant place, because, though it might not have the effect of prolonging the time of payment, yet it cast upon the drawer and indorser, if the bill were returned to and taken up by him, an additional burthen of proving a presentment at the particular place, and also prolonged by at least a day the receipt of the notice of dishonour(b). it has been suggested, that since the above act, if an acceptance be offered, payable at a particular place, and adding the words, "and not otherwise, nor elsewhere," the holder must not receive it without the previous consent of the drawer, though, without the addition of these words, an acceptance since that act, payable at a named place, may be taken without that precaution, because it imposes no new burthen on any party (c). It should seem, however, that an offer of an absolute acceptance for a part may be taken without previous consent, but as to the residue, immediate notice of the partial non-acceptance should be given.

On the offer of a conditional or varying acceptance, if the holder resolve to reject it altogether, he may protest generally, or give general notice of non-acceptance; but if he is willing to accept the offer, he should then give notice of its exact terms to all the parties, and state his readiness to accept the offer if they will respectively consent. A general or unqualified protest or notice of non-acceptance would, in such a case, evince that the holder did not acquiesce in the offer, and preclude him from afterwards availing himself

⁽z) Id. ibid.; Paton v. Winter, 1 Taunt. 422, (Chit. j. 763); Mar. 17, 18, 68, 85, 86; Poth. pl. 48; Beawes, pl. 221; Kyd, 138; Roscoe, 187, 188; Bayl. 5th ed. 253.

⁽a) Glen. 2d. edit. 115, citing Poth. n. 49; Boucher, n. 1048. And see Outhwaite v. Lunt-

ley, 4 Campb. 180, (Chit. j. 932); ante, 188, note (d).

⁽b) Rowe v. Young, 2 Brod. & B. 166; 2 Bligh, Rep. 391, (Chit. j. 1084).

⁽c) Roscoe, 392.

^{(1) {} A conditional or restricted acceptance by the drawee does not destroy the liability of the drawer to the holder, if it be drawn as payable absolutely and in money. Neither will a direction of the drawer to the drawee to charge the bill to a particular account between them, or to a particular fund, vitiate the bill, as regards the liability of the drawer to the holder. Knox v. Reeside, 1 Miles, 294. >

IL Of Ac- of it(d); but not if he was not aware of the acceptance when he caused the ceptances. bill to be noted or protested for non-acceptance(e).

ōthly, Effect of Acceptances.

What is a Condiceptance.

Any act which evinces an intention not to be bound, unless upon a certain Form and event, is a conditional acceptance. Thus an acceptance by the drawee of a bill, to pay, "as remitted for(f);" or, "on account of the ship Thetis, when in cash for the said vessel's cargo(g);" or a promise to accept a returned bill, "when it shall come back(h)," *or to accept "as soon as he should sell such goods(i)(1);" or an answer "that the bill would not be tional Ac- accepted till a navy bill was paid (k);" or "until the ship with the wheat arrived(1);" or "that he (the drawec) would have accepted the bills if he had [*302] had funds (meaning the fund on account of which the bills were drawn); that he had not been able to obtain those funds from France; but that when he did obtain them he would pay the bills(m);" or that the drawer had consigned a ship and cargo to him (the drawee) and another person at Bristol, but that

> (d) Sproat v. Matthews, 1 T. R. 182, (Chit. j. 483); Bentinck v. Dorrien, 6 East, 200; 2 Smith, 337, (Chit. j. 712); 1 Pardess. 394,

Spront r. Matthews, 1 T. R. 192, (Chit. j. 433). The drawee of a bill of exchange, when a bill was presented to him for acceptance, said, that a ship was consigned to him and a person in Bristol, and that till he should know to which port the ship would come, he could not accept; but afterwards said, that the bill would be paid though the ship should be lost; the plaintiff noted the bill for non-acceptance. The ship did afterwards arrive, and the defendant disposed of the cargo, and in an action against the defendant as acceptor, Buller, J. held, that the acceptance was conditional only, and that the noting showed that the plaintiff did not choose to take it, and directed a nonsuit, and upon a rule to show cause why there should not be a new trial, the court discharged the rule.

(e) Fairlie v. Herring, 3 Bing. 625; 11 Moore, 520, (Chit. j. 1300); ante, 290, 291,

(f) Banbury r. Lissett, Stra. 1212, (Chit. j. 310). The drawee accepted a bill "for Lissett and Golley, of Leghorn, to pay as remit-ted from thence, at usance;" and it was objected in an action against him, that there was no evidence to show he had a remittance, and that his acceptance was conditional only. Lee, C. J. declared he so understood it, but he left it to the jury, and they found for the defendant upon another point and gave no opinion upon this.

(q) Julian v. Shobrooke, 2 Wils. 9, (Chit. j. 837). The defendant accepted a bill to pay when in cash for the cargo of the ship Thetis; and on being sued, moved in arrest of judg-

ment, that a conditional acceptance was not good, but the court held otherwise, and overruled the objection.

(h) Cox v. Coleman, cited in Lumley v. Palmer, Hardw. 74, (Chit. j. 274); ante, 298, note (h).

(i) Smith v. Abbott, Stra. 1152; Anon. 12 Mod. 477.

Smith v. Abbott, Stra. 1152, (Chit. j. 294). The defendant accepted a bill, "to pay when goods consigned to him were sold." He said the goods, and on being sued upon his acceptance, in arrest of judgment, it was urged that it was not binding, because it was conditional; but the court, on consideration, held that though the plaintiff might have refused to take it, and have protested the bill, yet as he did take it, it was binding on the defendant.

(k) Pierson v. Dunlop, Cowp. 571, (Chir. j. 892). An answer "that the bill would not be accepted till a navy bill was paid," was held a conditional acceptance, to pay when the navy bill should be discharged; and see Mila r. Prest, 4 Campb. 393, next note; and Mendizabel v. Machado, 3 Moore & S. 841; infra, note (m).

(1) Miln v. Prest, 4 Camp. 393, Holt, C. N. P. 181, S. C. (Chit. j. 951); ante, 297, note (y). Gibbs, C. J. said, "If the jury are of opinion that the answer given by the defendant. according to the use of language in commercial dealings, imported a promise to accept the bill on the arrival of the cargo, I am of opinion that the cargo having arrived, the defendant is now liable as acceptor."

(m) Mendizabel v. Machado, 3 Moore & S. 841; 6 Car. & P. 218, S. C. In this case the defendant having received the funds was held liable as acceptor.

If the holder of a bill of exchange, who is entitled to an absolute acceptance, takes a special and conditional one, he cannot resort to the drawer but upon failure of the drawee to pay according to the terms of such limited and conditional acceptance. Campbell v. Pettingill, 7 Greenleaf's Rep. 126.

⁽¹⁾ Where a bill was drawn on the defendant who had received goods of the drawer, for mile. on consignment, refused acceptance; but on presentment, said, 'that if the goods were sold when the bill became due, he would pay it,' of which, due notice was given to the drawer; and before the bill became due, and before the goods were sold, they were attached in the hands of the consignee by the creditors of the drawer; it was held, that the defendant was not bound by this conditional undertaking. Brown & Co. v. Colt, 1 M'Cord, 408. See Schimmelpennick v. Bayard, 1 Peters, 264

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as he could not then tell whether the ship would arrive at London or at Bris- II. Of Actol, he could not accept at that time(n); or to pay if a certain house should ceptances. be given up to the drawee before a named day(o); have respectively been 5thly. holden to be conditional acceptances, and not to render the acceptor l'able Form and to the payment of the bill until the contingency has taken place (p). But an Acceptanswer by the drawee, that he would pay if another person would not, was con-ances. strued to amount to an absolute acceptance, it appearing that the drawee held himself liable at all events, and that from other circumstances it was not intended as a conditional acceptance (q). And until the case of Rowe v. Young, and the statute 1 & 2 Geo. 4, c. 78, it was not settled whether the drawee, by accepting the bill payable at a particular place, qualified his general liability, so as to render it necessary to present the bill for payment at that place(r). A conditional acceptance becomes as binding as an absolute one, when the event has happened on which the drawee undertook to pay the But it must nevertheless be declared on specially, with an averment bill(s). that the condition has been performed (t)(1).

With respect to the mode of annexing the condition, it is observed, that if a man intend to make a conditional acceptance, and accept in writing, he should be careful to express in such written acceptance the condition he may think proper to annex; for if the acceptance be in writing, but the condition be not, he will not be at liberty to avail himself of it against any subsequent party, if either such party, or any intermediate one between him and the person to whom the acceptance *was given, took the bill without notice of [*303] the condition, and gave a valuable consideration for it; and at all events, the onus of proving such condition will lie upon the acceptor(u). If, however, the terms of the acceptance be ambiguous, parol evidence may be resorted to in order to explain them (x). And where an executrix gave an acceptande for a debt due from her testator, and at the same time took a written engagement on another paper from the drawer to renew the bill from time to time until sufficient effects were received from the estate; this was held a sufficient qualification of the acceptance (y).

A partial acceptance varies from the tenor of the bill, as where it is made What a to pay part of the sum for which the bill is drawn(z), or to pay at a different partial or

Accept.

(n) Sproat v. Matthews, 1 T. R. 182; ante, 801, note (d).

(o) Swan v. Cox, 1 Marsh. 177.

(p) Id. ibid.; Clarke v. Cock, 4 East, 73, (Chit. j. 676).

(q) Wilkinson v. Lutwidge, Stra. 648, (Chit. j. 263).

(7) Gainmon v. Schmoll, 5 Taunt. 344, (Ch. j. 904); 1 Marsh. 80, S C; Sebag v. Abiibol, 4 Maule & S. 462; 1 Stark. 79, (Chit. j. 942, 947). See post, Ch. IX. s. i. as to Presentment for Payment.

(s) Banbury v. Lissett, Stra. 1212, (Chit. j. 810); Lumley v. Palmer, Hardw. 74, (Chit. j. 275); Pierson v. Dunlop, Cowp. 571, (Chit. j. 892); Sproat v. Matthews, 1 T. R. 182, (Chit. j. 433); ants, 301, note (d); Miln v. Prest, Campb. 393; (Chit. j. 951;) Mendizabel v. Machado, 3 Moore & S. 941, in notes; Lewis v. Orde, 1 Gilb. on Evid. by Lofft, 179.

(t) Laugston v. Corney, 4 Campb. 176, ance. (Chit. j. 930); Swan v. Cox, 1 Marsh. 176; Ralli v. Sarell, Dow. & Ry. N. P. C. 33.

(u) Clark v. Cock, 4 East, 73, (Chit. j. 676); Knines v. Sir Robert Knightly, Skin. 54; Thomas v. Eishop, Hardw. 1, 2, 3, (Chit. j. 277, 278, 279); Mason v. Hunt, Dougl. 296, (Chit. j. 403); Powerbank v. Monteiro, 4 Taunt. 846, (Chit. j. 889).

(x) Swan v. Cox. 1 Marsh. 179. (y) Bowerbank v. Monteiro, 4 Taunt. 144,

(Chit. j. 889).
(z) Wegersloffe v. Keene, 1 Stra. 214, (Chit. j. 244); Petit r. Benson, Comb. 452, (Chit. j. 204); Molloy, pl. 26; Mar. 68, 85; Poth. pl. 48: 1 Pardess. 398, 399. According to the last work, the holder cannot reject the offer of a partial acceptance, but should receive it and protest for the residue of the amount of the bill. Wegersloffo v. Keene, 1 Stra. 214. A for-

^{(1) {} A conditional or restricted acceptance by the drawee, does not destroy the liability of the drawer to the holder, if it be drawn as payable absolutely, and in money. Knox r. Reeside, 1 Miles, 294. }

5thly, Form and Effect of Acceptances.

6thly, Of the Liability of the Acceptor. [*304]

II. Of Ac- time (a), or place (b). An acceptance may also vary from the tenor, in the ceptances. manner in which the acceptor undertakes to pay the bill(c); as for instance, part in money, and part in bills, or payable at banker's, &c.; this also differs from a bill in its original formation, which we have seen must be for the payment of money only (d).

> The liability which an acceptance imposes on the drawee may be collected from the preceding part of this Chapter, in which it has been shown, that an absolute acceptance is an engagement to pay according to the tenor of the bill(e); and a conditional or partial one, *to pay according to the tenor of the acceptance (f): and a drawee having accepted a bill after a condition annexed thereto by the indorser is bound thereby, and should not pay the bill until the condition be performed (g)(1).

> The acceptor is primarily and originally liable to pay the bill, and the drawer and indorsers are respectively liable in the nature of sureties on his default: it will be found of the greatest importance to keep in view this distinction between their respective situations and liabilities (h). But although

eign bill for 1271. 18s. 4d. was drawn on the defendant and he accepted it, to pay 1001. part thereof; he was sued upon this acceptance, and on demurrer to the replication, insisted that a partial acceptance was not good within the custom of merchants, but the court held otherwise, and judgment was given for the plain-

(a) Molloy, 283. In Price v. Shute, as mentioned in Molloy, B. 2, c. 10, s. 20, and as understood by Buller, J. a bill drawn payable 1st January, was accepted to be paid 1st March, the holder struck out 1st March and put in 1st January, and when it was due according to that date, he presented it for payment, which the acceptor refused, whereupon the payee struck out 1st January and restored 1st March, and recovered in an action brought on that acceptance; see also Bayl. 5th edit. 203; but in Paton v. Winter, 1 Taunt. 423, Lawrence, J, observed, that in Master v. Miller three judges against Buller thought there must have been some mistake in Molloy's account of that decision, or that the case was not law, and that Lord Kenyou held the case not to conflict with Master v. Miller, because there the acceptance only was altered, and there was no alteration of the bill itself. See however as to the case of Paton v.

Winter, anle, 189, note (i).
Walker r. Atwood, 11 Mod. 190, (Chit. j.
229). A bill dated 8th April, and no time fixed for payment, it was presented to defendant 18th April, and he accepted it, to pay 8th September, this being stated in declaration, defendant demarred, and insisted that as no time was prescribed for the payment, the bill was payable at sight, and then a promise to pay two or three months after sight was not an acceptance within the custom of merchants, but the court held it was an acceptance within the custom, and the demurrer was over-ruled.

(b) Sebag v. Abitbol, 4 Maule & S. 462; 1 Stark. 79, (Chit. j. 942, 947); Gammon v.

Schmoll, 5 Taunt. 344; 1 Marsh. 80, (Chit.). 904); post, Ch. IX. s. i. Presentment for Payment-When necessary; Cowie v. Halsall, 4 B. & Al. 198, 199; 8 Stark. R. 36, (Chit.) 1099); and per Lawrence, J. in Parker v. Gordon, 7 East, 384, (Chit. j. 727). In l Pardess. 394, the reasons are stated why a holder may refuse an acceptance payable at another place; and see ante, 301, note (c).

(c) Petit v. Benson, Comb. 452, (Chit.) 204). A bill was accepted to be paid half in money and half in bills, and the question was, whether there could be a qualification of an acceptance, and it was proved by divers merchants that there might, for that he might refuse the bill totally, and accept it in part, but that the holder was not bound to acquiesce in such an acceptance.

(d) Ante, 132.

(e) Poth. pl. 164; 1 Pardess. 342, 348; Leftley v. Mills, 4 T. R. 174, (Chit. j. 473.) (f) Poth. pl. 115, 116, 117. (g) Robertson v. Kensington, 4 Taunt. 30,

(Chit. j. 834); 1 Pardess. 399. (h) See 1 Pardess. 399; per Lord Mansfield, in Heylyn v. Adamson, 2 Burr. 674, (Chit. j. 349). "There is this difference between the acceptor and the others, that the acceptor, is first liable." Per Lord Mansfield, in Dingwall v. Danster, Dougl. 249, (Chit. j. 401). "The acceptor is first liable, and the indorsers in the order in which they stand on the bill." Per Lord Eldon, in Smith v. Knox, 8 Esp. Rep. 47, (Chit. j. 717). The acceptor of a bill is to be considered as the principal debtor, and the other parties as sureties only." Per Chambre, I. in Clark r. Devlin, 3 B. & P. 366, (Chit.) 674). "The acceptor was primarily liable on the bill to the plaintiff." Per Lord Tenterden and Holroyd, J. in Pownal v. Ferrand, 6 B. & C. 442; 9 Dow. & Ry. 603, (Chit. j. 1327). "The acceptor of a bill is considered as the principal debtor, all the other parties to the

^{(1) {} Wallace r. M'Cornell, 13 Pet. 136. The acceptor of a bill drawn on his letter of credit, and addressed to the payee or purchaser of the bill, is an absolute acceptor and not a guaranter.

Bank of Ill. v. Sloo, 16 Louis. Rep. 539.

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he is thus primarily liable, it seems reasonable to hold that he is not liable II. Of Acfor his own debt, but for that of another; therefore, although he is promoting liable, yet it does not follow that in the origin of the transaction he was the 6thly, liable, yet it does not follow that in the origin of the transaction he was the 6thly, of Acceptable was antecedently a debtor(k). And Liability of Acceptable was antecedently a debtor of Acceptable was antecedently and of Acceptable was antecedently and of Acceptable was antecedently and the control of Acceptable was anteceden he is under no other implied contract or liability beyond that created by or. the acceptance itself; therefore he is not liable to pay re-exchange (l), or the costs of actions against other parties(m); and since the late rule of court T. T. 1 Vict. 1838, he is at liberty to stay proceedings on payment of the bill and of the costs of the action against himself only (n). upon this principle of primary liability that the action and proceedings in France are more direct, and less limited against an acceptor than against a drawer or indorser(o).

If the acceptor omit to pay the bill, and any one of the indorsers be obliged to pay a part, he may sue the acceptor for the amount, as paid for his use in part discharge of his primary liability, and the acceptor will at the same time continue liable to another action of the holder to recover the rest of the money due upon the bill, though we have seen that a bill cannot be indorsed for a part, so as to subject the acceptor to two actions (p). It is laid down by foreign *writers, that after a bill has been once completely accepted, the [*305] drawee is liable, notwithstanding it be proved that the drawer had previously become bankrupt, nor will deceit or fraud, unless practised by the party presenting for acceptance, constitute any defence for the acceptor (q).

If the drawee accepted the bill without value, or for the accommodation of the plaintiffs, or one of them, he may resist the payment altogether (r); and he is at liberty to show that the acceptance was partly only for value, and as to residue for the accommodation of the plaintiff(s). But when the bill is in the hands of a third person, who has given value for it, and who became the holder before it was due, the acceptance will in general be obligatory on the acceptor, though he received no consideration, and although the holder knew that circumstance (t)(1); because the very object of an accommo-

bill are sureties that the acceptor shall pay the bill if duly presented." Per Best, C. J. in Philpot v. Bryant, 4 Biag. 720; 1 Moore & P. 754; 3 Carr. & P. 244, (Chit. j. 1387).

In one case Lord Ellenborough treated the

drawer of an accommodation bill as the principal debtor, and the acceptor as a surety discharged by indulgence to the drawer, Laxton v. Peat, 2 Campb. 445, (Chit. j. 773); and see 1 Pardess. 341; but that doctrine was over-ruled in Fentum v. Pocock, 1 Marsh. 16; 5 Taunt. 192, (Chit. j. 896); where Mansfield, C. J. said, "Laxton v. Peat is the first case in which it has ever been supposed that the acceptor was not the first and the last person compollable to pay the holder." So in Yallop v. Ebers, 1 Bar. & Adol. 703, Lord Tenderden, C. J. said, "the doctrine in Laxton v. Peat, that an accommodation acceptor might be considered as a surety has been long over-ruled." Ex parte Young, 3 Ves. & B. 40.

(i) Per Lord Eldon, in Bishop v. Young, 2 Bos. & P. 83, (Chit. j. 621); and Priddy v. Henbrey, 1 B. & C. 679; 3 Dow. & Ry. 165. (Chit. j. 1179); and see Rowe v. Young, 2 Bligh Rep. 391; 2 Brod. & B. 166, (Chit. j. 1084); ante, 292, 293.

(k) Id. ibid.; ante, 292, 293.

(1) Napier v. Schneider, 12 East, 420, (Chit. j. 790); and per Lord Tenterden, in Dawson v Morgan, 9 Bar. & C. 620, (Chit. j. 1440); and Woolsley v. Crawford, 12 East, 420, (Chit. j 798).

(m) Dawson v. Morgan, 9 Bar. & C. 618, (Chit. j. 1440); post, Part II. Ch. III. Sed quære if not liable to drawer for costs of action against him. Stovin v. Taylor, 1 Nev. & Man. 250, 251; post, Part II. Ch. VI. Sum recoverable-Expenses.

(n) See further as to Motions to stay Proceedings, post, Part II. Ch. III.

(o) See 1 Pardess. 441, 442, 443. (p) Pownal v. Ferrand, 6 B. & C. 439; Ry. & Mood. 407; 9 Dow. & Ry. 603, (Chit. j. 1327).

(q) 1 Pardess. 401. (r) Sparrow v. Chisman, 9 B. & C. 241; 4 Man. & Ry. 206, (Chit. j. 1422), and other cases, ante, 70, note (1); and see the reasons. 1 Pardess. 465.

(s) Darnell v. Williams, 2 Stark. R. 166, (Chit. j. 998); ante, 70, note (m); 1 Pardess.

(t) Ante, 79, 80; Simmonds v. Parminter, 1 Wils. 187, 188, (Chit. j. 321); Vere v. Lew-

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⁽¹⁾ An action for money had and received may be maintained by the indorsec of a note against the maker, although the note was signed by the maker merely for the accommodation of the pay-

Liability of Accept-

II. Of Ac-dation acceptance is to enable the party accommodated to obtain money of ceptances, credit from a third person, and therefore the want of consideration furnishes no defence to one who has advanced money on the credit of the acceptor, though he may have been defrauded by the drawer(u). The judgment of Lord Eldon in Smith v. Knox(x) states the law very clearly on this subject. He said, "If a person gives a bill of exchange for a particular purpose, and that is known to the party who takes the bill; as if for example, to answera particular demand, then the party taking the bill cannot apply it to a different purpose; but where a bill is given under no such restriction, but merely for the accommodation of the drawer or payee, and that is sent into the world, it is no answer to an action on that bill, that the defendant accepted it for the accommodation of the drawer, and that that fact was known to the holder: in such case if the holder gave a bon't fide consideration for it, he is entitled to recover the amount, though he had full knowledge of the transaction;" and though the holder of a bill may have received it with full notice of its having been accepted for the accommodation of the party dealing with him, yet he may retain the same as a security for a subsequent balance, [*306] unless the accommodation acceptor withdrew such bill(y). But if a *bill

is, 3 T. R. 183, (Chit. j. 455); Master v. Mil-18, 3 T. R. 135, (Chit. j. 435); Master v. Miler, 4 T. R. 339, (Chit. j. 482, 490); Poth. pl. 118, 121; Molloy, pl. 28, and Mallett v. Thompson, 5 Esp. R. 179, (Chit. j. 702); Smith v. Knox, 3 Esp. R. 46, (Chit. j. 617).

See the reason in 1 Pardess. 466.

(u) Id. ibid.; ante, 80, 81; Ex parte Prescott, 1 Atk. 231, (Chit j. 333); Arden r. Wat-Kins, 3 East, 825, (Chit. j. 667); Smith v. Knox, 3 Esp. R 46, (Chit. j. 617); Hailey v. Lane, 2 Atk. 182, (Chit. j. 294); Darnell v. Williams, 2 Stark. R. 166, (Chit. j. 998).

(x) Smith v. Knox, 3 Esp. Rep. 46, (Chit. j. 617); and see the observations of the court as to the liability of an accommodation acceptor in Fentum v. Pocock, Marsh. 16, 17; 5 Taunt.

192, (Chit. j. 896); 1 Pardess. 466.

In the Governor and Company of the Bank of Ireland r. Breesford, 6 Dow's Rep. 233, (Chit. j. 1032); Lord Eidon observes, "The Solicitor-general says, that the Court of Common Pleas have determined (in the case of Fentum v. Pocock, 6 Taunt. 192; 1 Marsh. 14, (Chit. j. 836), that although one receives a bill of exchange with the knowledge that it is an accommodation bill, & c. yet the acceptor is bound to pay, and this decision took place when Sir James Mansfield was Chief Justice, and the present Chief Justice (Sir Vicary Gibbs) was one of the puisne judges. If that went on this principle, that with a view to the benefit of commercial intercourse, you would not inquire into the knowledge of parties, but that all should be taken according to the natural effect

of the bill, as appearing on the face of it, I think that a most wholesome principle. And it would not be surprising that I, who have so often contended that you ought always to look only at the natural effect of a bill of exchange, and never to hold that the acceptor was not first liable, should approve of that principle."

(y) Atwood r. Crowdie, 1 Stark. R 483, (Chit. j. 979). A. and Co. bankers in the country, being pressed by B and Co. hankers in town, to whom they are indebted, to send up any bills that they can procure, transmit for account an accommodation bill accepted by D. and Co. When the bill becomes due, the balance is in favour of B. and Co; but the bills are not withdrawn, and afterwards the balance between the houses turns considerably in favour of A and Co. and is so when B. and Co. become bankrupts. It was held that A. and Co. were entitled to recover against the acceptor. Upon a motion for a new trial it was contended, that the bills had not been sent for the purpose of securing a fluctuating balance, but on account of a then existing debt. Lord Ellenborough, " Upon what terms D. and Co. originally accepted the hill does not appear, but the circumstances indicate what the nature of the transaction was; their not withdrawing their bills, or demanding them back, showed that they considered themselves to be sureties." See ante, 220, and Woodroffe v. Hayue, 1 Carr. & P. 600, (Chit. j. 1241); post, Ch. IX. s. ii. Application of Payment; but see Bloxsome r. Neule, MS. ante, 219, note (1).

How far one indorser is answerable over to another on an accommodation note, for the benefit of the drawer, quere. Bank r. M'Willie, 4 McCord's Rep. 438.

What want of consideration between drawer and acceptor is no defence as against third psrsons, see further, United States v. Bank of the Metropolis, 15 Pet. 377.

The acceptance of a bill by the drawee is presumptive evidence of funds of the drawer in but hands. Kendall r. Galvin, 15 Maine, 181.)

ee, and the maker never received either money or any other consideration for signing it. Cole v. Cushing, 8 Pick. 48.

The acceptor is the principal debtor. He cannot assume the attitude of a surety, even when the acceptance was merely for the accommodation of another party. Anderson v. Anderson, 4 Dana, 352. And see Patty r. Milne, 16 Wend. 557.

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has been accepted for the accommodation of the drawer for a particular II. Of Acpurpose, which is afterwards satisfied, and the holder have notice thereof, he ceptances. cannot afterwards apply the bill as a security upon another transaction(z) 6thly, (1); and therefore if A. accept a bill for the accommodation of B., which Liability B. delivers over to C., his creditor, to provide for a bill about to become of the Acdue, and C., before A.'s acceptance becomes due, returns it to B. as use-ceptor. less, in order that it may be forwarded to A., and abandons all claim on the bill, he cannot, by subsequently obtaining possession of the bill, acquire a right of action against A.(a). And where the drawer of a bill, accepted for his accommodation, indorsed it for value to his bankers, and before the bill was due became bankrupt, it was held, that the bankers, who knew that the bill was accepted for the accommodation of the drawer, could not recover from the acceptor more than the amount of their balance, as between them and the drawer at the time of his bankruptcy(b). And where the defendant accepted a bill for the accommodation of R. B. who drew and indorsed it to the plaintiff, his agent, and the latter, as such agent, paid it away on the drawer's account for wines purchased for him; and the wine contract was afterwards rescinded, but the holder refused to restore the bill, unless he were paid 150l. due to him on a former account from R. B.; and the plaintiff promising to pay that sum, the bill was delivered to him, and he brought an action upon it against the defendant, as the acceptor; the jury having

(z) Cartwright v. Williams, 2 Stark. Rep. 840, (Chit. j. 1023); Fletcher v. Heath, 7 B. & C. 517; 1 Man. & Ry. 335, S. C.; and see Bleaden v. Charles, 7 Bing. 246, ante, 81, note

(a) Cartright v. Williams, 2 Stark Rep. 340, (Chit. j. 1023); ante, 81, not (h).
(b) Jones v. Hibbert, 2 Stark. R. 304, (Ch.

j. 1009). See Smith v. De Witts, 6 D. & R.

120; Ry. & M. 212, (Chit. j. 1244, 1253); 5 Bing. 13. See ante, 80, 86, 218, 219, and Marsh v. Houlditch, post, Ch. IX. s. ii. Application of Payments; and Pease v. Hirst, 10 B. & C. 122; 5 Man. & R. 89, (Chit. j. 1456). If an accommodation acceptance be intended by the acceptor to continue as a security, then it will continue in force accordingly. See ante, 218, note (r).

(1) Where a party indersed an accommodation note for another at sixty days, with a view of enabling the maker to obtain a discount at a bank, and the maker, after refusal by the bank to discount the note, passed it off when it had but 18 days to run, in the purchase of lottery tickets, at retail price, the vendor of the tickets knowing that the maker was not a dealer in tickets, and having been informed that the note had been in the bank, and the bank marks being upon it, it was held, in an action against the indorser, that the circumstances combined were sufficient to have put the vendor of the lottery tickets on inquiry, and that he was thus chargeable with notice of the misapplication of the note, and that the indorser was not liable. Brown r. Taber, 5 Wend. Rep. 566.

A. indorsed B's note payable in sixty days, which it was intended should be presented to a bank for discount; and at the same time he also indorsed mother note in blank and without date, with which it was designed the first note should be renewed when it fell due. The first note was discounted by the bank, and when it became due was not renewed, and was not protested. Twenty-two months afterwards, the blank note was procured from the drawer by the cashier of the bank, who dated it, and laid it before the directors to be discounted, in renewal of the first note; it was discounted, and when it became due was protested for non-payment; of which regular notice was given to the drawer. Held, that if the cashier, as the agent of the bank, procured the second note by improper means from the drawer, and contrary to the original design of the indorser, when he put it into the possession of the drawer, the bank could not recover in an action against the indorser. Bank v. Irvine, 3 Penn. Rep. 250.

Where the indorsers of an accommodation note lend their names to the drawer, without any limitation or restriction as to the manner in which the note is to be used, he has a right to apply it to the payment or security of an antecedent debt, or to sustain his credit in any other way.

Grandin v. Le Roy, 2 Paige's Chan. Rep. 509.

Where a note is made payable to a bank by its corporate name, for the purpose of raising money upon it at such bank to pay and satisfy a particular debt, and the debtor procures a third person to become a joint maker of the note, who signs the same "A. B. surety," and the bank refuse to discount the note, the creditor, for whose benefit the note was made, may, with the assent of the bank, maintain an action upon it, in the name of the bank, against the makers, although the note was not discounted at the bank in pursuance of the original intention. The Utica Bank v Ganson et al., 10 Wend. Rep. 814.

6thly, Of the Liability of the Acceptor

II. Of Ac- found a verdict for the defendant, the court refused to set it aside or allow it ceptances. to be entered for the plaintiff for 150l. the sum he had become liable to pay on the bill being given up to him(c). So where A. accepted bills for the accommodation of B., who discounted them with his bankers, and the latter became bankrupt before the bills were due, being indebted to B. in a cash balance exceeding the amount of the bills; upon the joint petition of A. and B. it was held, that the assignees were not entitled to sue A. upon these bills, and that the bills ought to be delivered to B. in part discharge of the balance due to him(d). And where it can be shown that the plaintiffs are agents for a third person, who ought not in justice to recover the amount of [*307] the bill, such proof will defeat the action(e); and no action *can be sustained against the acceptor, if when he had thereby been compelled to pay the bill, it would necessarily lead to some sustainable action against the very party to whom he made the payment, to recover back the money, it being a maxim that the law abhors and will not give effect to circuity of action, which can be productive of no substantial benefit (f).

Executor.

A general unqualified acceptance by an executor on account of debts due from his testator, is an admission of assets, and will therefore make him personally responsible in case there be no effects of the testator in his hands(g).

In case of Forgery.

It is no defence for an acceptor to an action by a bonû fide holder, that the drawer's name has been forged(h); and if the drawee, on being asked if the

(c) Hallett v. Dewes, 1 Moore & P. 79; 6 234, 235; 1 Tyr. 84, S. C. Bayley, B. said, Law J. 32, C. P.

(d) In re Sikes & Co. 4 Law J. 195, Chan. Cas. April and June, 1826.

(e) Lee v. Zagury, 8 Taunt. 114; 1 Moore, 556, (Chit. j. 1003); and see Harrhy v. Wall,

2 Stark. R. 195, (Chit. j. 999).

(f) Carr v. Stephens, 9 B. & C. 758; 4 Man. & Ry. 591, (Chit. j. 1444). A receiver of the rents of an estate, to a share of which a married woman was entitled, having in his hands money due to her, by the direction of the husband accepted a bill on the faith of that fund, drawn by a creditor of the husband for money lent to him. Before the bill became due, the husband and wife gave a joint direction to the receiver to pay over the money to a third person, which he did before the commencement of this action. When the bill became due the acceptor refused to pay it, unless the drawer would indemnify him against the claim of the husband and wife to have the money paid according to their order. An indemnity was given, but the acceptor still refused to pay; and it was held, that the drawer could not maintain an action on the bill, as it would only lead to a circuity of action, as the acceptor being bound to pay the money according to the order of the husband and wife, might recover it back by suing on the agreement to indemnify.

(g) See King v. Thom, 1 T. R. 487, (Chit. j. 438); ante, 201, note (k); Aspinall v. Wake, 10 Bing. 51, 55, 56; 3 Moore & S. 423, S. C.; and in Ridout v. Bristow, 1 Cromp. & Jer. 231,

"If an administratrix take upon herself to give a security which may have the effect of inducing forbearance, and which purports to bind her individually, is it competent for her to say, you must prove assets? To my mind the act of giving such a security supersedes the necessity of an investigation as to there being assets. It seems to me, that the words 'value received by my late husband' do not make the proof of assets necessary; and I go still further and say, that it was not competent for her to show that there were no assets." And see ante, 69, 70, note (k), as to the sufficiency of the considera-

What not evidence to charge a party as executor de son tort, Serle v. Waterworth, 4 M. &

(h) Price v. Neal, 3 Burr. 1354; 1 Bla. R. 390, (Chit. j. 364, 365). Two forged bills were drawn upon the plaintiff, which he accepted and paid; on discovering the forgery, he brought this action for money had and received, to recover back the money. At the trial the jury found a verdict for the plaintiff; and on a case reserved, Lord Mansfield said, " It is incumbent on the plaintiff to be satisfied that the bills drawn upon him were the drawer's hand-writing, before he accepted and paid it them; but it is not incumbent on the defendant to inquire into it." See also Smith v. Mercer, 1 Marsh. 453, 6 Taunt. 74, (Chit. j. 923); ante, 261, n. (u); and Jones v. Ryde, 1 Marsh. 160, (Chit. j. 906); Barber v. Gingle, 8 Esp.

⁽¹⁾ The holder of a note payable to bearer, in possession of the payee after due, cannot maintain an action upon it against the maker, if the payee be a mere agent, and the persons having the beneficial interest in the note forbid its payment to him. Comstock v. Hoag, 5 Wend. Rep. 600.

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acceptance be in his hand-writing, answers that it is, and that it will be duly II. Of Acpaid, he cannot afterwards set up as a defence forgery of his name, for he ceptances. has accredited the bill, and induced another to take it(i)(1). If the holder 6thly, of a bill, the acceptance of which turns out *to have been forged by an in- Of the dorser, delivered it up to him, and receive a fresh bill, he may recover upon Liubility the latter, unless there was an agreement between him and such indorser to ceptor. stifle a prosecution for the forgery (k).

[*308]

A complete acceptance communicated to the holder is not revocable(1); When an even with the consent of the holder, because the drawer and indorsers are Acceptintersected(m). Nor can the authority to pay be countermanded, except in ance is rethe case of loss on the bill(n). And it was for some time doubted, whether, if the drawee had inconsiderately written his acceptance on the bill, he could, even before the holder was apprised thereof, cancel such acceptance(o).

Rep. 60, (Chit. j. 618); East Inda Company v. Tritton, 5 D. & R. 214; 3 Bar. & C. 290, (Chit. j. 1216); Fuller v. Smith, Ry. & Mood. 49: 1 Car. & P. 197, (Chit. j. 1205). More fully, post, Ch. IX. s. ii. Payment by Mistake, where money paid on a forged bill is recovera-

Wilkinson v. Lutridge, Stra. 613, (Chit. j. 263). In an action against the acceptor of a bill, Raymond, C. J. allowed the plaintiff to read the bill, without proving the drawer's hand, because he thought the acceptance a sufficient acknowledgment on the part of the defendant; but he said it would not be conclusive; and if the defendant could show to the contrary, the reading of the bill should not preclude him. In Jenys v. Fowler, 2 Stra. 946, (Chit. j. 272), however, the same learned judge rejected evidence to show that it was not the drawer's hand, and strongly inclined to think that actual proof of forgery would not exonerate the defendant. And in Smith v. Chester, 1 T. R. 655, (Chit. j. 439), Buller, J. said, "that when a bill is presented for acceptance, the acceptor looks to the hand-writing of the drawer, which he is afterwards precluded from disputing, and it is on that account he is liable, even though the bill is forged."

Per Dampier, J. in Bass v. Clive, 4 M. & Sel. 15, (Chit. j. 930). Suppose the drawer's name is forged, yet if the drawee accept the bill, he is precluded from averring, as against

strangers, that it is a forgery.

(i) Leach v. Buchanan, 4 Esp. Rep. 226,
(Chit. j. 657). The plaintiff, before he took

the bill, sent a person with it to the defendant to inquire whether the acceptance upon it were his hand-writing; the defendant said that it was, and that it would be duly paid. He now offered evidence of the actual forgery of the acceptance: but Lord Ellenborough held, that that proof would not discharge the defendant; that after having so accredited the bill and induced a person to take it he was bound to pay it. Verdict for the plaintiff.

Cooper v. Le Blanc, 2 Stra. 1051, (Chit. j. The plaintiff, on discounting a note, sent to the defendant to know whether an indorsement on it was his, and the defendant said it was, and the note would be paid when due; he would, notwithstanding, have given evidence, by similitude of hands, that the indorsement was a forgery, but Lord Hardwicke would not allow it; he seemed inclined, however, to admit proof of actual forgery, but the defendant could not adduce it, and the plaintiff had a verdict. See Wilkinson v. Lutwidge, Stra. 648, (Chit. j. 286).

(k) Wallace v. Hardacre, 1 Campb. 45, (Ch.

j. 740). See ante, 83, note (b).
(l) Marius, 93; Molloy, B. 2, chap. 10, pl.
28. Laws of Hamburgh, Article 7; 1 Pardessus, 400.

(m) 1 Pardessus, 400, 401.

(n) Id. 427. (o) Thornton v. Dick, 4 Esp. Rep. 270, (Chit. j. 761); Raper v. Birbeck, 15 East, 17, (Chit. j. 851); Bentick v. Dorrien, 6 East, 129; 2 Smith, 337, (Chit. j. 712); post, 309, note

⁽¹⁾ It seems that if the drawee accept a forged bill in the hands of a bona fide holder, he is bound by it; for he is presumed to know the handwriting of the drawer, and by his acceptance to take this knowledge upon himself. Levy v. Bank of the United States, 4 Dall. 234. S. C. 1
Binn. 27. At all events if he pay the bill, he cannot recover the money back. Ibid. And if a
bank once pay a forged check, or carry it to the credit of the holder, it is conclusive upon the bank. Ibid.

A bank is entitled to recover against the second indorser of a note discounted by the bank, although the indorsement of the name of the payee is a forgery, and although the note was offered for discount by the maker, and not by the second indorser. State Bank v. Fearing, 16 Pick.

Where a bill is assignable only by indorsement, a person who obtains possession by a forged indorsement of the name of the payee acquires no interest in it, although ignorant of the forgery; and the original holder may recover the amount from the acceptor, even if the latter has paid it. Dick v. Leverich, 11 Louis. 573.

6thly, Of the Liability of the Acceptor. [*309]

II. Of Ac- But it is now settled, that although a drawee has written his acceptance on ceptances. the bill, with the intent to accept the same, he may, before he has communicated such fact to the holder, and parted with the bill, change his mind and obliterate his acceptance, and thereby relieve himself from liability (p). And according to the observations on Price and Shute, in *Paton v. Winter(q), it should seem, that an acceptance may be altered, though the bill itself cannot be; and an offer to pay, rejected at the time, may be afterwards revoked, upon the holder's applying again for payment (r); and from the case of Fernandey v. Glynn(s), it appears, that by the usage of trade in London, a check may be retained by the banker on whom it is drawn till five in the afternoon of the day on which it is presented for payment, and then returned, although it has been previously cancelled by mistake. And if the acceptance of a bill drawn and indorsed in France but accepted and pavable here, be cancelled by mistake, and the French courts erroneously decree this to be a discharge of the other parties, an indorsee who has taken up the bill may still sue his immediate indorser in this country (t). There appears no reason why the drawee, before he has induced the holder to take or hold the bill on the credit of the acceptance, should not be at liberty to cancel his acceptance: the circumstance of the bill being thereby deficed cannot constitute any sufficient reason why he should be liable as acceptor, for the

> (p) Cox v. Troy, 5 Barn & Ald. 474; 1 Dowl. & Ry. 38, (Chit. j. 112)). Abbott, C. J. "I am of opinion that in this case the defendant is entitled to judgment: it is true that the jury have found that he did accept the bill, but connecting that finding with the other facts of the case, it does not seem to me that it means more than that at one period the defendant, or some one on his behalf, did write an acceptance on it, and at that time was minded to accept it; the question will then be, whether, having that intention at the time, and having written that acceptance, he was at liberty, on an alteration of circumstances, to erase those words before he delivered out the bill to the holder. Upon that question there appears in the books to be some difference of opinion. In Bentinck r. Dorrien, Lawrence, J. says, 'when the general question shall arise, it will be worth considering how that which is not communicated to the holder can be considered as an acceptance. whilst it is yet in the hands of the drawee, and where he obliterates it before any communica-tion made to the holder.' That expression was used after the decision in the cases of Thornton v. Dick, and Trimmer v. Oddy. And at a later period, in Raper v. Birbeck, 15 East, 20, Lord Ellenborough said, 'I remember Pothier, in his Treatise on Bills of Exchange, speaking of an acceptor who has put his signature to a bill, but has not parted with it, says, that before he does part with it, i' peut changer de volent! et rayer son acceptation; a fortiori, then a third person who cancels an acceptance by mistake shall not be held thereby to make void the bill, but shall be at liberty to correct that mistake, in furtherance of the rights of the parties to the hill.' The manner in which Lord Ellenborough quotes the Treatise of Pothier seems to indicate, that at that time he did not retain the opinion which he had delivered in the case of Thornton v. Dick. In a case like the present, which depends on the law merchant, the opinions of learned lawyers, and the practice of

foreign and commercial nations, though they cannot, strictly speaking, be quoted as authorities here, yet are entitled to very great weight and attention. When I find, therefore, that it is laid down in Pothier's Treatise, that a party who has given an acceptance may erass it be-fore the bill goes out of his hands, it affords a strong argument in support of the view which I take of the question. I think the rule there laid down is far better than the one contended for by the plaintiff. I cannot perceive how the holder of a bill or any antecedent party is prejudiced by it, for it is to him the same thing, whether, when the drawees give it bick, they deliver it to him unaccepted, or whether he finds that the drawees have withdrawn their acceptance, having at one time intended to accept it, but having subsequently changed their mind. Thinking, as I do, that no prejudice can arise to the holder, or any other parties to the bill, and that they are placed precisely in the same situation as if no acceptance was given, it seems to me that it was competent for the acceptors to erase their acceptances before they delivered out the bill; and, therefore, the defendant is entitled to our judgment." See Mar. S3; Mollov, b. 2, chap. x. pl. 28, p. 103; 1 Pardessus, 401; Wilkinson v. Johnson, 5 Dow. & Ry. 408; 3 Bar. & Cress. 428, (Chit. j. 1231). See the report of the case of Trimmer and Oddy, 6 East, 200; and Pothier Traits du Contrat de Change, part 1, chap. 3, s. 3, pl. 44. Emerigon Trait: des Assurances, ch. 2, s. 4, p. 45; and Stevenson on Bills, 163, 164.

(q) Paton v. Winter, 1 Taunt. 423, (Chit.). 763); but as to that case, see ante, 189, n. (i).

(r) Anderson v. Heath, 4 Maule & S. 303, (Chit. j. 936).

(a) 1 Campb. 426, n. cited in Raper v. Bir-beck, 15 East, 19, (Chit. j. 851). And see Wilkinson v. Johnson, 3 B. & C. 438, 437,

(t) Novelli v. Rossi, 2 B. & Ad. 757.

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holder is not prejudiced by the erasure, but may immediately resort to all II. Of Acthe antecedent parties on the bill, and which also ought not to be put in circu- ceptances. lation after the drawee has determined not to pay it (u). If a bill has been ac- 6thly, of cepted by mistake, it seems that the drawee is at liberty, before he has de-the Lialivered it to a third person, to cancel his acceptance (v). At all events, if the Acthe holder of the bill, the acceptance of which has been so cancelled, with full ceptor. knowledge of all the facts, cause it to be noted for non-acceptance, he will afterwards be precluded from insisting that the bill was accepted (x)(1). if the noting, or even a formal protest, were made, without knowledge of the facts, as in ignorance of a promise to accept a foreign bill, which was equivalent to an actual acceptance, such noting or protest will not waive the benefit of such acceptance (y).

The liability of the acceptor cannot in general be released or discharged, How the otherwise than by agreement, release, or payment(z). If *however, by the an Acceptlaws of a foreign country, where the acceptance was made, and where it or may be was to be performed, the obligation is by any act vacated, it will no longer discharghave any obligatory force in this country (a); and by the consent of the holder, it may in all cases be waived or released, and the waiver may be either [*310] expressed or implied(b). With respect to the mode by which it may be waived or discharged, it may be observed, that the general rule of law is, that although a simple contract, previously to the breach of it, may be discharged by parol, yet if it has been once broken, then it cannot be discharged without payment or a release in writing(c); but in the case of a bill it is

(u) As to this point of circulating a bill after it has been dishonoured, see Roscoe v. Hardy, 12 East, 484; 2 Campb. 458, S. C., (Chit. j. 801); ante, 215, note (x).

(v) Trimmer v. Oddy, 6 East, 200; Cox v. Troy, 5 B. & Ald. 474, (Chit. j. 1129); ante,

308, note (p).

(x) Bentinck v. Dorrien, 6 East, 199, 2 Smith's Rep. 337, (Chit. j. 712). This action, which was by the indorsee against the defendants as acceptors of a bill, was referred, and the arbitrator, after reciting in his award, that the plaintiff, on the 31st May, left the bill with the defendants for acceptance, and they signed an acceptance thereon; but that on the 1st of June, before the bill was called for, they cancelled that acceptance, and that the plaintiff thereupon noted the bill for non-acceptance, declared himself to be of opinion that by such noting the plaintiff had precluded himself from insisting that the defendants had bound themselves to pay the bill, and therefore awarded in favour of the defendants. A rule nisi was obtained for setting aside this award, on the ground that the acceptance was irrevocable. But after cause shown, the court held, that whether such acceptance could or could not be revoked, the plaintiff had, at all events, by noting the bill for non-acceptance, precluded himself from contending that the acceptance was valid. Rule discharged. Sproat r. Matthews, 1 T. R. 182,

(Chit. j. 433); ante, 301, note (d).

(v) Fairlie v. Herring, 3 Bing. 625; 11 Moore, 520, (Chit. j. 1800); ante, 290, n. (n). (2) Poth. pl. 76, 118; Mar. 83, 145, 146; Bacon v. Searles, 1 H. Bla. 88, (Chit. j. 449); Fentum v. Pocock, 1 Marsh. 14; 5 Taunt. 192, (Chit. j 896).

(a) Robertson v. French, 4 East, 130; Burrows v. Jemino, Stra. 733; Sel. Ca. 144, (Chit.

Burrows v. Jemino, 2 Stra. 732, (Chit. j. 265). The plaintiff accepted a bill at Leghorn, and by the law there, if the drawer fails, and the acceptor hath not sufficient effects of the drawer in his hands at the time of the acceptance, the acceptance becomes void. And this being the plaintiff's case, he instituted a suit at Leghorn, and his acceptance was thereupon vacated by the sentence of that court. The plaintiff, on his return to England, was sued as acceptor, and now filed his bill for an injunc-tion and relief. King, Lord Chancellor held that the plaintiff's acceptance of the bill having been vacated and declared void by a competent jurisdiction, that sentence was conclusive, and bound the Court of Chancery here. and granted a perpetual injunction to enjoin the defendant from suing upon this bill.

(b) Post, 311, 312.

(c) Fitch v. Sutton, 5 East, 230: Rozal v. Lampen, 2 Mod. 43; Edwards v. Weeks, id.

⁽¹⁾ A. having accepted two bills of exchange for nearly the same amount on the same day, sent his clerk to the person in whose hands they both were, as agent of two different holders to take up one of them, but the clerk took up the other and brought it to A. who struck out his name as acceptor. In about five minutes from the time he received it, he wrote his name again under the acceptance and sent it back to the agent who received it and gave up the other bill. Held, that the bill first taken up was paid and the indorsers discharged. Bogart r. Nevins, 6 Serg. & Rawle, 361.

ceptances. 6thly, Of the Liability of the Acceptor. How discharged. [*311]

II. Of Ac- otherwise; and the courts have gone so far as to decide that what amounts to an assent to discharge the acceptor, is a question for the jury, arising out of the circumstances of the case(d); from which it might be inferred, that any act indicating an intention to relinquish the right of action will be sufficient; but that decision appears in some measure to be contradicted by the case of Dingwall v. Dunster(e), where the court decided, that nothing but an express consent, *or the statute of limitations, would discharge the acceptor; and that no neglect to call on him for any length of time, nor indulgence to him or to the drawer would have that operation (f); and in a subsequent case it was decided, that though the holder of a bill may discharge the liability of the acceptor by parol, yet for this purpose the words must amount to an absolute renunciation of all claim upon him in respect of the bill(g); and an acceptor

> 259; Langden v. Stokes, Cro. Car. 393; May v. King, Cases K. B. 538; Vin. Ab. tit Release; Com. Dig. Pleader, 2 G. 13. et tit. Action on the Case in Assampsit, G.; Heathcote v. Crookshanks, 2 T. R. 24; Kearslake v. Morgan, 5

T. R. 514, (Chit. j. 520).

(d) Ellis v. Galindo, cited in Dingwall v. Dunster, Dougl. 247, (Chit. j. 408, 427). James Galindo drew upon his brother for 801. in favour of the plaintiff. When the bill became due, James paid the plaintiff 31. 15s. 4d. and indorsed a promise to pay the remainder in three months. Three years elapsed, and then plaintiff sued the drawee upon his acceptance. Lord Mansfield thought the defendant discharged, and nonsuited the plaintiff. An application was made for a new trial, when Lord Mansfield said, he thought the case did not interfere with Dingwall and Dunster, but a rule to show cause was granted; after cause was shown, Lord Mansfield said, "The doubt is, whether the question should not have been lest to the jury, it being a question of intention arising out of the circumstances." Willes, J. "I thought it should have been left to the jury;" and per Buller, J. "I rather think the case should have gone to the jury; but I am not, therefore, of opinion, that there ought to be a new trial; the indorsement could not have been meant us an additional security, for the drawer was equally liable before. I should have left the question to the jury, but with very strong observations, and as the demand is so I do not think there ought to be a new trial." Rule discharged.

(e) Dingwall r. Dunster, Dougl. 247, (Chit. j. 401); et vide Byrn v. Godfrey, 4 Ven 8; Anderson v. Cleveland, 18 East, 480; 1 Esp.

R. 46, (Chit. j. 400).

Dingwall r. Dunster, Dongl. 235, 247. (Chit. j. 401). Dunster lent Wheate his acceptance, which became due the 18th December, 1774.

It was then in the hands of Dingwall; but he finding that Wheate was the real debtor, wrote to his attorney in February and November, 1775, for payment, received interest upon the bill from Wheate, and suffered several years to elapse without calling on Dunster. On 18th February, 1775, Dunster wrote to thank Dingwall for not proceeding against him, and said he had been informed by a person Dingwall had sent, that Wheate had taken up the bill; but Dingwall took no notice of this letter; he afterwards saed Danster, for whom

the jury found; but upon a rule to show cause why there should not be a new trial, the whole court held, that there was nothing in the plaintiff's conduct to discharge Dunster; that it meant nothing more than an indulgrant to him, and that he would try to recover from the drawer if he could. Lord Mansfield, however, said, " No use has been made of the defeadant's letter; probably the fact did not warrant him in asserting that a person the plaintiff sent had told him Wheate had taken up the bill; had the plaintiff, by any thing in his conduct confirmed him in such a belief, it might have altered the case." Bayl. 5th edit. 214.

Anderson v. Cleveland, 18 East, 430; 1 Esp. R. 46, (Chit. j. 400). In an action by an indorsee against the acceptor of a hill, so demand was proved till three months after the bill was due, and when the drawer had become insolvent; but per Lord Mansfield, "The acceptor of a bill or the maker of a note always remains liable. The acceptance is a proof of having assets in his hand, and he ought never to purt with them unless he be sure that the bill has been paid by the drawer." Bayl. 5th edit.

(f) See Farquhar v. Southey, Mood. & M. 14; 2 Carr. & P. 497, (Chit. j. 1815); infra,

note (g).
(g) Whatley r. Tricker, 1 Campb 35, (Chit.
j 740). The indoraces of a bill, knowing that it had been accepted for the accommodation of the drawer, and possessing goods of the drawer's from the produce of which they expected payment, said (at a meeting of the acceptor's creditors), that "they looked to the drawer, and should not come upon the acceptors." In consequence of which the latter assigned their property for the benefit of their creditors, and paid them 15s. in the pound. The drawer's goods, however, proved to be of little value, and he became insolvent, upon which the independent of the property o dorsees sued the acceptors. Lord Ellenborough said, that if the plaintiff's language amounted to an unconditional renunciation of all claim upon the acceptors, whereby the latter had entered into an arrangement with their creditors. the acceptors were discharged; but if only to a conditional promise not to resort to the acceptors, if satisfied elsewhere, they were not. The jury found for the plaintiff. Parker v. Leigh, 2 Stark. 229, (Chit. j. 1006). An acceptor of a bill is not discharged by the

bill not being presented for payment for three



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cannot avail himself of a renunciation on the part of a holder of his claim on II. Of Ashim, unless it be not only express, but founded on some consideration(h). ceptanoes. Where, on a bill becoming due, the acceptor's name was crossed, and an un- 6thly, of stamped agreement to renew written on the back, it was left to the jury to the Liastamped agreement to renew written on the back, it was left to the july to bility of decide whether it had been cancelled with the consent of the drawer, in which the Accase, although the second agreement was a nullity, the drawer could not re-ceptor. cover on the bill, and the jury having found that it was so cancelled, the How displaintiff failed in his action (i). We have just seen (j) that the cancellation charged. of an acceptance by mistake does not operate as a discharge.

The effect of a legacy by a creditor to the acceptor, or an entry, discharg-

ing him from payment, will be considered hereafter (k).

What amounts to a waiver, and discharge of the acceptor's liability, must by Wairdepend on the circumstances of each particular case. An agreement to con- er or versider an acceptance as at an end(l), or a message from the holder to the acceptor of an accommodation bill, "that the business has been settled with the drawer, and that he need not give himself any further *trouble(m)," have [*312] been holden to amount to a waiver of an acceptance. But it should seem, that the holder's receiving a part of the money due on a bill from the drawer, and taking a promise from him upon the back of it for the payment of the residue at an enlarged time, will not of itself amount to a discharge of the ac-Nor will the mere passively holding a bill accepted for accommodation many years, and receiving interest from the drawer, without application to the acceptor, discharge the acceptor; but it should seem that it may be left to the jury, whether the holder agreed to discharge the acceptor, or renounced all intention of holding him liable(o). It has been decided, that

m four years after it becomes due: he is only discharged by payment of the bill, or by a distinct or direct agreement by the holder to discharge him. Therefore, where A. and Co. having accepted a bill for B.'s accommodation, B. paid it into the hands of his bankers without notice, who retained possession of it for several years, charging him with interest for it, but never debiting him with the amount of the bill; and during this time they became bankers to A and Co. also, but never gave them notice that they held the bill against them; and it appeared that the balance of B.'s account was always against him; that of the account of A. and Co. in their favour, but very seldom to the amount of the bill; in an action by the bankers against A. and Co., it was held, that under these circumstances, the defendants were not discharged, unless the jury should infer that the plaintiffs had entered into an agreement to discharge the defendants, or had expressly re-nounced all intention of holding them liable on the bill. Farquhar and others v. Southey, Mood. & M. 14; 2 Carr. & P. 497, (Chit. j. 1315). (h) Parker v. Leigh, 2 Stark. Rep. 228,

(Chit. j. 1006); and see Badnall v. Samuel, 3 Price, \$21, (Chit. j. 985); Perfect v. Musgrave, 6 Price, 111, (Chit. j. 1044); post, Ch. IX.

ii. Payment—Effect of giving Time, &c.
(i) Sweeting v. Halse, 9 Bar. & C. 365; 4

Man. & Ry. 287, 383; Dans. & Ll. 287, (Chit. j. 1423). As to effect of a receipt in full, see Stark. Evid. Part IV. 1274, ct seq.

(j) Ante, 809. (k) Post, Ch. IX. s. ii. Payment—What

amounts to. As to effect of appointing acceptor executor, post, 313.

(1) Walpole v. Pulteny, cited Dougl. 236, 237, 248, 249. Walpole held a bill accepted by Pulteney, but agreed to consider his acceptance at an end, and wrote in his bill-book, opposite to the entry of this bill, "Mr. Pulteney's acceptance is at an end." Walpole kept the bill from 1772 to 1775, without calling upon Pulteney, and then brought this action. The jury found a verdict for the plaintiff; but the Court of Exchequer thought the verdict wrong, and granted a new trial, upon which the jary found for the defendant; Bayl. 5th edit 203.

(m) Black r. Peele, cited Dougl. 236, 237, 248, 249. Black arrested Peele as acceptor of a bill drawn by Dallas, but on finding that the acceptance was an accommodation one, his attorney took a security from Dallas, and sent word to Peele that he had settled with Dallas, and that he need not give himself any further trouble. Dallas afterwards became bankrupt, upon which Black again sued Peele; but it was held that as Black had, in express words, discharged Peele, the action could not be maintained. But in Adams v. Gregg, 2 Stark. Rep. 531, where an accommodation acceptor having applied to the holder to give it up, which he refused to do, but said the acceptor should not be troubled about it, Abbot, C. J. thought that such declaration was no discharge, and the plaintiff had a verdict.

(n) Ellis r. Galindo, ante, 310, note (d).

(o) Anie, 811, note (g).

oeptances. 6thly, Of the Liability of the Acceptor. How discharged.

II. Of Ac if the holder of a bill of exchange agree not to sue the acceptor, upon his making affidavit that the acceptance is a forgery, and such affidavit be accordingly made and sworn, he cannot afterwards bring an action on the bill, though the affidavit be false (p); and if the cancellation or discharge be obtained by a substituted security, known to the party giving it to be invalid, and therefore fraudulent, the holder nevertheless cannot treat the acceptance as still subsisting (q).

By formal Release.

It has been decided, that a release by the holder to the drawee, after the bill is drawn, and before acceptance, will not discharge him from the obligation created by a subsequent acceptance, because he was not chargeable at the time of the release(r). And even an express release from the drawer, before a bill falls due, will not, without cancelling the bill, preclude the drawer from afterwards passing it away to a bon? fide taker, and who may sue such acceptor notwithstanding the release(s). And it seems, that if a creditor for goods sold is also the indorser of a bill of exchange which he has indorsed to a third person for valuable consideration, who, at the time of the execution of a composition deed by the creditor, is the holder of the bill, and the creditor sign the deed, containing a release, but without specifying the amount of his debt, the composition would extend only to the amount of the goods sold and bills actually in his hand at the time he executed (t). And where the *drawer of a bill of exchange, accepted by defendant, agreed with him and the rest of his creditors to take a composition of eight shillings in the pound, to be secured by promissory notes, to be given by defendant payable on days certain, and that defendant should assign to the creditors certain debts, upon which they should execute a general release, and the assignment was executed, and all the creditors except the plaintiff received their composition and executed the release, and plaintiff might have received his promissory notes, if he had applied for them; but it did not appear that defendant had ever tendered them to plaintiff, or that he had ever applied for them, and the plaintiff afterwards, and after the days of payment of the promissory notes had expired, sued the defendant on the bill of exchange, it was held, that he was not precluded by the agreement from recovering (u). But where in an action against the de-

(p) Stephens v. Thacker, Peake Rep. 187, (Chit. j. 511); Lloyd v. Willan, 1 Esp. Rep. 178. Sed quære.

(q) Sweeting r. Halse, 9 Bar. & C. 369, ante, 311, note (i); but note, that case turned

principally on a point of evidence.

(r) Drage r. Netter, Lord Raym. 65, (Chit. j. 192).

(s) Dod v. Edwards, 2 C. & P. 602, (Chit.

j. 1334); ante, 215, note (y). (t) Harrhy r. Wall, 2 Stark. Rep. 195, 198; 1 Bar. & Ald. 103, (Chit. j. 999); but it would be otherwise if the party holding the bill were a mere agent of the creditor; Margeston v. Ait-ken, 3 Car. & P. 338; Dans. & Lloyd, 157, (Chit. j. 1408). If a defendant has entered into a deed of composition with his creditors, containing the usual clause of release, and the plaintiff has executed the deed as a creditor for a certain sum, that is a good defence to an action by the plaintiff, as indorsec to a bill to a larger amount, of which the defendant was indorser, and which then lay dishonoured in the plaintiff's hands. But it is no defence as to two similar bills, also of larger amount, which the plaintiff had paid away, and which were then

in the hands of third parties. If, after a bill is dishonoured, the indorser offer to pay the holder so much in the pound on the amount; semble, that this dispenses with proof of the notice of dishonour.

Lord Tenterden, C. J. "The utmost effect that can be given to the argument and to the deed is, that the plaintiff releases whatever debt is then due to her; but I am of opinion that that deed cannot be taken as a release by the plaintiff as to bills then outstanding undishonoured in other hands. It does not I think apply 10 two of the bills. As to the remaining bill I think that the plaintiff cannot recover on it, as it was dishonoured at the time of executing the deed. With respect to the offer of the composition, dispensing with proof of the notice of dishonour, Mr. Gurney may move to enter a nonsuit, if he should upon consideration think fit to do so, my opinion, as at present advised, is against him. I am inclined to think if enough." Verdict for the plaintiff, damages 31/.

(u) Cranley v. Hillary, 2 M. & Sel. 120, (Chit. j. 895); and see Oughton r. Trotter. 2 Nev. & Man. 71.

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fendants, as acceptors of a bill of exchange for 10391., it appeared that the II. Of Acdefendants owed the plaintiffs a balance of 3211., that the defendants failed, ceptances. and their creditors, amongst whom were the plaintiffs, agreed to take a com- subly. Of position of 5s. in the pound on their debts by notes at four and eight months; the Liaand there being a dispute as to the balance due to the plaintiffs, the latter the Acpromised to adjust their account with one of the defendants, and said they ceptor. would do as the other creditors did; and the defendants insisted for some How distime that 2501. 9s. 7d. was the balance due, but the defendants' attorney af- charged. terwards called on the plaintiff's attorney and told him that the defendants were ready to pay the composition on 3211., the sum really due, without, however, making any tender of the notes or of cash for the amount of the composition, and plaintiff's attorney refused and said they must have the whole; it was held, that a tender was not necessary under the circumstances, and that the plaintiffs could only recover the amount of the composition on the balance (x). So where it is agreed that the notes shall be given on a specified day, if the plaintiff accept them after the appointed time, he thereby waives any objection on the ground of their not having been given on the precise day (y).

A general release by the drawer of a bill to the acceptor will, as between them, discharge the acceptor, though the drawer is not the holder, nor has then paid the bill(z). And the payee's appointing the maker of a promissory note or acceptor of a bill his executor, is in law a release, and prevents a subsequent holder from suing either of such parties(a). There is, however, a distinction between the appointment of a debtor to be executor, or administrator, the former being the act of the creditor, extinguishes the debt;

the latter, being the act of the ordinary, does not (b).

In general a release to one of several joint and several debtors or parties to a bill or note operates as a release of the whole, for the debt is thereby in law discharged(c); nor can the effect of such release be destroyed by pa-But where the defendant and one M. N. gave *the plaintiff their [*314] joint and several promissory note to secure a separate debt due from each of them, and the plaintiff afterwards executed a deed of release to M. N.; it was held, that although this release discharged both as to the note, it did not enure to the discharge of the separate debt of the defendant, but that the plaintiff might recover that upon an account stated(e). And although a covenant not to sue in general enures as a release, it does not operate to discharge any other person than him with whom it is entered into, and does not exonerate other contracting parties (f), and this legal and implied operation of a release to one of several debtors may be restrained in some cases by the

(x) Reay v. White, 1 Crom. & Mees. 748. (y) Lee Shipton v. Casson, 5 B. & C. 378; 8 D. & R. 130, S. C.

(z) Scott v. Lifford, 1 Campb. 250; 9 East,

347, (Chit. j. 747).
(a) Freakly v. Fox, 9 Bar. & C. 130; 4
Man. & Ry. 18, (Chit. j. 1418); post, Part II.
Ch. I. By and against whom Action to be

In such case the bill or note is no longer neotiable; 55 Geo. 3, c. 184, s. 19; Bartrum v.

Caddy, 1 Perry & Dav. 207, 212, 213.
(b) Sir John Needham's case, 8 Co. 134. (c) Co. Litt. 282; 2 Roll. Abr. 410, pl. 47;

Chitty, jun. on Contracts, 606, 607.
(d) Brooks v. Stuart, 1 Perry & Dav. 615. To a declaration against the defendant as maker of a promissory note, the defendant pleaded

that the note was a joint and several note by defendant and A., and that A. had been released. Replication, that A. had been released at defendant's request, and that defendant, in consideration of such release at his request, ratified the promise in the declaration, and promised that he would remain liable on the note, as if there had been no release; held, that the replication, setting up a parol contract to avoid the release, was bad.

(e) Cocks v. Nash, 4 Moore & S. 162. (f) Dean v. Newall, 8 T. R. 168; Two-penny v. Young, 3 Bar. & C. 212; 5 Dowl. & R. 262, (Chit. j. 1215). A covenant not to sue upon a simple contract debt for a limited time, is not pleadable in bar of an action for such debt; Thimbleby r. Barron, 8 M. & W.

Othly, Of the Liability of the Acceptor.

How discharged. By Payment.

II. Of Ao- express terms of the instrument(g). One of two makers of a joint promisceptances. sory note, payable twelve months after date, though a surety for the other for the amount, is not discharged by the payee not having demanded payment for him when due, nor till after having entered into a deed of composition with the principal and his other creditors, and received the composition money (h).

> We shall hereafter consider what will amount to payment of a bill, &c.(i) A deed reciting the actual payment of money is conclusive at law against the recovery of such money (k); but not so where from the whole tenor of the deed it shows the payment had not been made; and where the defendant having given plaintiff a promissory note for 401. in consideration that he would withdraw an execution upon premises of defendant, the plaintiff executed a general release of all suits, which, after reciting the agreement to withdraw the execution, &c. proceeded, "witnesseth, that in pursuance of the said agreement, and in consideration of the said sum of 401. being now so paid as hereinbefore is mentioned, &c." it was held, in an action on the promissory note, which had been dishonoured, that the release was no bar to the suit(1). It seems, that if a composition deed, or other deed, contain a clause for the delivery up of securities, or extinguish the original debt on such securities, the holder thereby entering into such deed would be liable to the debtor if he enforced the payment of them from other parties, though it would be otherwise if the deed contained no such clause, and did not extinguish the debt(m).

When a bill is accepted in consideration of the future consignment of goods to the acceptor, and the prospect of the profit of the commission on the sale thereof, and the holder of the bill, aware of the nature of the acceptance, agrees to take and receives the bill of lading, &c. from the acceptor, which were the consideration of the acceptance, the acceptor is, by this act of the holder, discharged from the liability imposed on him by his accep-[*315] tance(n). He is also discharged when, as has *been before observed, the holder, upon an offer by the drawee of a conditional or partial acceptance,

(g) Solly v. Forbes, 2 B. & B. 38.
(h) Perfect v. Musgrave, 6 Price, 111, (Ch. j. 1044). See Clarke v. Wilson, 3 M. & W. 208; post, Ch. IX. s. ii. Of Payment—Effect of giving Time, &c.

(i) Post, Ch. IX. s. ii.

(k) Rowntree v. Jacob, 2 Taunt. 141; Co. Lit. sect. 512.

(1) Lambourne v. Cork, 1 D. & R. 211.

(m) Thomas v. Courtney, 1 B. & Ald. 1 ((hit. j. 958); Stock r. Mawson, 1 B. & P.

(n) Mason v. Hunt. Dougl. 284, 297, (Chit. j. 408). Rowland Hunt agreed that his partner, Thomas Hunt, should on consignment of a cargo, and an order for its insurance, accept bills for 36-001. The cargo was consigned, the order for insurance given, and I homns Hunt effected the in-surance, but he refused to accept the bills. After some negotiation, the plaintiff, being the holder, signed a memorandum, by which, after

stating that the consignment had been made on account of the hills, and that the Hunts being apprehensive that the net proceeds might not be sufficient to discharge them, had refused to accept, he accepted the bill of llading and policy, and undertook to apply the net pro-ceeds, when in cash, as far as they would go, to the credit of the payee, in part-payment of the bills. The plaintiff afterwards sued the Hunts, and insisted that Rowland Hunt's agreement was an acceptance; but after a verdict for the defendant, and time taken to consider upon a rule to show cause why there should not be a new trial, the whole court was clear, that by the memorandum the plaintiff had waired all right to insist upon Rowland Hunt's agreement, for it was obvious, that the whole consideration of the acceptance was the consignment, upon which there would be a commission, and the policy of these the plaintiff had taken to himself.

^{(1) {} The acceptor for accommodation of the drawer, may pay the bill on the last day of grace before the commencement of business hours, and forthwith bring his action against the drawer for indemnity. Whitwell v. Brigham, 19 Pick. 117. }

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gives a general notice of non-acceptance to any of the antecedent parties, II. Of Acomitting to mention in such notice the nature of the acceptance offered(o).

The drawee will not be discharged from liability, in the case of an acceptance 6thly, Of made payable at a banker's, (but without the words "there only," or "not other- the Liawise or elsewhere," required by the 1 & 2 Geo. 4, c. 78,) by the holder's bility of neglect to present it there, although he can prove that he has sustained damages ceptor. in consequence of such neglect(p); for, as observed by Bayley, J. " an ac- How disceptance payable at a banker's is to be deemed for the benefit of the person charged. who makes it; it is an act of his own doing and imposes no obligation on the By Neglect holder to present it at the banker's on the very day it becomes due, in order to present to charge the acceptor. It is the duty of an acceptor, making his bills pay-for Payable at his banker's, to see from time to time how his account stands(q)." when. But it should seem, that if the bill be accepted, payable at a particular place according to the provisions of the 1 & 2 Geo. 4, c. 78, the acceptor will be discharged if the holder neglect to present it there, and the acceptor has sustained damages by such neglect(r).

It was decided at nist prius, that an accommodation acceptor will be dis- Not by givcharged by the holder's giving time to the drawer, after having notice that ing Time to Drawer the bill was accepted for his accommodation(s); and the law in France was of Acomto that effect(t). But that doctrine was afterwards doubted(u), and may modation be considered as over-ruled, and the rule seems now to be, that the holder's Bill. merely giving such time, or taking a cognovit from the drawer, though he have full notice that the bill was accepted for the accommodation of such drawer, will not discharge the acceptor(x). Nor does the holder's releasing

(o) Sproat v. Matthews, 1 T. R. 482, (Chit.

(d) Spread 9. Matthews, 1 1. R. 482, (Chit. j. 433), Bentinck v. Dorrian, 6 East, 199, (Chit. j. 712); anle, 309, note (x).

(p) Sebag v. Abitbol, 4 M. & Sel. 462, (Chit. j. 942, 947); Turner v. Hayden, 6 Dow. & Ry. 5; 4 B. & C. 1, (Chit. j. 1246); see post, Ch. IX. s. i. as to Presentment for Payment ment.

(q) Per Bayley, J. in Turner v. Hayden, 6 Dow. & Ry. 7; 4 B. & C. 1, (Chit. j. 1246). (r) See Rhodes v. Gent, 5 B. & Al. 244, (Chit. 1124); and Turner v. Hayden, 6 Dow.

& Ry. 5; 4 Bur. & Cres 1, (Chit. j. 1246).
(a) Laxton v. Peat, 2 Campb. 195, (Chit. j. 773); Collett v. Haigh, 3 Cumpb. 281, (Chit. j. 877); Adams v. Gregg, 2 Stark. Rep. 531;

(Chit. j. 1076). (t) Poth. pl. 180; and see Roscoe, 385, note 16.

(u) Raggett v. Axmore, 4 Taunt. 730, (Ch. j. 881); Kerrison v. Cooke, 8 Campb. 362, (Chit. j 885).

(x) Fentum v. Pocock, 1 Marsh. 14; 5 Taunt. 192, (Chit. j. 896), (cited and approved of in Price v. Edmonds, 10 B. & C. 584), (Chit. j. 1483); and in Nichols v. Norris, 3 B. & Ad. 41; and see Harrison v. Courtauld, id. 86, next note. This was an action against the acceptor of a bill of exchange, and at the trial the plaintiff had a verdict, with liberty for the defendant to move to enter a nonsuit, on the ground that he was discharged by the plaintiff having taken a cognovit from the drawer; and upon motion accordingly, and cause shewn, the court held, that the acceptor binds himself, at all times, to pay the holder (though not per-haps the drawer) until discharged by payment

or release, and that though it were an accommodation bill, that would not alter the circumstances, and discharged the rule. And see the Bank of Ireland v. Beresford, 6 Dow, 233, (Chit. j. 1032); ante, 805, note (x).

Mallett v. Thompson, 5 Esp. Rep. 179, (Ch. j. 702). The plaintiff, holder of an accommodation note, who took it with full notice that the maker had received no value from the indorser. for whose accommodation the defendant made it, and received a composition, and covenanted not to sue such indorser, may, notwithstanding, sue the maker, though, on payment of it, he will have a right of action against the indorser.

Kerrison v. Cooke, 8 Campb. 862, (Chit. j. 885). Where upon an accommodation bill becoming due, it was presented for payment to the acceptor, and he promised to pay it, it was held, that he was not discharged by time being afterwards given without his consent to the drawer by the indorsee, who knew that it had been accepted for the drawer's accommodation.

In Carstairs v. Rolleston, 5 Taunt. 551; 1 Marsh. 207, (Chit. j. 909); it was discussed, but not determined, whether a release to the indorsee of an accommodation note, discharged the maker, if the holder was aware at the time of all the circumstances. See Harrison v. Courtauld, 3 B. & Ad. 86, next note.

That the acceptor or maker of an accommodation bill or note is not discharged by the holder's entering into a composition with the drawcr or payee, see Maltby v. Carstairs, 7 B. & C. 735; Thomas v. Ceurtney, 1 B. & Ald. 1; and see Nichols v. Norris, 3 B. & Ad. 41; peet, Ch. IX.s. ii. Of Payment—Effect of giving

ceptances. 6thly, Of the Liability of the Acceptor. How discharged.

II. Of Ac- the drawer, or his assignees, discharge the accommodation acceptor, although at the time of executing the release (but not at the time of taking the bill) he knew it to be an accommodation bill; thus where H. accepted a bill for the accommodation of B., the drawer, who indorsed it over as security for a debt, and afterwards became bankrupt, and the indorsee entered into an agreement with the assignees for purchasing part of the bankrupt's property, and for the arrangement of some claims, which he, the indorsee, had upon the estate; and he afterwards gave them a release of all demands, no mention being made during this transaction of the bill, which had been dishonoured; and it appeared that he knew at the time of the agreement, but not when he took the bill, that it was accepted for accommodation; it was held, that nothwithstanding the above release, the acceptor was still liable at the suit of the indorsee(y). If, however, an acceptor, in satisfaction of his liability, indorse another bill, and the holder be guilty of laches with respect to the latter, in not giving notice to such acceptor of the non-payment of the latter bill, he will thereby discharge such acceptor(z); but if the latter merely handed over the second bill as a collateral security, without indorsing it, he would not be discharged from liability on the first bill by any laches of the holder of the second(a).

By alteration.

We have seen that the alteration of the bill in any material respect, or of the acceptance, without the concurrence of the acceptor, and even in some cases with his assent, unless to correct a mistake, will discharge him from liability (b). And where the drawer of a bill accepted payable at B. and Co.'s., after keeping it three or four years, indorsed it to the plaintiffs, erasing the name of B. and Co. without the knowledge of the acceptor; B. and Co. having failed since the acceptance, it was held, that the acceptor was thereby discharged(c). And though there is a case in which it has been supposed to have been decided, that if the holder strike out an acceptance, [*317] which varies from the *tenor of the bill, and substitute an acceptance according to the tenor, he may afterwards restore the acceptance he struck out, and that such acceptance will continue binding (d); yet it has been doubted whether that determination went further than to decide that the alteration in the acceptance, (though it annulled the acceptance, and discharged the acceptor) did not destroy the bill as to the other parties(e).

(y) Harrison v. Courtauld, 3 Bar. & Adol. that day, which the acceptor refused; the bold-

(2) Bridges v. Berry, 3 Taunt. 130, (Chit.

j. 804). (a) Bishop v. Rowe, 3 Maule & S. 362, (Chit. j. 921); Hickling v. Hardy, 7 Taunt. 312; I Moore, 61, (Chit. j. 993).
(b) Ante, 181 to 192; Long v. Moore, 3

Fap. Rep. 155, note. A bill of exchange, after acceptance, had been altered by inserting the word "date" in the place of "sight." The plaintiff wanted to go on the common counts, and offered in evidence another bill drawn upon the defendant for the same amount, but not accepted. Lord Kenyon held, that the plaintiff could not recover against the defendant, for he was liable only by virtue of the instrument, which being vitiated, his liability was at an end.

(c) Tidmarsh v. Grover, 1 Maule & S. 735, (Chit. j. 891); ante, 182.

(d) Price v. Shute, Beawes, s. 222, 1st edit. p. 444; Molloy, B. 2, c. 10, s. 28. A bill was drawn, payable 1st of January, and the drawee accepted it to pay the 1st of March; the holder struck out the 1st of March, and substituted the 1st of January, and sent the bill for payment on

er then struck out the lat of January and restored the 1st of March. And in un action on this bill, the question was, whether these alterations did not destroy the bill, and Pemberton, C. J. ruled that they did not. And see observations

in Paton v. Winter, 1 Taunt. 423, (Chit. j. 763).
(c) Master v. Miller, 4 T. R. 330, (Chit. j. 482, 490) Lord Kenyon, in commenting on the case of Price r. Shute observes, that the books do not say against whom the action was brought, and it could not have been against the acceptor, because his acceptance was struck out by the party himself who brought the action; and he concludes, " that on the person to whom the bill was directed refusing to accept the bill, as it was originally drawn, the holder resorted to the drawer;" however, Buller, J. 4 T. R. 336, says " that he cannot consider this case in any other light than as an action against the acceptor, because the books only state what passed between the holder and the acceptor." See Wilkinson v. Johnson, 5 D. & R. 408; 8 Bar. & Cres. 428, (Chit. j. 1231); and see Paton r. Winter, 1 Taunt. 428, (Chit. j. 768). . 34/2

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If a drawee of a bill has accepted for a particular purpose, and the holder, II. Of Acwith knowledge of the facts, has improperly applied the same for a different ceptances. purpose, he may, after demanding the same, recover the bill or its amount in 7thly, Inan action of detinue or trover, and the verdict may be for the full amount of demnity to And if A. acceptor, the sum payable, subject to reduction on giving up the bill(f). accept a bill for the accommodation of B., and B. discount it with C., his and his Right. banker, who afterwards become bankrupt, owing B. more than the amount of the bill, equity will prevent the assignees of C. suing A cdot (g). of an acceptance for the accommodation of the drawer, it is not unusual to take from such drawers an express written undertaking to provide money for the payment of the bill and to indemnify him, which, when it is for a sum above twenty pounds, must be stamped with an agreement stamp; and an accommodation acceptor of bills to a considerable amount should take an express written engagement not only to pay over to him the amount of the bills before they became due, so as to anticipate the means of payment, but also to indemnify him as well against the principal sum and interest he may be obliged to pay, as against all costs, and extra costs and expenses he may incur at law or in equity in resisting or delaying payment, and all interest on all sums and costs he may be obliged to pay or may incur(h)(1). And where there is any risk of the accommodated party becoming bankrupt, it is advisable also to take a counter bill or note, so as to enable the acceptor to claim under the commission against the drawer(i). But in France, if the drawee has taken an express and particular mode of indemnity, he cannot retain general funds in his hands of a different nature, nor can he retain other goods not intended for sale, though deposited in his hands(k). And in this country, where there is an express contract, a party cannot resort to one that is implied(l).

*In the absence of any express contract, the law implies a contract to in-[*318] And it should seem, that if an agent has accepted bills for the accommodation of his employer, he may in some cases retain money or goods in his hands to discharge it, until the bill be delivered up to him, or he be otherwise sufficiently indemnified (n). Before the 6 Geo. 4, c. 16, s. 50, money lodged after a secret act of bankruptcy, and within two months of the commission, with an accommodation acceptor to take up a bill coming due, could not be retained to indemnify him by paying the bills(0). But the 50th section of that act has altered the law in this respect(p). And where A., an agent, held funds belonging to B., his principal, but had accepted bills drawn by B. to the full amount of them, and B. paid away the bills to his

(f) Evans v. Kymer and another, 1 Bar. & Adol. 528, (Chit. j. 1512); see ante, 250, n. (r).

(g) In re Sikes, 4 Law J. 195, ante, 306,

(h) Unless there be such express stipulations, · extra costs and interest on interest may not be recoverable. In one case, persons who as parties to bills paid the Bank 100,000l. were precluded from recovering 5000l. interest on the money so paid, from the parties whom they had accommodated, but see Rigby v. Macnaniara, 2

Cox, 415. (i) See post, Part II. Ch. VIII. s. iv. Bankruplcy-Of the Proof of Bill under a Commission.

(k) 1 Pardess. 403.

262; and see 1 Pardess. 402, 412, 419.

(n) Fletcher v. Heath, 7 Bar. & C. 517; 1 Man. & Ry. 335, S. C.; Madden r. Kempster, 1 Campb. 12, (Chit. j. 739); Morse r. Wil-liams, 3 Campb. 418; Ex parte Metcalfe, 11 Ves. 407, (Chit. j. 719); and see 1 Pardess. 402.

(o) Kinder v. Butterworth, 6 B. & C. 42; 9 Dow. & Ry. 47, S.C.

(p) And see 10 Bar. & C. 217, and 1 Bar. & Adol. 343.

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⁽¹⁾ Touissant v. Martinnant, 2 T. R. 100. (m) Young v. Hockley, 3 Wils. 346; 7 T. R. 568; 2 T. R. 35; 2 B. & P. 268; Sparkes v. Martindale, 8 East, 593; 3 Wils. 18; 1 Atk.

^{·(1) {} An accommodation acceptor may pay the bill on the last day of grace, before business hours, and immediately sue the drawer to recover an indemnity. Whitwell v. Brigham, 19 Pick. 117. }

II. Of Ac-creditors, who, to relieve A. from the liability, and without the knowledge ceptinces. of B., accepted from A. a composition of 10s. in the pound, and gave him 7thly, In- up the bills, A. then holding funds belonging to B., to the full amount of the demnity to, bills: B. afterwards became bankrupt, and his assignees brought assumpsit and Right for money had and received against A., for the difference between the amount of Accept. of the bills and the composition: it was held, that as B. had been benefitted to the full amount of the bills, the payment of the composition was, as between him and A., a full payment of the bills, and therefore the action was not maintainable (q). And where a sum of money has been lodged with a party to indemnify him against bills of exchange he has accepted for the accommodation of another, an action will not lie against him to recover the money while the bills are outstanding, although the statute of limitations has run So where a person who has funds in his hands belonging to another, or is otherwise indebted to him, accepts a bill for his accommodation, and the drawer afterwards commits an act of bankruptcy, or becomes insolvent, such acceptor may retain the funds or debt until the bill becomes due, as an indomnity against his liability as acceptor(s). And since the 6 Geo. 4, c. 16, s. 52(t), an accommodation acceptor, being in the nature of a surety to the drawer, may prove under the commission against him, although he has been obliged to pay the bill after the act of bankruptcy (u). Where A. and B. having purchased a large quantity of wheat for C. and D., which they kept in their hands for sale, and which was to be paid for at a given time, requested C. and D. to furnish them with acceptances of their friends, to meet the payment of it; and C. and D. obtained the acceptances, under a promise that they would sell the wheat to meet them before they became due; and the price having fallen, the bills were returned to C. and D., who wrote to A. and B. to sell the wheat at some price to take them up; and A. and B. having paid the bills to their bankers, continued to sell the wheat, and [*319] nothing *more was said about them until C. and D. become insolvent several months afterwards, and then A. and B. sued a party to one of them; it was held, that these circumstances were a good defence to the action (z).

> But there is no implied contract of indemnity, unless the bill were really agreed or understood to have been accepted for the accommodation of the drawer or other party; and therefore where W. drew a bill on a third person, to whom he had been sending goods for sale, and who accepted the bill, neither party knowing the state of accounts between them, and it wraed out that W. was at the time indebted to the acceptor, the court held, that this was not to be considered as an accommodation bill within the proper acceptation of that term, and that there was no implied contract of indemnity as to the costs(y).

> A person who accepts bills drawn upon him by a broker or agent, and receives goods of the principal's as an indemnity against such acceptances, will not have a greater right to detain them as such indemnity than the broker or agent had(z); and, therefore, where a broker, having accepted bills for

7th Feb. 1828.

⁽q) Stonehouse v. Read, 5 D. & R. 603; 3 Bar. & Cres. 669, (Chit. j. 1242). (r) Morso v. Williams, 3 Campb. 418, (Chit.

j. 891).
(a) Wilkins v. Casey, 7 T. R. 711, as observed upon in Willis v. Froeman, 12 East, 659, (Chit. j. 802); 11 Ves. 407; Madden v. Kempster, 1 C. mpb. 12, (Chit. j. 739); 1 Pardess.

⁽t) This enactment is in the same terms as the former enactment in the stat. 49 Geo. 3, c. 121, e. 8.

⁽u) Ses post, Part II. Ch. VIII, Bankruster, Ex parts Yonga, 3 Ves. & Bea. 46; 2 Rose, 40, S. C.; Stedman v. Martinaant, 13 East, 427, (Chit. j. S27); Moody v. King, 2 R. & C. 559; 4 Dow. & R. 30; 2 Bing. 47, (Chit. j. 1200).

—(x) Fowler v. Beylis, 1 Law J. 82, K. B.

⁽y) Bignall v. Andrews, 7 Bing. 217. (z) Fletcher v. Heath, 7 Bar. & C. 517; 1 M. & R. 385.

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his principal on the security of goods then in his hands, pledged the goods II. Of Acwith a person who had notice of the agency, but did not inform the princi-ceptances. pal of this transaction, it was held, that under the 6 Geo. 4, c. 94, s. 5, the 7thly, Inbroker could only transfer such right as he had, which was a right to be in-demnity demnified against the bills which he had accepted, and that the principal hav- to, and Right of ing satisfied those bills, was entitled to have back his goods from the pawnee Acceptor. without paying the amount for which they were pledged(z). Where the plaintiffs consigned goods to their factor, and at the same time drew bills upon him for the amount, which he accepted, but which they themselves ultimately paid, and the factors sent them to the defendant, with whom he had general dealings, without intimating that they were the property of a third person, and drew a bill upon him for the amount, which the defendant accepted and paid; after which the factor became insolvent, having before that time apprised the defendant that he had received a notice of countermand of the sale from the plaintiffs, but the defendant afterwards sold the goods; it was held, that the defendant was liable for the value of the goods in an action for money had and received, and that he would have been equally liable had he not known that the goods were the property of the plaintiffs(a).

Where there is an express contract of indemnity, the circumstance of the parties to it having been partners will occasion no difference; therefore, where I., T., and B., were jointly concerned in the sale of certain goods, and I. consigned them to B. who sold them on the joint account; and T. being requested to accept bills for the firm, refused to do so without some security, when B. engaged, if T. paid the bills, to pay him out of the proceeds received for goods already sold, it was held, that T., having accepted and paid the bills, might sue B. for money had and received to his use; for though originally it was a partnership transaction, and in general one partner cannot sue his co-partner, yet in this case by the defendant's express engagement, the proceeds of the goods became separated from the partnership account, and appropriated to the plaintiff's use as soon as he had paid the bills(b). An express contract with an accommodation acceptor to deliver up the bills *or indemnify him, is not proveable under a commission of bankruptcy against [*320] the party making it, and notwithstanding he has obtained his certificate, he may be sued; and where the defendant, before he became bankrupt, on sufficient consideration undertook to pay the balance due on a bill, of which the plaintiff was the acceptor, and he afterwards, by a new undertaking, engaged to deliver up the acceptance to the plaintiff within a month, or to indemnify him against it, and afterwards the defendant became bankrupt, not having paid or indemnified the plaintiff, and the latter was obliged to take up the bill after the defendant had obtained his certificate, it was held, in an action brought for non-performance of the promise, that it was sustainable, because the plaintiff could not have proved in respect of promise or breach under the defendant's commission, either as for a debt not payable at the time of the bankruptcy, or for a contingent debt, or in the character of a surety, and therefore that the bankruptcy and certificate afforded no defence(c).

With respect to the sum recoverable by an accommodation acceptor from the party he accommodated, upon his express implied contract to indemnify, What costs it is reported to have been decided, that he cannot recover the costs or de-ble.

⁽z) See preceding note.
(a) Jackson v. Clarke, 1 Younge & Jerv. Moo. 341, (Chit. j. 1255). (c) Yallop v. Ebers, I Bar. & Adol. 698

7thly, Indemnity to, and Right of Acceptor.

II. Of Ac- fending an action of the suit of a bona fide holder, which he must have known ceptances. was indefensible, because he ought not to have incurred such costs, and should at least have paid after he had been served with the writ(d). But in some of those cases the declaration was only for money paid, when it ought to have been special for not indemnifying, and the payment of costs incurred by A. cannot be money paid for the use of B.(e). And other cases establish, that where there has been an express or implied contract to indemnify, all the costs of the acceptor's resisting the action on the bill are recoverable from the party accommodated (f), even the costs of a bill in equity, or a writ of error; because an accommodation acceptor is not, as between him and the party who promised to provide for the bill, to be expected to be prepared immediately to pay, and he has a right, as against him, to delay the time of payment, in order to prevent an execution against his own property And such acceptor may, it seems, recover the amount of the costs which he has incurred, without proving that he has actually paid them(h). [*321] And where an action *is brought by an accommodation acceptor against the drawer, for not indemnifying him, the court will not permit the defendant to

set up any counter claim(i). An accommodation acceptor, perhaps, like a surety, who pays the creditor, may in equity have a right to the benefit of all instruments and securities given by the principal debtor for payment of that debt(k).

8thly, Liability of a of a third Person. who has not aceptpromised to pay out of Funds when in his Pow-*321]

Besides the liability to pay a bill incurred by the act of accepting it, the Drawee, or drawee or any other person may, by express promise, subject himself to liability to pay the amount out of the money then in his hands, or which he may afterwards receive, and this, although the bill itself may be invalid; as where it has been drawn on an agent, requesting him to pay a sum of money out of ed, but has a particular fund, though we have seen that such instrument will be wholly void as a bill of exchange, because the payment of it depends upon a contingency(l); yet if the drawee promise to pay the amount when he shall receive funds, and the holder, in consequence, retains the bill, the amount, when received, will be recoverable from the drawee as received to his use(m).

> (d) Reach v. Thompson, Mood. & M. 487, 4 Car. & P. 194, (Chit j. 1486); Knight r. Hughes, id. 247; Gillett v. Rippon, id. 406;

> Spurrier v. Elderson, 5 Esp. Rep. 1, S. P.
> (e) Roach v. Thompson, Mood. & M. 487,

&c; 4 Car. & P. 194, (Chit. j. 1486).

(f) Chilton v. Whitlen, 3 Wils. 12, 13, 362, (Chit. j. 378); Ex parte Marshall, 1 Atk. 262, (Chit. j. 333); Taylor v. Higgins, 3 East, 169; Sparkes v. Martindale, 8 East, 593; Exparte Lloyd, 17 Ves. 245; Bignall v. Andrews, 7 Bing. 217; and see Bleaden r. Charles, 5 Moore & P. 14; ante, 81, note (i).

(g) See the same cases, and Ex parte Marshall, 1 Atk. 262, (Chit. j. 533). An extent of the crown was taken out against a surety of a bankrupt, who paid the debt after disputing it for some time, and being put to an expense thereby; and it was urged, that notwithstanding he disputed the payment of a just debt, he should be admitted to prove the expenses of such suit under the commission against the principal; and per Lord Chancellor, "I know of no such distinction, and it would be a very hard case here, as the failing of Garway was in all probability the sole occasion of the difficulties that Hatton was under, and made him incapable of paying the demand of the crown, and as

an extent is both an action and execution in the first instance. Hatton, in his situation, could not be supposed prepared to pay it immediately, and therefore there is no pretence for saying, that his representatives shall be precluded from proving the expenses Hatton was put to in the suit with the crown."

And see Sparkes r. Martindale, 8 East, 598, where the costs of filing a bill, &c. were recovered, it being proved that before the expense had been incurred, the surety gave notice to his principal of the action having been brought, and he refused to defend or indemnify; and as to extra costs, see Sandbach v. Thomas, 1 Stark. Rep. 206; and as to costs in error, see 3 Wils.

(h) Bullock v. Lloyd, 2 Car. & P. 119, (Chit.

j. 1274). (i) Hardcastle v. Netherwood, 5 Bar. & Ald. 93, (Chit. j. 1118).

(k) Dowbiggin v. Bourne, Younge's Rep. Ex. 115.

(1) Ante, 134.

(m) Stevens r. Hill, 5 Esp. Rep. 247, (Chit. j. 716); Kilsby r. Williams, 5 B. & Al. 215; 1 Dow & Ry. 476, (Chit. j. 1249); Ex parte Alderson and another, 1 Madd. 53, 55; 2 Rose, 31; and see Maber v. Massias, 2 Bla. Rep

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a draft on the executor of a debtor, which the executor promised to discharge II. Of Acon his receiving assets, is an equitable assignment of the debt, available ceptances. against assignees in bankruptcy(n). But as a chose in action is not assigna- Liability of ble so as to enable the assignee to sue the original debtor merely by virtue Perty of such assignment, it follows, that unless the third person, who has funds in promising to pay Unhand, expressly promises to pay, and such promise be accepted, the holder of accepted

1072; Ex parte Kirk, 1 Atk. 108; ante, 144, 145; see also Israel v. Douglas, Hen. Bla. 239; 4 Dowl. & R. 7; 3 Bar. & C. 855: 4 Id. 166; 8 Id. 395; 1 Chitty on Pleading, 6th edit. 36,

Stevens v. Hill, 5 Esp. Rep. 247, (Chit. j. 716). Assumpsit, first count against defendant as acceptor of a bill, drawn by Admirul Smith on defendant his agent; the others money counts. The bill had been burnt by accident, and the plaintiff gave parol evidence of it. The defendant was a navy agent, and the bill was drawn by Admiral Smith in this form, 'out of my half-pay which will become due on the 1st January pay to Stevens 15l.' This was brought to Hill, who said he had then no money of Admiral Smith's in his hands, but that he would pay it out of the admiral's money when he received it. Admiral Smith was called, he produced an account furnished by Hill as his agent, containing an account of the money received at different times on the admiral's account, and also of the bills drawn by him on Hill, on which there was a balance of 411. due to Hill. It was objected by Garrow, first, that the plaintiff could not recover on the count on the bill, as it appeared to be not a bill of exchange, it being drawn on a particular fund, and not payable generally, which was necessary to constitute a legal bill. This count was abandoned, and that for money had and received relied upon. To this it was answered, that the engagement of Hill was to pay the bill when he had money of Admiral Smith's in his hands, and that it appeared by the account which was produced by Admiral Smith, that the admiral was the debtor of Hill, and of course that Hill had no funds in his hands out of which only the bill was to be paid. Lord Ellenborough, having taken the papers produced, in which the receipts of mon-ey and entries of bills were put under their re-spective dates, observed, "that though on the eneral balance a sum of 40l. was due to the defendant, yet, by referring to dates, it would appear that Hill, after the day the bill was brought to him for acceptance, and after his declaration as proved, and before he had been called upon to make any payment, had received money of Admiral Smith's more than sufficient to answer the bill, it was therefore his duty to have reserved for that bill, and not to have paid other drafts subsequently drawn; he was not therefore protected by subsequent payments." His lordship added, that "a similar case of an army agent occurred before Lord Kenyon, in which the agent had promised to pay the draft of a person on him, and having neglected to do so, an action was brought; that he was of counsel for the defendant in that cause, and argued that this promise of the agent was nudum pactum, but Lord Kenyon overruled the objection, and held, that it was an appropriation of so much to the use of the holder of the draft, and made him liable on the re- funds when ceipt of any money upon the credit of which it received.
was drawn." De Bernales v. Fuller, cited in

Vas. 14 East, 590, n. (a), 598, S. P.
Kilsby v. Williams, 5 Bar. & Ald. 816; 1
Dow. & Ry. 476, (Chit. j. 1149). Plaintiff paid into his own bankers a check of 2501. drawn upon them by a third person, which they received without any objection; and in the course of the same day the drawer of the check paid in a sum of money, part of which he particularly appropriated, leaving a balance unappropriated of 2371. The bankers, who were then creditors of the drawers to a large amount, wrote on the next morning to the plaintiff, stating that the check was not paid, but that they would keep it in the hope of there being money to pay it, and on that day a further unappropriated balance was paid in, making altogether a sum exceeding the plaintiff's check; it was held, that under these circumstances the plaintiff might maintain an action for money had and received against the bankers, and that the latter, being his agents for the receipt of the money, could not appropriate the balance to the payment either of their own general account against the drawer, or of two checks presented on the same day, but subsequently to that of the plaintiff, and paid by them.

See also Adren v. Rowney, 5 Esp. Rep. 254, S. P., (Chit. j. 717.) If a check drawn upon a person is sent by another to know if it is good, before he will receive it, and such person says it will be honoured, as he is indebted to the drawer of it, though the check turns out to be void, as being post-dated, the holder may nevertheless recover, on proving that the sum due to the drawer was so appropriated. But in these cases the difficulty of establishing the facts in evidence, on account of the instrument not hav-

ing been duly stamped, must be considered.

What not sufficient to raise an implied promise by bankers to pay check in the absence of funds, Boyd v. Emmerson, 4 Nev. & Man. 99; 2 Ad. &. El. 184, S. C.; post, Ch. XI. as to Checks.

(n) Ex parte Alderson and another, 1 Madd. 53, 55; 2 Rose, 13, App. Row became indebted to petitioners in 5251. and being a creditor of the estate of Fish, deceased, gave them a draft on the executors as follows:-" Please to pay Messrs. Alderson, or order, four hundred and seventeen pounds, six shillings, as part of the amount due to me for plumber's work done for the late John Fish, Esq. Jane Row." The petitioners presented the draft to the executor, but he, not being prepared with assets, did not accept it, but retained it, to be paid when there should be funds. The Vice-Chancellor. "This is a good equitable ussignment; the executor bound himself to pay when in possession of asceptances. mising to pay Unacout of Funds when received.

II. Of Ac- the bill cannot sue him(o); and if, before the party offer to pay the bill, it has been returned for non-acceptance (p), the holder has no remedy against So where the drawee proposed to pay, and a dispute arose Liability of such party. Party pro- about a charge for a duplicate protest, and the holder then declined to receive the amount of the bill, without such charge, it was held, that afterwards he cepted Bill could not compel the drawer to pay the bill(q). Where A. gives B. anorder *on his bankers, directing them "to hold over from his private account 4001. to the disposal of B." and the bankers accept the order, such order is nevertheless revocable, and may be countermanded before payment made to [*323] B. or appropriation to his credit(r). So where A., resident abroad, remitted a bill to B., his agent in England, drawn by A. and specially indorsed by him to C., with whom his children were at school, in payment of C.'s account for their board and education; and B. got the bill accepted by the drawees, and sent a letter by post to C. stating that he had received a commission from A. to pay her some money on account of his children, and desired to be informed when and how it should be delivered; and while the bill remained in B.'s hands he received directions from A. to keep it and the proceeds in his hands, and to have a fair investigation into C.'s accounts, and after such investigation to pay her what might be due to her; but no such investigation took place and B. detained the bill; it was held, that C. could not recover the bill in an action of trover(s). And a promise to give a credit at a future time is not like a promise to pay(t)(1).

> (o) Williams v. Everett, 14 East, 582, (Chit. j. 842); Grant v. Austen, 3 Price, 59; Kelly, residing abread, having remitted bills on England to the defendants, his bankers, in London, with directions in the letters inclosing such bills to pay the amount in certain specified proportions to the plaintiff and other creditors of Kelly, who would produce their letters of advice from him on the subject, and desiring the amount paid to each person to be put on their respective bills, and that every bill paid off should be cancelled; and the plaintiff having, before the bills became due. given notice to the defendants that he had received a letter from Kelly, ordering payment of his debt out of that remittance, and having offered them an indemnity if they would hand over one of the bills to him, but the defendants having refused to indorse the bill away, or to act upon the letter, admitting, however, that they had received the direction to apply the money, and the defendants having in fact afterwards received the money on the bills when due, held, that they did not, by the mere act of receiving the bills and afterwards the produce of them, with such directions, and without any assent on their part to the purport of the letter, and still more against their express dissent, bind themselves to the plaintiff so to apply the mon-ey in discharge of his debt due to him from Kelly, and consequently that the plaintiff, between whom and the defendants there was no privity of contract express or implied, but on the contrary it was repudiated, could not maintain his action against the defendants as for money had and received by them to his own use, but that the property in the bills and their produce still continued in the remitter. And see Assignees

-, 1 Salk. 143; Williamson of Holland v. v. Thompson, 16 Ves. 442; Scott r. Porcher, 8 Mer. 652.

Wedlake r. Hurley, 1 Cromp. & J. 33, (Chit. j. 1506). A. remitted to B. a bank-bill indorsed, "Pay to the order of B. under provision for my note in favour of C. payable at the house of B. on 1st Jan. 1830." B. received the proceeds of the bill, and refused to pay them over to C. In an action for money had and received by C. it was held, that B. was not liable to C. because B. had never assented to hold the bill or money to the use of C. And see Brind v. Hampshire, 1 M. & W. S65; poel, 323, note (s).

(p) Stewart v. Fry, 1 Moore, 74; 7 Taunt. 339, (Chit. jun. 984). Where persons received money for the express purpose of taking up a bill of exchange two days after it became due, and upon tendering it to the holders and demanding the bill, found that they had sent it back protested for non-acceptance to the persons who indorsed it to them; held, that such persons having received fresh orders not to pay the bill, were not liable to un action by the holders for money had and received, when, upon the bills being re-procured and tendered to

them, they refused to pay the money.

(q) Anderson r. Heath, 4 M. & Sel. 303, (Chit. j. 936); ante, 299, note (n).

(r) Gibson v. Minet, Ryan & Moo. 68; 1 Car. & P. 247; 9 Moore, 31; 2 Bing. 7, (Chit. j 1208).

(s) Brind r. Hampshire, 1 Moes. & Wels.

(t) Pedder r. Watt, Peake's Rep. Addenda. 41, (Chit j. 547, 555.)

⁽¹⁾ See also as to acceptance, 2 Kent's Com. 2d ed. 82-8.

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In France the holder of a bill for value, whether or not the drawee has ac- II. Of Accepted or promised to pay, may proceed against him in the name of the ceptances. drawer, for the debt or funds, in respect of which the bill was drawn, and with all the rights that the drawer had(u). But in England no such action at law can be supported, unless there has been an acceptance, or an express promise to pay (x). In equity a principal who has consigned goods to his factor, and received his acceptance in advance, may, on failure of factor, restrain him from receiving the proceeds (y).

In France, a third person may become a party to a bill pour aval, which sthly, of is effected by writing his name on the bill under those words, and which billity of a places him in the situation of a second acceptor, but with this difference, that Party who he is entitled to due notice of the dishonour by *the original drawee(z). has guar-But this description of surety is unknown in England, where a series of ac-anteed the Payment. ceptors is not allowed, so that a person to whom a bill is not addressed can[*324]
not, after the drawee has accepted, also become liable as an acceptor, and the only mode of becoming legally responsible for the payment of the bill is by indorsement before that in favour of the holder(a), or by a distinct collateral engagement(b). To sustain the latter, it must be founded on adequate consideration, such as having funds of the drawer or other party to the bill, or be in consideration of forbearance to one of the parties; and if the effect of the contract be to pay the debt of another out of the party's own funds, the consideration must appear on the face of the written undertaking, and all the rules which we have considered essential to the validity of a guarantee on the transfer of bills applies to an engagement of this nature(c). Therefore a written undertaking, "Mr. W. will engage to pay the bill drawn by Pitman

(u) 1 Pardess. 343, 429, 442, 448; ante, 291, note (1).

(x) Ubi supra.

(y) Bryan v. Tomkins and Gosling, Vice-Chancellor's Court, 18th February, 1932, MS. Mr. Knight applied for an injunction to restrain the defendants from receiving the produce of a quantity of malt, which had been consigned to them by the plaintiff. It appeared that Tomkins and Gosling, the defendants, were mult factors residing in London, and that the phintiff, Mr. Bryan, was in the habit of forwarding great quantities of malt to them for the purpose of sale. In order to facilitate any legal proceedings that might occur in the course of these transactions, and to give the defendants the power to sue at law, the plaintiff agreed that all contracts entered into by them on his behalf should be made in their own name; but the debts that became consequently owing were specifically the debts of Bryan. It was constantly the practice in the nunlt trade, when a quantity of malt was consigned to a London factor, for the consignor to draw bills on the factor on the credit of the dealing between them; and these bills were accepted by the factor, and used by the consignor as his own property. This course had been adopted by the plaintiff and the defendants, and several bills thus created had been negotiated by the plaintiff, and had ultimately become the property of Messrs. Bunny and Slocock, bankers at Newbury. Messrs. Tomkins and Gosling had since stopped payment, and being debtors to a considerable amount (in addition to the acceptances of the plaintiff's bills) to Messrs. Slocock and Co., a

deed of composition was entered into by the creditors of the defendants, which Messrs. Slocock and Co. had signed, and by which they had received 10s. in the pound. This arrangement including the bills drawn by the plaintiff, the learned counsel contended, that the debts, which would otherwise have been due to Mr. Bryan, now clearly belonged to the defendants. and that their liability on the acceptances had not been affected by the deed of composition made by Messrs. Slounck and Co. He therefore trusted his Honour would not suffer the defendants to receive the produce of the malt, which was most undoubtedly the property of the plaintiff. Mr. Ching followed on the same side. Mr. Pepys and Mr. Elderton, on the part of the defendants, opposed the application.

The Vice-Chancellor thought the plaintiff had an equity, and granted the injunction.
(2) 1 Pardess. 419 to 422; Pailliet Man. de

Droit Français, 849. (a) Bishop v. Hayward, 4 T. R. 470, (Chit. j. 492); Britton v. Webb, 2 Bar. & Cres. 483; 3 Dow. & Ry. 650, (Chit. j. 1199); ante, 26,

note (o). (b) Jackson v. Hudson, 2 Campb. 447,

(Chit. j. 799); ante, 165.

(c) As to guarantees on transfers, ante, 243, (c) As to guarantees on transiers, aniz, 235, et seq.; and see Phillip v. Astling, 2 Taunt. 206, (Chit. j. 777); Warrington v. Furbor, 8 East, 242; 6 Esp. 89, (Chit. j. 783); Swinyard v. Bowes, 5 Maule & S. 62, (Chit. j. 955); Holbrow v. Wilkins, 1 Bar. & C. 10; 2 Dowl. & R. 59, (Chit. j. 1652); Van Wart v. Wolley, R. 59, (Chit. j. 1652); Van Wart v. Wolley, Chit. 8 Bar. & C. 459; 5 Dowl. & R. 874, (Chit. i.

II. Of Acceptances. in favour of S. S." was held invalid, because it did not state the consideration for which it was given(d). Sometimes even a collateral security by deed is taken(e). In these cases of collateral guarantees, where the parties names are not on the bill, they are not entitled to the strict and immediate notice of dishonour, as a party is who has drawn and indorsed the bill, and unless he has really sustained loss by the want of notice, he continues liable on his guarantee (f).

(d) Saunders v. Wakefield, 4 Bar. & Ald. 595. See other cases Chit. Col. Stat. 373, 374, in notes; Morley v. Boothby, 3 Bing. 107. (e) Murray v. King, 5 Bar. & Ald. 165, (Chit. j. 1119). (f) Warrington v. Furbor, 8 East, 242; 6 Esp. 89, (Chit. j. 733), and other cases, post, Ch. X. s. i. When Notice of Non-payment necessary.

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*CHAPTER VIII.

OF NON-ACCEPTANCE AND THE NECESSARY PRO-CEEDINGS THEREON—PROTEST FOR BETTER SECURITY—AND ACCEPTANCES FOR HON-OUR SUPRA PROTEST.

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	<i>ib</i> . 332 835 336	7. Liability of the Parties on Non-acceptance 8. How Consequences of Laches may be waived ib. II. OF PROTEST FOR BETTER SECU- RITY 332 III. OF ACCEPTANCE SUPRA PROTEST 1. By whom made 2. Mode of accepting supra Protest

I. OF Non-acceptance and Proceedings thereon.

THE inquiry into the conduct which the holder of a bill should pursue on a 1. Of Nonrefusal or neglect to accept at all, or on the offer of a conditional or partial acceptance and Proacceptance, very much resembles and is governed by most of the same rules ceedings as prevail in the case of non-payment of a bill or note, and therefore the read-thereon. er is referred to that part of the work for further information on the sub-It will, however, be advisable to consider all the decisions more immediately relating to notice of non-acceptance, under the above sub-divisions, even at the risk of repetition.

It has already been observed, that a presentment for acceptance is only 1st, When necessary when a bill is made payable within a certain period after sight(b). Notice of Non-ac-If, however, in that or any other case, a bill be in fact, though unnecessarily, ceptance presented, and an acceptance be refused, or only a conditional or partial ac-neccessary ceptance be offered, notice should immediately be given to the persons to consewhom the holder means to resort for payment, or they will, in this country, quences of in general be totally discharged from their respective liabilities, not only on Neglect. the bill of exchange, but the original consideration of it(c)(1); and it is not in that case sufficient for the holder to wait till the time mentioned in the bill for payment has elapsed, and then to give notice of non-acceptance as well as of non-payment (d)(2). And if an indorser should, on a bill over-due be-

(a) See post, Ch. X.

(b) Ante, 272.
(c) Blesard v. Hirst, Burr. 2670, (Chit. j. 2670, (Chit. j. 384); Goodall v. Dolley, 1 T.-R. 712, (Chit. j. 364); Bridges v. Berry, 3 Taunt. 130, (Chit. j. 2670; Goodall v. Dolley, 1 T. R. 712;

j. 804); Racker v. Hiller, 16 East, 43; 3

(2) The holder of a bill ought to present it for acceptance within a reasonable time, whether

^{(1) {} Higgins v. Morrison's Ex'r, 4 Dana, 102. Callum v. Carey, 9 Porter, 131. Riggs v. M'Donald, I Ala. Rep. (N. S.) 641. }

ceedings thereon.

1st, When Notice of Non-acceptance neccessary or not, and Consequences of Neglect. [*326]

. Of Non- ing returned to him, pay the same under ignorance of the refusal to accept, acceptance and of the neglect of the holder, he will not be able to recover from the prior parties, who had previously been *discharged by such laches(e). Perhaps there may be stronger reason for requiring prompt notice of non-acceptance than of non-payment, because, as regards non-payment, the drawer ought to have supplied the drawee with funds before the bill is at maturity; but he might be justified in drawing before effects had actually reached the drawee, and if the latter should refuse to accept, the drawer ought to be informed thereof, in order that he may be enabled to stop such effects in transitu. The law in France is different, for there a protest for non-acceptance is only requisite when a presentment for acceptance was essential, as in case of bills payable after sight, and in other cases, although there has been a refusal to accept, the holder may or not at his election protest and give notice(f). In America, if on the day of presentment acceptance be refused, but on the next day the drawee alter his mind and accept, but no notice of the refusal to accept be given, it has been held that the other parties are discharged(g). But we have seen, that a bona fide holder, to whom a bill has been transferred after refusal to accept, is not affected by the neglect of any previous holder to give notice of that fact(h). And if the drawer and drawee(i), or one of several drawees in partnership (j), is the same person, notice is not necessary, it being considered he must have knowledge of his own refusal to And if the bill were given on a wrong stamp, the neglect to present it for acceptance, or give notice of the refusal, would not prejudice the vendor of the goods, in payment of which such improperly stamped bill had been given, and he may, notwithstanding his laches, sue for the price (k); and if the bill were given only as a collateral security, and the party delivering it were no party upon it, he will not in such case be discharged from his original liability by the laches of the holder, unless he was really prejudiced And, as no laches can be imputed to the Crown, if a by the omission (l). bill be seized under an extent before it is due, the neglect of the officer of the Crown to give notice of the dishonour will not discharge the drawer or indorsers(m)(1).

> Anon. 1 Vent. 45; Poth. pl. 133; Dagglish v. Weatherby, 2 Bla. Rep. 747, (Chit. j. 382); per Lord Ellenborough in Orr v. Magennis, 7 East, 362; 2 Smith, 328, (Chit. j. 726); 3 & 4 Anne, c. 9, s. 7.

(e) Roscoe v. Hardy, 12 East, 434; 2 Camp. 458, (Chit. j. 801).

(f) 1 Pardess. 404. (g) Mitchell v. Degrand, 1 Mason, 176;

Bayl. 160, American edit. (h) Ante, 214, 215; Selw. 9th edit. 330.

(i) Roach v. Ostler, 1 Man. & R. 120, (Chit. j. 1359).

(j) Porthouse v. Peake, 1 Campb. 82, (Chit. j. 741).

(k) Ante, 124; Wilson v. Vysar, 4 Taunt. 218, (Chit. j. 860); Cundy v. Marriott, 1 B. & Adol. 696, (Chit. j. 1522).

(1) See more fully this, post, Ch. X. s. i. Presentment for Payment-When necessary. (m) West on Extents, 28, 29.

such bill was payable at sight or in any other manner; what is reasonable time, depends on the particular circumstances of the case, and it is for the jury to determine whether laches is impa-

is the holder. Fernandez v. Lewis, 1 M'Cord, 322.

If a bill be payable after sight it must be presented within a reasonable time for acceptance. and immediate notice of non-acceptance given to the drawer: it is not sufficient to give notice of the non-acceptance and non-payment together after the day of payment has passed. Austin v. Rodman, 1 Hawks, 195. See ante, 163. See also, Van Wart v. Holly, 1 Wend, 219.

In Pennsylvania it is held, that in an action by an indorsee against the indorser of a foreign bill of exchange which has been protested for non-acceptance, it is not necessary to prove noice of the non-acceptance of the bill. Reed v. Adams, 6 Serg. & Rawle, 35. See Bank of Washing.

ton v. Triplett, I Peters, 25, 35.

(1) It seems that in the United States, the principle expressed in the text, has not been adopted. The contrary doctrine is very clearly to be inferred from the decision in the case of the United States v. Barker: wherein it was held, that whenever the United States, by their lawfully

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The reason why the law in general requires the holder to give due notice I. Of Nonof non-acceptance by the drawee is, that the drawer may forthwith withdraw acceptance from the possession of the drawee such effects as he may already have, or ceedings may stop those which he is in course of receiving, and that the drawer and thereon. indorsers may respectively take the necessary measures to obtain payment 1st, When from the parties respectively liable to them; and if notice be not given, it is Notice a presumption of law that the drawer and indorsers are prejudiced by the Non-acomission; and it is on this principle that notice of non-acceptance and non-ceptance payment are required (n).

From some cases to be found in the books (o), it appears to have *been for- Consemerly holden, that it was incumbent on the person insisting on the want of no-quences of the holder. Neglect. tice, to prove that he had really sustained damage by the laches of the holder; [*327] but it has been settled by later decisions, that such damage is to be presumed, and that the only excuse for the omission is the proof of the total want of effects in the hands of the drawee (p); and it is always presumed, till the contrary appears, that the drawer of a bill has effects in the drawee's hands, and that the indorser or assignor has given value for it, and consequently that each has sustained loss by the holder's neglect to give notice (q), by which the chance of obtaining satisfaction from the parties liable to them must necessarily have been rendered more precarious.

But if the drawer of a bill, from the time of making it to the time when it When was due and presented for acceptance, had no effects in the hands of the draw- Want of Effects exee or acceptor, and had no right upon any other ground to expect that the cuses Negbill would be accepted, and the bill was drawn for the accommodation of lect to give such drawer, he is $prim\hat{a}$ facie not entitled to notice of the dishonour(r)(1), Non-ac-

Notice of ceptance.

(n) Whitfield v. Savage, 2 Bos. & Pul. 280, 281, (Chit. j. 630); Orr v. Magennis, 7 East, 362; 2 Smith, 328, (Chit. j. 726); Claridge v. Dalton, 4 Maule & S. 226, (Chit. j. 934); Corry v. Scott, 3 B. & Ald. 621, (Chit. j. 1081).

(o) Mogadara v. Holt, 1 Show. 318; 12 Mod. 15, (Chit. j. 182, 133); Butler v. Play, 1 Mod. 27, (Chit. j. 161); Sarsfield v. Weatherby, Comb. 152, (Chit. j. 172, 173); Bickerdike r. Bolman, 1 T. R. 406, (Chit. j. 435); Vin. Abr. tit. Bills of Exchange, M.; Poth. pl. 157, 159. And quære as to the drawer, 1 Pardess. 458, 459; Postlethw. tit. "Bills of Exchange," 16, 17; Whitfield v. Savage, 2

B. & P. 280, 281, (Chit. j. 630).

(p) Per Abbott, C. J. in Hill v. Heap, Dowl. & Ry. N. P. C. 59; Dennis v. Morris, 3 Esp.

Rep. 153, (Chit. j. 626).

(q) Per Buller, J. in Bickerdike v. Bollman, 1 T. R. 406, 409, (Chit. j. 435); Tatlock v. Harris, 3 T. R.82, (Chit. j. 453); Anon. Ventr. 45; Nicholson v. Gouthit, 2 Hen. Bla. 612, (Chit. j. 556); Mogadara v. Holt, 1 Show. 317; 12 Mod. 15, (Chit. j. 182).

(r) Cory v. Scott, 3 B. & Ald. 619, (Chit. 1081); Norton v. Pickering, 8 B. & C. 610; 3 M. & R. 23, S. C.; Claridge v. Dalton, 4

Maule & S. 229; Legge v. Thorpe, 2 Campb. 310; 12 East, 171, (Chit. j. 783); where the rule, principle, and inconveniences are stated: and see Walwyn v. St. Quintin, 1 Bos. & Pul. and see Wallyn D. St. Quintia, I Bos. & Pul. 654, 655, (Chit. j. 578); Clegg v. Cotton, 3 Bos. & Pul. 241, 242, (Chit. j. 657); Gale v. Walsh, 5 T. R. 239, (Chit. j. 506); Poth. pl. 157; Bickerdike v. Bollman, 1 T. R. 405, (Chit. j. 435); Goodall v. Dolley, id. 712, (Chit. j. 440); Rogers v. Stephens, 2 T. R. 712 (Chit. j. 440); Rogers v. Stephens, 2 T. R. (Chit. j. 440); Rogers v. Stephens, 2 1. 14.
713, (Chit. j. 416); Nicholson v. Gouthit, 2
Hen. Bla. 610, (Chit. j. 556); Staples v. Okines,
1 Esp. R. 333, (Chit. j. 554); Wilkes v. Jacks,
Peake's C. N. P. 202. The progress of the cases on this subject is also stated in Brown v. Maffey, 15 East, 216, (Chit. j. 852). See also Pailliett Man. 843.

Legge v. Thorpe, 12 East, Rep. 171; 2 Camp. 310, (Chit. j. 783). Indorsee against drawer of a foreign bill, drawn upon Wyatt, payable one month after sight, of which acceptance had been refused. The declaration negatived effects in the hands of the drawee, or any consideration for the bill. It appeared at the trial that the defendant had no effects in Wyatt's hands, and that the latter had therefore refused acceptance; but that Wyatt was one of the executors of Weeks, and that Weeks

authorized agents, become the holder of a bill of exchange, it is bound to give strict notice of dis-honour, for the purpose of charging the indorser. 12 Wheat. 559.

(1) A drawer of a bill, having no funds in the hands of the acceptor, or having withdrawn them without giving notice of the bill, and intercepting all other funds before they reach the acceptor, is not entitled to strict notice of non-payment. Valk v. Simmons, 4 Mason, 113.

ceedings thereon.

let. When Notice of Non-acceptance necessary or not, and ment(u).

Conse-Neglect. Want of Effects.

I. Of Non- nor can he object, in such case, that a foreign bill should have been protestacceptance ed(s). In this case, the drawer being himself the real debtor, acquires no and Proright of action against the acceptor by paying the bill, and suffers no injury from want of notice of non-acceptance or non-payment, consequently the laches of the holder affords him no defence(t). And therefore where the drawer had supplied the drawee with goods on credit, which did not elapse until after the bill would fall due, and the drawer had no right to draw the bill, it was held that he was not discharged by the want of notice of non-pay-

It is, however, no excuse for not giving notice to the indorser of a bill, quences of that the drawee had no effects of the drawer(x)(1). And although no *consideration passed between the payee and drawer of a bill of exchange, it is not to be considered an accommodation bill as to the latter, if there was a [*328] valuable consideration as between the payee and the acceptor (y)(2). Where A. and Co. resident in America, employed B., resident at Birmingham in this country, to purchase and ship goods for them, and on account of such purchases they sent to B. a bill drawn by C. in America on D. in London, but did not indorse it; B. employed his bankers to present the bill for acceptance, and D. refused to accept, but of this the bankers did not give notice until the day of payment, when it was again presented and dishonoured, and before the bill arrived in this country C. became bankrupt, and he had not, either when the bill was drawn, or at any time before it became due, any funds in the hands of D., the drawee; in an action by B. against the bankers, for negligence, in not giving him notice of the non-acceptance, it was held, that inasmuch as A. and Co. not having indorsed the bill, were not entitled to notice of dishonour, and still remained liable to B. for the price of the goods sent to them, and the drawer was not entitled to notice as he had no funds in the hands of the drawee; B. could not recover the whole amount of

> executors had desired the defendant to employ the payee of this bill to do some carpenter's work on Weeks' property, and the defendant drew this bill on Wyatt for the payment of the payee. Wyatt denied that he had assets to pay the bill. The only question was, whether a protest for non-acceptance were necessary; Lord Ellenborough thought not; and a verdict was given for the plaintiff; but the point was reserved, and on a rule nisi for nonsuit and cause shewn, the whole court held that this case was governed by those of Bickerdike v. Bollman, 1 T. R. 405, (Chit. j. 435); and Rogers v. Stephens, 2 T. R. 713, (Chit. j. 446);

and discharged the rule.

(*) Legge v. Thorpe, 2 Campb. 310; 12 East, 171, (Chit. j. 783); see the preceding

(t) Per Chambre, J. in Leach v. Hewitt, 4 Taunt. 733, (Chit. j. 881); 1 Pardens. 458, 459, S. P.

(u) Claridge v. Dalton. 4 Maule & S. 226;

(Chit. j. 984).
(x) Wilkes r. Jacks, Peake R. 202. The French law is the same; 1 Pardess. 459.

(y) Scott v. Lifford, 1 Camp. 246; 9 East,

347, (Chit. j. 747, 749).

(2) It has been decided in Virginia, that notice of non-acceptance and non-payment need not be given to the indorser of a bill, if it was drawn and indorsed for the accommodation of the drawer, with the knowledge of the indorser, there being no expectation that the bill would be

duly honored. Farmer's Bank v. Vanmeter, 4 Rand. 553.

Where A. and B. were indorsers of a bill drawn for the accommodation of C., and A. being the first indorser paid it, and afterwards received the note of C., indorsed by B. for one half the amount, it was held, that this note was not given for the accommodation of A. and that he might recover on B.'s indorsement. Hatcher v. McMorine, 3 Devereux's Rep. 228.

Where the maker and owner of a note which he gets indersed by the payoes, transfers it 10 a third person, it becomes an accommodation paper, in which the inderser is merely a surety. Leckie v. Scott, 10 Curry's Louis. Rep. 412.

⁽¹⁾ Though there be no funds in the hands of the drawec of a bill of exchange; yet if the bill be drawn under such circumstances as might induce the drawer to entertain a reasonable expectation that the bill would be accepted and paid, he is entitled to notice. Campbell v. Pettengill, 7 Greenleaf 's Rep. 126.

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the bill, but only such damages as he had actually sustained in consequence I. Of Nonfor having been delayed in the pursuit of his remedy against the drawer(z).

If at any time between the drawing of the bill and its presentment and disceedings honour the drawee had some effects of the drawer in his hands, though insuffi-thereon. cient to pay the amount, he will nevertheless be entitled to notice of the dis-honour, and the laches of the holder will discharge him from liability, for Notice of this case differs from that where there are no effects whatever of the drawer Non-acin the hands of the drawee at the time, because the drawer must then know ceptance that he is drawing upon accommodation, and without any reasonable expector not, and tation that the bill will be honoured; but if he have effects at the time, it Consewould be dangerous and inconvenient, merely on account of the shifting of a quences of balance, to hold notice not to be necessary; it would be introducing a num-Want of ber of collateral issues upon every case upon a bill of exchange, to ex- Effects. amine how the accounts stood between the drawer and the drawee from the time the bill was drawn down to the time when it was dishonoured(a). For the same reason, if the drawer of a bill of exchange, when it is presented for acceptance, has effects in the *hands of the drawees, though he is indebted [*329] to them in a much larger amount, and they without his privity bave appropriated the effects in their hands to the satisfaction of their debt, he is entitled to notice of the dishonour(b). Nor is actual value in the hands of the drawee at the time of drawing essentially necessary to entitle the drawer to notice of dishonour of the bill, for circumstances may exist which would give a drawer good ground to consider he had a right to draw a bill upon his correspondent; as, where he had consigned effects to him, to answer the bill, though

(z) Van Wart v. Woolley, 3 B. & C. 439; 5 Dow. & Ry. 374; Mood. & M. 520, (Chit.

j. 1235). (a) Orr v. Magennis, 7 East Rep. 359; 3 Smith, 328, (Chit. j. 726). In an action by the payees against the drawer of a foreign bill, payable at ninety days after sight, the declaration averred presentment for acceptance and refusal, presentment for payment and refusal, and protest for non-payment; it then averred that at the time of making the bill, and from thence until presentment for payment, the defendant had no effects in the hands of the drawers. At the trial it appeared, that at the time of drawing the bill the defendant had effects in the hands of the drawees, but to what amount did not appear; but that when the bill was presented for acceptance, and thence until presentment for payment he had not any. The bill was only noted for non-acceptance, but was protested for non-payment, no notice of non-acceptance was given to the defendant. The plaintiffs had paid the amount to an indorsee. They were nonsuited for want of proving protest for and and notice of non-acceptance, On motion to set aside the nonsuit, Bickerdike v. Bollman and other cases were cited, to show that no notice, and therefore no protest was necessary. But Lord Ellenborough said, "that that case went on the ground that there were no effects in the hands of the drawee at the time when the bill was drawn, and the other cases followed on the same ground, but that no case had extended the exemption to cases where the drawee had effects of the drawer's in his hands at the time when the bill was drawn, though the balance might vary afterwards, and be turned into the opposite scale." Rule refused.

Hammond v. Dufrene, 8 Campb. 145, (Chit. j. 848); Thackray v. Blackett, 3 Campb. 164, (Chit. j. 849); but see the reasoning in 1 Pardess. 459, 460.

(b) Blackham v. Doren, 2 Campb. 503, (Ch. j. 818). This was an action against the drawer of a bill for 2501. payable after sight, of which acceptance had been refused; and to excuse the want of notice of non-acceptance, it was proved, that when the bill was presented, though the drawer had effects in the hands of the drawee to the amount of 1500l., yet that he owed them 10,000l. or 11,000l., and that they had approprinted the effects to go in satisfaction of this debt; this appropriation, however, was without the defendant's privity. Lord Ellenborough said, " If a man draws upon a house, with whom he has no account, he knows that the bill will not be accepted; he can suffer no injury from want of notice of its dishonour, and therefore he is not entitled to such notice; but the case is quite otherwise where the drawer has a fluctuuting balance in the hands of the drawee; there notice is peculiarly requisite. Without this, how can the drawer know that credit has been refused to him, and that his bill has been dishonoured? It is said here, that the effects in the hands of the drawees were all appropriated to discharge their own debt; but that appropriation should appear by writing, and the defendant should be a party to it. I wish that notice had never been dispensed with, then we should not have been troubled with investigating accounts between drawer and drawee. I certainly will not relax the rule still farther, which I should do if I were to hold that notice was unnecessary in the present case." Plaintiff nonand Proceedings thereon.

1st, When Notice of Non-acceptance Conse-Neglect. Want of Effects.

I. Of Non- they may not have come to him at the time when the bill was presented for acceptance acceptance, to which may be added the case of bills drawn in respect of other fair mercantile agreements(c). And therefore, where the drawer had sold and shipped goods to the drawee, and drew the bill before they had arrived, and the drawee not having received the bill of lading, refused to accept the goods because they were damaged, and who refused to accept the bill, it was decided that the drawer was discharged for want of notice(d). But if the vendor of goods sold upon credit draws upon the purchaser a bill, necessary which would be due long before the expiration of the stipulated credit, he is not entitled to notice of the dishonour, because he had no right to expect quences of that the drawee would honour the bill(e). Where the drawer of a bill of exchange had no effects *in the hands of the acceptor from the time of drawing the bill till it became due, but the acceptor had received from the *330] drawer, prior to this bill on which the action was brought, acceptances of the drawer, upon which he had raised money, some of which acceptances had been returned dishonoured and others were outstanding, it was held that the drawer was entitled to notice or dishonour of the bill(f). And it should seem, that although the drawer or other party may not have advanced money or goods to the drawee, yet if he has deposited short bills or policies, or even title-deeds in his hands, or has accepted cross-bills, and had reasonable ground to expect that the drawee would accept or pay in respect thereof, he is entitled to notice of the dishonour(g).

The death(h), bankruptcy, or known insolvency (i) of the drawee or his Death, **Bankrupt**-being in prison(k), constitute no excuses, either at law or in equity, for the cy, &c. no excuse.

(c) Per Lord Ellenborough, in Leggo v. Thorpe, 12 East, 175; 2 Camp. 310, (Chit j. 783); per Eyre, C. J. in Walwyn e. St. Quintin, 1 Bos. & Pul. 654; 2 Esp. R. 515, (Chit. j. 579); Ex parte Wilson, 11 Ves. 411, (Chit. j. 720).

(d) Rucker v. Hillop, 16 East, 43; 3 Camp. 217, 334, (Chit. j. 861). Where one draws a bill of exchange with a bond fide reasonable expectation of having assets in the hands of the drawee, as by having shipped goods on his account, which were on their way to the drawec. but without the bill of lading or invoice, the drawer is entitled to notice of the dishonour, though in fact the goods had not come to the hands of the drawee at the time when the bill was presented for acceptance, or he had rejected them, and he returned it, marked "no effects." Lord Ellenborough, C. J. said, When the drawer draws his bill on the bon't fide expectation of assets in the hands of the drawee to answer it, it would be carrying the case of Bickerdike v. Bollman further than has ever been done, if he were not at all events entitled to notice of the dishonour. And I know the opinion of my Lord Chancellor to be, that the doctrine of that case ought not to be pushed further. The case is very different where the party knows that he has no right to draw the bill. There are many occasions where a drawee may be justified in refusing, from motives of prudence, to accept a bill, on which notice ought nevertheless to be given to the drawer; and if we were to extend the exception further, it would come at last to a general dispensation with notice of the dishonour in all cases where the drawee had no

assets in hand at the very time of presenting the

bill; and thus get rid of the general rule requiring notice, than which nothing is more convenient in the commercial world. A bont fide reasonable expectation of assets in the hands of the drawce has been several times held to be sufficient to entitle the drawer to notice of the dishonour, though such expectation may ulti-mately have failed to be realized."

(e) Claridge v. Dalton, 4 Maule & S. 226,

(Chit. j. 934).

(f) Spooner v. Gardiner, Ryan & Mood. C.
N. P. 84, (Chit. j. 1211).

(g) In Walwyn v. St. Quintin, 2 Esp. R. 515, (Chit. j. 578), Eyre, C. J. left it to the jury to say whether title deeds were effects or not, and they found in the affirmative. Sec 1 Bos. & Pul. 652, S. C. and see Ex parte Heath, 2 Ves. & B. 240; 2 Rose, 141, (Chit. j. 894).

(h) Poth. pl 146; 1 Pardess. 450. (a) Form pr 140; I Pardess. 400.
(i) Russell v. Langstaffe, Dougl. 497, 516, (Chit. j. 415); Esdaile r. Sowerby, Il East, 114, (Chit. j. 767); Ex parte Wilson, Il Ves. 412, (Chit. j. 720); Whitfield r. Savage, 2 Bos. & Pul. 279, (Chit. j. 630); Thackray r. Blackett, 3 Campb. 165, (Chit. j. 349); Boultbee r. Stubbs, 18 Ves. 21; Rhode r. Proctor, 4 B. & C. 517; 6 Dow. & Rv. 610 (Chit. j. 1269); C. 517; 6 Dow. & Ry. 610, (Chit. j. 1269); 1 Pardess. 450; 6 B. & C. 382; Ex parte Johnson, 1 Mont. & Ayr. 622; 3 Dea. & Chit. 433. S. C; Ex parte Bignold, 2 Mont. & Ayr. 633; 1 Dea. 712, S. C. See several of these cases in the notes, post, Ch. X. s. i. as to Notice of Nonpayment, acc. Ex parte Smith, 3 Bro. C. C. 1, (Chit. j. 457), contra.

(k) Per Lord Alvanley, C. J. in Haynes r. Birks, 3 B. & P. 601, (Chit. j. 690).

neglect to give due notice of non-acceptance or non-payment; because many I. Of Nonmeans may remain of obtaining payment by the assistance of friends or oth-acceptance erwise, of which it is reasonable that the drawer and indorsers should have ceedings the opportunity of availing themselves, and it is not competent to the holders thereon to shew that the delay in giving notice has not in fact been prejudiced(1).

A neglect to give immediate notice may also be excused by some other Motice of Thus, the absconding or absence of the drawer or indorser Non-acmay excuse the neglect to advise him(m); and the sudden illness or death of ceptance the holder or his agent, or other accident(n), may constitute an excuse for $\frac{necessary}{or not, and}$ the want of a regular notice to any of the parties, provided it be given as Conse-

soon as possible after the impediment is removed (o).

The holder of a bill of exchange is also excused for not giving notice in Neglect. the usual time, by the day on which he should regularly have given notice being a public festival, on which he is strictly forbidden by his religion to attend to any secular affairs (p); and Good Friday or Christmas-day, Fast and Thanksgiving-days, are provided *for by express enactments(q). So he is $\lceil *331 \rceil$ excused if the political state of a country renders it impossible to give it (r).

If the drawee has offered a conditional or partial acceptance, or an accept- Notice in ance at an extended period, or if any other person than the drawee, &c. case of Conditionoffer an absolute acceptance, although the holder may be willing to receive al Acceptsuch offer, he must, if he intend to resort ultimately to the drawer and indors- unce ers, give each of them notice of such offer(s), and this before he accept the same(t); and in such case if the holder will have the power of availing himself of it, he should state in his notice the terms of the acceptance offered. for a notice generally of non-acceptance would, if made with full knowledge of the facts, shew that he did not acquiesce in the offer, and deprive him of the benefit of it(u). But it is said, that a neglect to give notice, where a conditional acceptance has been taken, is done away by the completion of those conditions before the bill becomes payable; and a neglect where there is an acceptance as to a part, and a refusal as to the residue, only discharges the persons entitled to notice as to the residue (x).

In general, if the parties to a bill or note have been discharged from liability by the neglect to give due notice of non-acceptance, they continue so discharged; and if an indorser, in ignorance of such laches, should pay the holder, he will not be able to recover from a prior indorser, who has been thereby previously discharged (y). But if an agent be directed to purchase

(1) Esdaile r. Sowerby, 11 East, 114, (Chit. j. 767); Russell v. Langstaffe, Dougl. 515; Bickerdike v. Bollman, 1 T. R. 408, (Chit. j. 435); De Berdt v. Atkinson, 2 Hen. Bla. 336, (Chit. j. 526); Nicholson v. Gouthit, id. 612, (Chit. j. 556); and admitted by the court in Warrington v. Furbor, 8 East, 245, 246, 247, (Chit. j. 733); Cory v. Scott, 3 Bar. & Ald. 623, (Chit. j. 1031); and see reasons in Rhode v. Proctor, 4 B. & C. 517; 6 D. & R. 610, (Chit. j. 1269). See also Terry v. Parker, 1 Nev. & P. 752; 6 Ad. & El. 502, S. C.; post, Ch. IX. X.

(m) Walwyn v. St. Quintin, 2 Esp. Rep. 516; 1 Bos. & Pul. 652, (Chit. j. 578); Bul. N. P. 273, 274; and see Crosse v. Smith, 1 Maule & S. 545, (Chit. j. 886); Bowes v. Howe, 5 Taunt. 30, (Chit. j. 892).
(n) See note, post, Ch. X. s. i. Non-pay-

ment.

(o) Turner v. Leach, sittings at Guildhall after Hilary Term, 1818, cor. Lord Ellenbo-

rough. A case was reserved upon another point. See 4 Bar. & Ald. 451, (Chit. j. 1108); and see Smith v. Mullett, 2 Campb. 208, (Chit. j. 775), post, Ch. X. s. i.

(p) Lindo v. Unsworth, 2 Campb. 602, (Chit. j. 824).

(q) 39 & 40 Geo. 3, c. 42; 7 & 8 Geo. 4, c. 15; post, Ch. X. s. i. Time of giving No-

tice of Non-payment.
(r) Patience v. Townley, 2 Smith's Rep. 223, (Chit. j. 714).

(s) Marius, 4th edit. 21; Beawes, § 221; 2d edit. 445; Bayl. 5th edit. 253; ante, 300; Roscoe, 195.

(t) Ante, 300.

(u) Sproat v. Matthews, 1 T. R. 182, (Chit. 433); ante, 301, note (d); Roscoe, 195. (x) Bayl. 5th ed. 254; Roscoe, 195.

(y) Roscoe v. Hardy, 12 East, 434; 2 Campb. 458, (Chit. j. 801); Turner v. Leach, 4 B. & Ald 454, (Chit. j. 1108).

and Proceedings thereon.

Notice of Non-acceptance necessary Consequences of Neglect. [*332]

I. Of Non- goods for his principal and to draw upon the latter for the amount, and the acceptance agent accordingly draw a bill upon his principal in favour of the seller, which the principal refuses to accept, the want of notice to the drawer of the dishonour of the bill, from the holder, furnishes no answer to an action by the agent, who has been obliged to pay the bill, against his principal, founded on 1st. When the contract of indemnity (z). And we have seen, that where the parties have been discharged by neglect to give notice of non-acceptance, a subsequent indorsee, who obtained the bill before it was due, in ignorance of the necessary refusal to accept, may recover from all the parties(a). Some Chapter X. Section I. As to Proceedings on Non-payment. See further, post,

*If an agent neglect his duty to give due notice of non-acceptance, though he will not be absolutely and necessarily liable to pay the full amount of the bill, yet he will be liable to a special action on the case for his negligence; and though the holder may ultimately recover from other parties the full amount of the bill and interest, yet the agent will be liable to pay some damages for the breach of his implied contract, and for the delay and trouble he

has thereby occasioned (b)(1).

The conduct which the holder must adopt on the dishonour of a foreign

2dly, When Protest for Non-acceptance requisite, and Mode of protesting.

(z) Huntley v. Sanderson, 1 Crom. & Mee. 467; 3 Tyrw. 469, S. C. S. & Co., the owners of a ship, of which H. was captain, despatched the latter to Miramichi, with instructions to purchase a cargo of timber, and draw upon them for the amount. H. proceeded to Miramichi accordingly, and there purchased some timber one L. for 154l. 11s. 11d. and drew a bill upon S. & Co. for the amount at sixty days sight, in favour of the seller or his order. The bill was dated 4 September, 1826, and on the 21st November it was duly presented for acceptance and protested for non-acceptance. The plaintiff was in Liverpool with the ship under his command from October, 1826, until April, 1827. It was not proved that the plaintiff received any notice of the dishonour of the bill, even from the then holder or from the defendants who had got the cargo. In 1832 the plaintiff was arrested upon this bill at Mirami-

chi and paid it, in order to release himself from In a special action of assumpsit brought by the plaintiffs against the defendants for not paying the bill, not accepting it, and for not indemnifying the plaintiff from all loss, &c., sustained by him from having drawn the bill, it was held first, that under these circumstances the defendants could not insist on the want of proof of notice to the plaintiff of the dishonour of the bill, as a defence to the action; secondly, that a promise to indemnify was the promise which the law would in this case imply; and as there was no damnification till 1532, the

statute of limitations did not apply.

(a) O'Keefe v. Dunn, 6 Taunt. 305; 1

Marsh. 618; 5 Maule & S. 292, (Chit. j. 937); affirmed on error, ante, 215, note (r)

(b) Van Wart v. Wooley, Mood. & M. 520; 3 B. & C. 439; 5 Dow. & R. 374, (Chit. j. 1235).

(1) A bank, where a note is left for collection, is chargeable either in case or assumpsit for neglecting the proper measures to charge indorsers. M'Kinster r. Bank of Utica, 9 Wend. Rep.

Where A. was the holder of a negotiable note, and turned it out to B. as collateral security for the payment of a debt due to the latter, who lest the note at a bank for collection, and the bank neglected to give notice of non-payment to the indorsers, whereby the money specified in the note was lost to A. who was obliged to pay its amount to B. it was held, that an action lay against the bank at the suit of A., although he never had any intercourse with the bank in relation to the note. Ib.

So also it was held that the suit was properly brought in the name of A., although it appeared that he had assigned his interest in the note to third persons. Ib. And see 11 Wend. Rep. 473, where the decision of the Supreme Court in this case is affirmed by the Court of Errors.

Il seems that in such a case an action lies at the suit of any person beneficially interested in having the duty performed. Bank of Utica v. M'Kinster, 11 Wend. 473.

The agent or broker with whom a bill payable a given number of days after date is left for collection is bound to present the bill forthwith, and if not accepted, to give notice to his principal; and if he neglects to do so, he becomes responsible in damages. Allen v. Suydam, 17 Wend. 368. Where an agent had neglected to make presentment for seventeen days, he was held liable in damages, to the full amount of the bill, although it appeared that the drawees had no funds, that they were directed by the drawer not to accept, and that the lateness of the presentment had no influence upon the non-acceptance; it appearing that subsequent to the drawing of the bill in question, other bills of the same drawer had been accepted by the same drawers, and paid, or secured to be paid. Ibid. >

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bill differs materially from that which he must pursue in the case of an inland I. Of Nonbill. Whenever notice of non-acceptance of a foreign bill is necessary, a acceptance bill. Whenever notice of non-acceptance of a joreign will is necessary, a and Proprotest(c) must also be made, which, though mere matter of form, is, by the ceedings custom of merchants, indispensably necessary, and cannot be supplied by thereon. witnesses or oath of the party, or in any other way (d), and, as it is said, is part of the constitution of a foreign bill of exchange; and the mere production When of this protest attested by a notary public, without proof of the signature, or Protest for affixing of the seal (though not so if made here(e)), will, in the case of a coptance bill payable and protested out of this country, be evidence of the dishonour requisite, of the bill(f), and to it all foreign courts give credit(g); and it cannot be and Mode supplied by mere proof of noting for non-acceptance and a subsequent pro- ing. test for non-payment. But proof that the drawer had no effects in the hands of the drawee at the time of drawing the bill, or at any time afterwards, will in this country excuse the want of a protest, and prevent the drawer from being discharged(h). So a subsequent promise by the drawer to pay the bill may preclude him from availing himself of the want of a protest(i). it is not advisable to omit protesting a foreign bill, because in foreign courts they are not always governed by the exceptions allowed in our courts(k).

If, therefore, the drawee refuse to accept, the holder, or some other person, if he be ill or absent(l), should cause it to be protested; and a protest for non-acceptance will be valid though made by a party *wrongfully detaining a bill, though it would be otherwise in case of a protest for non-pay-The bill should be taken to a notary (n), who is to present it again to the drawee, and demand acceptance; which should, in case the bill was drawn on a banker, or other person whose office-hours are known to be limited, be during the usual hours of business, and in London not later than five o'clock(o); and if the drawee again refuse to accept, the notary is there-

(c) See the form of a protest for non-payment, post, Ch. X. s. i. which, with the alterntion of the words in italics, will suffice in the

case of a foreign bill.

(d) Rogers v. Stephens, 2 T. R. 713, (Chit. j. 446); Gale v. Walsh, 5 T. R. 239; (Chit. j. 506); Orr v. Magennis, 7 East, 359, 360; 2 Smith, 328, (Chit. j. 726); Brough v. Perkins, Lord Raym. 993; 6 Mod. 80; 1 Salk. 131, (Chit. j. 228, 224); Bul. N. P. 271.

Rogers v. Stephens, 2 T. R. 713, (Chit. j. 446). In an action against the drawer of a foreign bill of exchange, it appeared that the bill had been noted for non-acceptance, but there was no protest, and this was pressed as a ground for nonsuit. Lord Kenyon admitted the objection, but, upon the other circumstances, thought this a case in which a protest was not

necessary.
Gale v. Walsh, 5 T. R. 239, (Chit. j. 506). In an action against the drawer of a foreign bill, it was reserved as a point, whether it was necessary to prove a protest for non-acceptance, and the court thought it so clear, upon motion to enter a nonsuit, that they suggested to the plaintiff's counsel the expediency of making the rule absolute in the first instance, and upon their acquiescence it was accordingly done; they afterwards, however, wished to have it opened, upon an idea that the drawer had no effects in the hands of the drawee, but it appearing upon the report that the idea was not well founded, the rule stood. And in Brough v. Perkins, Lord Raym. 993; 6 Mod. 80; Salk. 131, Holt,

C. J. says, a protest on a foreign bill is a part of the custom

(e) Chesmer v. Noyes, 4 Cumpb. 129, (Chit. j. 929).

(f) Anon. 12 Mod. 345, (Chit. j. 212); Dupays v. Shepherd, Holt, 297; Chesmer v. Noyes, 4 Campb. 129, (Chit. j. 929); 2 Roll. R. 346; 10 Mod. 66; Peake's Law of Evid. 4th edit. 80, 74, in notes.

4th edit. 80, 74, in notes.
(g) Molloy, 281; Da Costa v. Cole, Skin. 272, pl. 1, (Chit. j. 179).
(h) Orr v. Magennis, 7 Fast, 859; 2 Smith, 329, (Chit. j. 726); Legge v. Thorpe, 2 Campb. 310; 12 East, 171, (Chit. j. 783). As to this point, see ante, 827 to 231.
(i) Patterson v. Beecher, 6 Moore, 819, (Chit. j. 1126); Gibbon v. Coggon, 2 Campb. 188, (Chit. j. 774); post, Ch. X. s. i.
(k) Per Lord Ellenborough, in Legge v. Thorpe, 12 East, 177, 178; 4 Pardess. 225.
(l) Molloy, b. 9, c. 10, s. 17. A mere

(1) Molloy, b. 9, c. 10, s. 17. A mere agent to receive payment may cause protest to be made; 1 Pardess. 443, 444.

(m) 1 Pardess. 444.

(n) See the nature of his office explained in Burn's Ecc. Law, tit. Notary Public; and see regulations in 41 Geo. 3, c. 79, as altered and amended by 8 & 4 W. 4, c. 70; Chit. Stat. 185; Chit. & H. Stat. 699. And see The King v. Scriveners' Company, 10 B. & C. 511, (Chit. j. 1481).

(o) Parker v. Gordon, 7 East, 395; 3 Smith,

358; 6 Esp. 41, (Chit. j. 727); ante, 279.

and Proceedings thereon.

2dly, When Protest for Non-acceptance requinite, and Mode of protest-

1. Of Non-upon to make a minute on the bill itself, consisting of his initials, the month, acceptance the day and year, and the reason, if assigned, for non-acceptance, together The next step which the notary is to adopt is to draw up with his charge. the protest(p), which is a formal declaration annexed to the bill itself, if it can be obtained or otherwise to a copy (q), that the bill has been presented for acceptance, which was refused, and why, and that the holder intends to recover all damages, expences, &c. which he or his principal, or any other party to the bill, may sustain on account of non-acceptance (r). The abovementioned minute is usually termed noting the bill, but this, Mr. Justice Buller observed, is unknown in the law, as distinguished from the protest, and is merely a preliminary step, and though it has grown into practice within these few years, it will not in any case supply the want of a protest(s). The demand is the material thing, and should, it has been said, be made by a notary public himself, to whom credit is given, because he is a public offcer, and not by his clerk(t); but the number of bills requiring presentment is frequently so great as to render a presentment by the notary himself impossible, and the constant practice is for the clerk to make the presentment. In case, however, there be not any public notary at the place where the bill is dishonoured, it may be protested by any substantial person of that place in the presence of two or more witnesses (u); and it is said it should be made between sun-rise and sun-set. It should in general be made in the place where acceptance is refused; but if a bill be drawn abroad, directed to the drawee at Southampton, or any other place, requesting him to pay the bill in London, the protest for non-acceptance may be made either at Southampton or in London(x). The form of the protest should always be conformable to the law of the country where it is made(y). If a conditional or partial acceptance be offered, the protest should not be general, as otherwise it will release the acceptor from the effects of such acceptance(z). of the bill should, it is said, be prefixed to all protests, with the indorsements transcribed verbatim, and with an account of the reason given by the

[*334] *party why he does not honour the bill(a). Protests made in this country, must, in order to their being received in evidence, be written on paper stamp with a proper stamp(b).

Sending Copy of Protest.

It seems at one time to have been considered, that if the drawer or indorsers are abroad, out of England, the making the protest alone would not be sufficient, but that a copy of it, or some other memorial, must, within a reasonable time, be sent with a letter of advice to the persons on whom the

(p) Per Holt, C. J. in Buller v. Crips, 8 Mod. 29, (Chit. j. 222); Selw. N. P. 9th edit.

(q) Dehers v. Harriot, 1 Show. 164, (Chit. j. 485).

(r) Poth. pl. 84; Moll. 264; Mar. 16. (s) Per Buller, J. in Lestley v. Mills, 4 T. R. 175, (Chit. j. 473); Rogers v. Stephens, 2 T. R. 713, (Chit. j. 446); Gale v. Walsh, 5 T. R. 239, (Chit. j. 506); Bul. Ni. Pri. 271; and see Orr v. Magennis, 7 East, 359; 2 Smith,

828, (Chit. j. 726).
(i) Per Buller, J. in Lestley v. Mills, 4 T.
R. 175, (Chit. j. 473), sed quare. See note,
post, Ch. X. s. i. As to Proceedings on Nonpayment; Bayl. 258, 5th edit. Roscoe, 212. (u) Bayl. 258, 5th edit. no authority is there referred to, and quære if that position is not to be confined to inland bills by 3 & 4 Ann. c. 9,

s. 6, and 9 & 10 W. 3, c. 17, s. 1.

(x) Marius, 107; see Mitchell v. Baring, 10 B. & C. 4; 4 Car. & P. 35; Mcod. & M. 381, (Chit. j. 1454); and 2 & 3 W. 4, c. 98; as to Protest for Non-payment, post, Ch. X. s. i.

(y) Poth. pl. 155; 4 Pardess. 227, 230. (2) Beatinck v. Dorrien, 6 East, 199; 2 Smith, 337, (Chit. j. 712); ante, 300; and see Sproat v. Matthews, 1 T. R. 182, (Chit. j. 433); ante, 301, note (d). (a) Poth. pl. 135.

(b) See 55 Geo. 3, c. 184, which repeals 44 Geo. 3, c. 98, and 48 Geo. 3, c. 149. Protest of any bill of exchange or promissory note, for £ 1. d. any sum of money, 0 2 0

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holder means to call for payment(c): but this has recently been held to be I. Of Nonunnecessary, and that in giving notice of dishonour to the drawer of a foreign acceptance unnecessary, and that in giving notice of distintion to the unawer of a foreign and Probill, resident abroad, it is sufficient to inform him that the bill has been proceedings tested, without sending a copy of the protest(d); and if the drawer or in-thereon. dorser were in England at the time of the protest, it was always unnecessary, 2dly, though advisable, that a copy of such protest should accompany the notice When of non-acceptance (e). Nor is it necessary in any case to send the protested Protest for bill (f); but a notice of the dishonour of the bill should in all cases be im-ceptance mediately given (g), and which is always regulated as to time by the law of requisite, the place where the party to receive it resides(h). It has been even held, and Mode of protestthat the protest for non-acceptance or non-payment of an inland bill may be ing drawn up at any time before the trial, provided the bill be noted in due time(i).

At common law no inland bill could be protested for non-acceptance; but by the statute 3 & 4 Anne, c. 9, s. 4(k), (which will be observed upon more fully hereafter,) a protest was given "in case of refusal to accept in writing any inland bill amounting to the sum of five pounds, expressed to be given for value received, and payable at days, weeks, or months after date, in the same manner as in the case of foreign bills of exchange, and for which protest there shall be paid two shillings, and no more." It has been supposed that this protest must be made in order to entitle the holder to demand of the drawer or indorsers costs, damages, and interest(l); but in practice the plaintiff recovers interest against a drawer or indorser of an inland bill, on proof of due notice, without proving a protest; and it has since been *de- [*335] cided, that a protest is not essential to the recovery of interest(m). If the bill be of the above description, and under the amount of 201. the holder is certainly entitled to the above accumulative remedy, though no protest were made(n). This protest is directed to be made by such persons as are appointed by 9 & 10 Will. 3, c. 17, s. 1, to protest inland bills for non-payment(0), namely, by a notary public; and, in default of him, by any other substantial person of the city, town, or place, in the presence of two or more credible witnesses. Within fourteen days of the making of this protest, the same must be sent, or other notice thereof must be given to, or left in writing at the usual place of abode of the party from whom the bill was receiv-The protest for non-acceptance in the case of an inland bill is by no means necessary, and the want of it does not affect the holder's right to

(c) Poth. Pl. 148; and see Orr v. Magennis, 7 East, 359; 2 Smith, 828, (Chit. j. 726), poet, Ch. X. a. i.

(d) Goodman v. Harvey, 4 Ad. & El. 870; 6 Nev. & M. 372, S. C.

(e) Robins v. Gibson, 3 Campb. 834, (Chit. j. 885); 1 Maule & S. 288, S. C.; Cromwell v. Hynson, 2 Esp. R. 511, 512, (Chit. j. 571); Pothier Traite du Contrat de Change, part 1, c. 5, s. 150; Chaters v. Bell, 4 Esp. Rep. 48, (Chit. j. 686); Manning's Index, 66, acc.; Goostrey v. Mead, Bul. N. P. 271; Gilb. Evid. 79; Lovelass on Bills, 99; Selw. N. P. 9th edit. 836, semb. contra. See post, Ch. X. s. i. (f) Mar. 68, 86, 87, 120; Lovelass on

Bills, 100. (g) Id. ibid.; Hart v. King, 12 Mod. 309, (Chit. j. 212); Anon. 1 Vent. 45; Orr v. Ma-

gennis, 7 East, 359; 2 Smith, 328, S. C. (h) 4 Pardess. 227, 230; Poth. pl. 155.

(i) Chaters v. Bell, 4 Esp. R. 48, (Chit.). 686); Selw. Ni. Pri. 9th edit. 360; Goostrey r. Mead, Bul. N. P. 272, observed on in Orr v.

Magenois, 7 East, 361; 2 Smith, 328, (Chit. j. 726); Rogers v. Stephens, 2 T. R. 714, (Chit. j. 446); Manning's Index, 66. See this point considered, post, Ch. X. s. i. Notice of Nonpayment.

(k) See the construction of this statute, Kyd, 149; 2 Stra. 910, note 1. And see 9 G. 4, c. 24, s. 4, as to Irish bills.

(1) Harris v. Benson, 2 Stra. 910, (Chit. j. 271); Lumley v. Palmer, Rep. temp. Hardw. 77, (Chit. j. 275); Brough v. Perkins, 2 Lord Raym. 993; 1 Salk. 131; 6 Mod. 80, (Chit. j. 223, 224); Boulager v. Talleyrand, 2 Esp. Rep. 550, (Chit j. 585); Powell v. Monnier, 1 Atk. 613, (Chit. j. 283); Bridgman's Index, vol. ii. 599, pl. 123, 2d edit. tit. Trade, vi ; Manning's Index, 66.

(m) Windle v. Andrews, 2 B. & Al. 696; 2 Stark. 425, (Chit. j. 1062).

(n) Stat. 3 & 4 Anne, c. 9, s. 6; Kyd, 149.

(o) Stat. 3 & 4 Anne, c. 9, s. 6.

(p) Id. section 5.

ceedings thereon.

I. Of Non-the principal sum, as it would in the case of a foreign bill(q); and it is in acceptance practice seldom made. An inland bill is in general only noted for nonacceptance, which noting, as already observed, is of no avail(r); and if not paid when due it is then noted, and sometimes, though not very often, protested for non-payment(s)(1); and a protest for non-acceptance, made in this country, must be proved by the notary who made it, and it will not, as in the case of a protest made abroad, prove itself(t). See further, post, Chapter X. Section I. As to Proceedings on Non-payment."

8dly. When Notice without Protest sufficient, and how to be iven.

Whether or not a protest be necessary, notice must be given of the nonacceptance, for otherwise, for the reasons before stated(u), the holder in general discharges the drawer and indorsers from all liability. There is no precise form of words necessary to be used in giving notice of the non-acceptance of a bill; any act of the holder, signifying the refusal of the drawee, will be a sufficient notice; and in the case of an inland bill a mere notice will suffice, though we have seen that in the case of a foreign bill there must also be a protest(x)(2): when a qualified acceptance has been given, the notice should state the terms (y). It has been said, in the course of argument, that it is not enough to state in the notice that the drawee refuses to honour, but that it must go farther, and express that the holder does not intend to give credit to the drawee(z); but it should seem, that as the only reason why notice is required, is, that the drawer or indorsers may have the earliest opportunity of resorting to the parties liable to them, it is not necessary that their

- (q) Boroughs v. Perkins, Holt, 121, (Chit. j. 223, 224); Harris v. Benson, 2 Stra. 910, (Chit. j. 271); Boulager v. Talleyrand, 2 Esp. Rep. 550, (Chit. j. 585); Brough v. Perkins, 6 Mod. 80; 1 Salk. 131; 3 Salk. 69; Lord Raym. 992, S. C.
- (r) Ante, 833; Kendrick v. Lomax, 2 C. & J. 407.
- (a) 8 & 4 Anne, c. 9, s. 5; Kyd, 150.
- (t) Chesney v. Noyes, 4 Campb. 129, (Chit. j. 929); ante, 332, note (e).
 - (u) Ante, 325.
 - (x) Ante, 832.
 - (y) Ante, 331. (z) Tindal r. Brown, 1 T. R. 169.

(1) In case of an inland bill of exchange, no protest for non-acceptance or non-payment is necessary to entitle the holder to a recovery against the parties to the bill. Miller v. Hackle, 5 John. Rep. 375. A bill drawn in the United States upon any part of the United States, is in law an inland bill. Ibid. Quere. Bills of exchange drawn in one state of the union, on persons living in another state, partake of the nature of foreign bills, and ought to be so treated in the cours of the United States. Buckner r. Finley, 2 Peters, 586. 3 Kent's Com. 2d ed. 94.

(2) 'The law does not prescribe any form of notice to an indorser; all that is necessary is, that it should be sufficient to put the party upon inquiry, and to prepare him to pay it or to defend himself. If, therefore, there be some uncertainty in the description of the note in the notice, if it does not tend to mislead the party, it will be good. Reedy v. Seixas, 2 John. Cas. 337. So where a note was payable at a bank, and notice was given on the day when it became due, but in the notice, the note was stated to be due three days before, and the name of the promissor was mistaken, it was held sufficient notice to charge the indorser, it being in evidence that be was liable on no other note payable to the bank. Smith r. Whiting, 12 Mass. Rep. 6.

It is not necessary that the notice of dishonour of a bill should contain a notification that the holder looks to the party notified, for payment. Cowles v. Harts, 3 Conn. Rep. 516.

A notice to an indorser was held sufficient, although it did not state at whose request it was given, nor who was the owner of the note. Shed v. Bret, 401. See Mills v. Bank of the United States, 11 Wheat. 431. A protest on inland bills is generally deemed unnecessary in this couptry, but the practice has been to have bills drawn in one state on persons in another, protested; and stat. of Ken. 1798, ch. 57, seems to require it. 3 Kent's Com. 2d. ed. 94.

A mistake as to the date of a note will not vitiate the notice, if in other respects it conveys to the party sufficient knowledge of the particular note dishonoured. Id.

Nor is it necessary that the notice should contain a formal statement that it was demanded at the place where payable; it is sufficient if it state the fact of non-payment, and that the holder looks to the indorser for payment. Id. Quere, whether it be necessary to inform the indorser that he is looked to for payment? This is implied by notice of non-payment. Bank of the United States v. Carneal, 2 Peters, 543.

Going to the place of business of the maker of a promissory note, during business hours, to demand payment, and finding it shut, no person being left to answer any inquiries, is due diligence. Shed r. Bret, 1 Pick. 401. . 666.7 , · z

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liability should be pointed out to them, because that is a legal consequence I. Of Nonof the default of acceptance, of which they must necessarily be apprised by acceptance of the default of acceptance, of which they must necessarily be apprised by and Promere notice of the fact of non-acceptance(a). The notice, however, should ceedings explicitly state what the bill is, and that acceptance has been refused by the thereon. drawee, and must not be calculated in any way to mislead the party to whom it is given; and a letter from an indorser to a drawer, merely containing a demand of payment, is *not sufficient(b); nor is a notice stating the bill to [*336] have been drawn by the party, when, in fact, he was not the drawer, but only an indorser, sufficient(c).—See further, post, Chapter X. Section I. As to Proceedings on Non-payment.

In France, it should seem that protests should not be made till after the presentment and refusal(d), and it cannot be made upon a day de fete(e).

There does not appear to be any express decision with respect to the time 4thly, when a foreign bill must be protested for non-acceptance in this country (f), when (f)but from analogy to the time when a protest must be made for non-payment, test must it should seem that in this country, it, or at least the noting, should be made be made within the usual hours of business(g), on the day when the acceptance is re- and Notice fused(h), and that the neglect to make it on that day will only be excused given. by inevitable accident, such as sudden illness of the holder, robbery, or other circumstances(i), which have been before noticed(k). It has been considered, that it is sufficient to note a foreign bill for non-acceptance on the day of refusal, and that the protest may be drawn any day after by the notary, and be dated on the day the noting was made; but it is advisable to complete the protest for non-acceptance on the day it is made(1). We have seen that when the drawee, after the bill has remained in his hands twenty-four hours for acceptance, requests further time to consider of it, the holder should give immediate notice to the drawer and indorsers of such request (m).

Where a foreign bill has been refused acceptance, and the party to whom notice is to be given is resident abroad, we have seen that notice of the protest should be communicated to him, though it is unnecessary that a copy of such protest should accompany the notice; but where such party is resident in England, it suffices to give notice to him of the dishonour, without informing him of the protest, because he may inquire into the fact(n). in all cases notice of the non-acceptance must be sent or given to the parties to whom the holder means to resort within a reasonable time after the dishonour of the bill(o); and the holder must not delay giving notice till the bill is protested also for non-payment (p). It has been much disputed, whether it is the province of the Court, or of the jury, to decide what is a reasonable

(a) Shaw v. Croft, coram Lord Kenyon, Sittings after Trinity Term, 1798, MS. and other cases, post, Ch. X. s. i.; and Selw. 9th ed. 332.

(b) Hartley v. Case, 4 Bar. & Cres. 339; 6 Dow. & Ry. 505; 1 Carr. & P. C. N. P. 555, (Chit. j. 1263). See the cases fully stated, post, Ch. X. s. i. Non-payment.

(c) Beauchamp v. Cash, Dow. & Ry. C. N.

(d) 1 Pardess. 441, 446, 454; 4 Pardess. 480, from which it appears to be so as to protests for Non-payment.

(e) 1 Pardess. 446. (f) And see 1 Pardess. 405.

(g) Mar. 112.
(h) Leftley v. Mills, 4 T. R. 175, (Chit. j. 478); Bul. N. P. 272; Bayl. 5th edit. 266.
(i) Poth. pl. 144; Turner v. Leach, ante,

330, note (o).

(k) Ante, 325, ct seq.
(l) Goostrey v. Mead, Bul. N. P. 271; Chat-(1) Goostrey v. Mead, Bul. N. P. 271; Chaters v. Bell, 4 Esp. Rep. 48, (Ch. j. 636); Rogers v. Stephens, 2 T. R. 714, (Chit. j. 446); Orr v. Magennis, 7 East, 361; 2 Smith, 328, (Chit. j. 726); Robins v. Gibson, 1 Maule & S. 288, (Chit. j. 885); Selw. 9th edit. 360, post, Ch. X. s. i. Non-payment. (m) Ingram v. Foster, 2 Smith's Rep. 243;

ante, 279, note (x)

(n) Ante, 334, 335.

(o) Darbishire v. Parker, 6 East, 3, 14, 16; 2 Smith, 195, (Chit. j. 707); Haynes v. Birks, 3 B. & P. 601, 602, (Chit. j. 690.)

(p) Goostrey v. Mead, Bul. N. P. 271; Roscoe v. Hardy, 12 East, 434, (Chit. j. 301); Blesard v. Hirst, Burr. 2672, (Chit. j. 384).

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and Proceedings thoreon.

4thly, Time test must be made given.

I. Of Non-time for this purpose (q): it should seem that the better opinion is, that what accorptance is a reasonable time for giving notice is a question partly of fact and partly of law; the jury are to find the facts, such as the distance fat which the persons live from each other, the course of the post, &c.(r): but when those facts have been established, the reasonableness of the time becomes a question of law, and consequently to be determined by the court, and not by the when Pro- jury (*)(1). If the holder intend to sue the drawer and indorsers of a foreign bill, he must give notice to each, direct, in due time, and is not entitled in so and Notice doing to consume or occupy as much time as each indorser had(t). It is therefore advisable for the holder, on the day after the dishonour, to forward [*337] distinct notices to each and every party to the bill.

It was once thought, that it would be sufficient to charge the drawer, if notice of the dishonour of a bill were given to him even at the end of two months, provided he had not in the interim sustained any particular damage by the delay(u), but it is now settled, that in the case of a foreign bill, notice should be given on the day of the dishonour, if any post or ordinary conveysnce sets out that day(x); and if not, by the next earliest conveyance(y)(2).

With respect to inland bills not protested for non-acceptance, notice of the refusal to accept should in all cases be given within a reasonable time; it should be forwarded at least on the following day(z), where there is no excuse for its being given after(a). In the case of an unqualified refusal to honour the bill, it seems that a notice of such dishonour might be given on the same day, but where there is no such unqualified refusal, the giving the notice on the day of presentment seems questionable(b). With reference to the rule

(q) Tindal v. Brown, 1 T. R. 168, (Chit. j. 481).

(r) See ante, 278, and post, Ch. X. s. i.

Non-payment.

(s) Per Lord Mansfield, C. J. and Buller, J. in Tindal v. Brown, 1 T. R. 168, (Chit. j. 18 1 1802 v. Blown, 17. 105, (cat. j. 431); Darbishire v. Parker, 6 Fast, 3, 9, 10, 12; 2 Smith, 195, (Chit. j. 707); Haynes v. Birks, 3 B. & P. 599, (Chit. j. 690); Browning v. Kinnear, Gow, C. N. P. 81; (Chit. j. 1054), acc.; Russell v. Langstaffe, Dougl. 514, (Chit. j. 415); contra. Post, Ch. X. s. i.

Bateman v. Joseph, 12 East, 433; 2 Campb. 461, (Chit. j. 801). In this case it was held, that the want of due notice of the dishouour of a bill is answered by shewing the holder's ignorance of the place of residence of the prior in-dorser, whom he sues, and whether he used due diligence to find out the place of residence is a question of fact to be left to the jury. The Court all agreed, that this was a question proper to be left to the jury, and they had decided Whether due notice has been given of the dishonour of a bill, all the circumstances necessary for the giving of such notice being known, is a question of law; but whether the holder have used due diligence to discover the place of residence of the person to whom the notice is to be given, is a question of fact for the jury.

See also per Grose, J. in Scott r. Lifford, 9 Fast, 347; 1 Campb. 246; Storges r. Detrick. Wightw. 76.

(i) 1 Pardess. 455; Marsh v. Maxwell, 2 Campb. 210, note, (Chit. j. 776); Turner v. Leach, ante, 330, note (o). See post, Ch. X. s. i. As to the Time of giving Notice of Non-payment.

(u) Butler v. Play, 1 Mod. 27, (Chit. j. 161); Sarsfield v. Witherley, Comb. 152, (Chit.).
172); Mogadara v. Holt, 1 Show. 318; 12
Mod. 15, (Chit. j. 152, 183).
(x) Leftley v. Mills, 4 T. R. 174, (Chit. j. 172).

473); Anon. Lord Raym. 743, (Chit. j. 216); Coleman v. Sayer, 2 Stra. 829, (Chit. j. 267); Mar. 97.

(y) Muilman r. D'Eguino, 2 H. Bla. 565, (Chit. j. 549); Williams v. Smith, 2 B. & Ald.

496, (Chit. j. 1055).

(2) Leftley v. Mills, 4 T. R. 170, (Chit. j. 473). See post, Ch. X. s. i. as to Notice of Non-payment, and Haynes v. Dirks, 3 Bos. & Pul. 601, (Chit. j. 690); Darbishire v. Parker, 6 East, 3; 2 Smith, 195, (Chit. j. 707); and post, Ch. XI. as to Presentment of Checks for Payment.

(a) As to such excuses, see ante, 330; and post, Ch. X. s. i. Notice of Non-payment. (b) Burbridgo v. Manners, 3 Campb: 193,

(2) If there has been such a demand on the maker as the latter is bound by, so that he bad no right to refuse payment, the indorser cannot object that the legal forms of a demand were not complied with. Wittvell v. Johnson, 17 Mass. Rep. 449.

⁽¹⁾ Notice of the non-acceptance of a bill of exchange cannot be given by a stranger; it must he by one who is a party to it, and who, on the bill being returned to him, would have a right of action upon it. Chanoine v. Fowler, 8 Wend. Rep. 173. Notice from a drawee who refuses to accept is no better than from a stranger.

Stanton v. Blossom, 14 Mass. Rep. 116.

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which prevails in giving notice of non-payment, it seems that each party is 1. Of Nonentitled to a day, to notify the dishonour to his immediate inderser (c), and acceptance When an in- and Prothis without regard to the time when the next post sets of f(d). land bill is protested for non-acceptance, the protest or notice thereof should thereon. be sent within fourteen days after it is made, under the 3 & 4 Anne, c. 9, s. 5(e). The time of giving notice of *non-acceptance, where bills fall due on Good Friday, Christmas-day, Fast and Thanksgiving-days, is expressly provided for (f). See further, post, Chapter X. Sec. I. As to Proceedings on Non-payment.

We have already seen that the notoriety of the insolvency of the drawee, 5thly, By as in the case of bankruptcy, constitutes no excuse for the neglect of the holdtice must er to give notice of non-acceptance to the drawer and indorsers(g); and it be given. pears to have been considered that such notice must come from the holder(h)(1); and that it will not suffice if it come from any other party, because the object of the notice is not merely that the parties may immediately call on those who are liable to them for an indemnity, but it must import that the holder intends to stand on his legal rights and to resort to them for payment (i); and therefore, where the drawer having notice before the bill was due that the acceptor had failed, gave another person money to pay the bill, and the holder neglected to give notice of the dishonour, it was holden that the drawer was discharged (k). And in a subsequent case it was held, that notice of the dishonour of a bill of exchange must be given to the drawer and indorsers by the holder himself, or some person authorised by him, or But it is now settled that notice of at least not by a mere stranger (l).

(Chit. j. 855); Hartley v. Case, 4 Bar. & C. 839; 6 D. & R. 505; 1 Car. & P. 555, (Chit. j. 1263).

(c) Darbishire v. Parker, 6 East, 3; 2 Smith, 195, (Chit. j. 707); Smith r. Mullett, 2 Campb.

208, (Chit. j. 775). (d) Geill v. Jeremy, Mood. & M. 61, (Chit. j. 1385); but note, a decision as to notice of non-payment of an inland bill. Post, Ch. X.

(e) Sed quære.

(f) 39 & 40 Geo. 3, c. 42; 7 & 8 Geo. 4, c. 15; post, Ch. X. s. i. Time of Notice of Non-payment.

(g) Ante, 330, note (i); Esdaile v. Sowerby, 11 East, 117, (Chit. j. 767).

(h) Tindal v. Brown, 1 T. R. 170, (Chit. j.

481); Ex parte Barclay, 7 Ves. 597, 598, (Chit. j. 656); Staples v. Okines, 1 Esp. Rep. 333, (Chit. j. 544); Kyd, 125. In Selw. Ni. Pri. 9th edit. 332, it is observed, that in Ex parte Barclay the attention of the court was not directed to Lord Kenyon's opinion in Shaw v. Crost, ante, 335, note (a). See post, Ch. X. s. i. By whom Notice of Non-payment must be given.

(i) Id. ibid.

(k) Nicholson v. Gouthit, 2 H. Bla. 612, (Chit. j. 556); Whitfield v. Savage, 2 Bos. & Pal. 277, (Chit. j. 630); and see Esdaile v. Sowerby, 11 East, 114, 117, (Ch. j. 767).

(1) Stewart v. Kennett, 2 Campb. 177, (Chit. j. 772).

What constitutes reasonable diligence in giving notice of protest, is matter of law, to be decided by the court; but the speed used, and whether the nearest roads are travelled, &c. are facts for the jury. Dodge v. Bank of Kentucky, 2 Marsh. 616. Noble v. Bank of Kentucky, 8 Marsh. 264. The utmost possible dispatch is not necessary. Ib.

The reasonableness of notice to an indorser of the non-payment of a promissory note, is a question of fact, to be submitted to the jury, no general rule can be laid down by the court on the subject. Gurly v. The Gettysburg Bank, 7 Serg. & Rawle, 324. See aute, pages 163 and 224. Notice of the protest of a note, negotiated in bank, is good, if given on the day after the protest, although the parties of the court who has been been been an expectation.

although the parties may reside in the same town where the bank is. Frankford Bank v. Markey, 3 Marsh. 505.

⁽¹⁾ In some early cases in the United States, it seems to have been held that what was reasonable notice, was a mere question of fact to be left to the jury. Robertson v. Vogle, 1 Dall. Rep. 252. Steinmetz v. Currie, 1 Dall. Rep. 270. Bank of North America v. McKnight, 2 Dall. Rep. 158. Scott v. Alexander, 1 Wash. Rep. 335. Reedy v. Seixas, 2 John. Cas. 387. But it may be collected from the more recent cases, that when the facts are ascertained, then whether the notice be reasonable or not, is purely a question of law. Taylor v. Bryden, 8 John. Rep. 178. Bryden v. Bryden, 11 John. Rep. 281. Ireland v. Kip, 11 John. Rep. 281. Hussey v. Freeman, 10 Mass. Rep. 84. See Ferris v. Saxton, 1 Southard's Rep. 1.

ceedings thereon.

4thly, By whom Notice must be given.

1. Of Non-dishonour may be given by any party to the bill(m); and any holder, acceptance whether lawfully so or not, may effectually protest for and give notice of and Pronon-acceptance though he cannot protest for non-payment, because the former would enure to the benefit of the party legally entitled to the bill, which the latter would not(n). And where, a few days before a bill became due, the acceptor informed the drawer he would be unable to pay it, and told such drawer that he must take it up, and gave him part of the amount to assist him in so doing, and the latter promised to take up the bill accordingly; it was held, that in an action by the indorsee against the drawer, the latter might nevertheless set up as a defence that the bill was not duly presented for payment, and that he had not regular notice of the dishonour, but that the sum paid him by the acceptor was money had and received to the plaintiff's use(o)(1).

6thly, To whom Notice must be given.

The notice of non-acceptance, when necessary, must be given to all the parties to whom the holder of the bill means to resort for payment, and though proof that the drawer had no effects in the hands of the acceptor will be an excuse for want of notice with respect to him, it will not have that operation with respect to any of the indorsers; for they have nothing to do with the accounts between the drawer and the drawee(p); and a bonû fide indorser is [*339] entitled to notice, although the *drawer and drawee were fictitious (q). If a party draw on himself, no notice is necessary (r). If the party entitled to no tice be a bankrupt, notice should be given to him before the choice of assignees, or if he has absconded, to the messenger or the person in the house, and after the choice of assignees to them(s). If the party be dead, notice should be given to his executor or administrator; and it is expedient, though not in general absolutely necessary, to give notice to a person who has guaranteed the payment of the bill(t). When the party entitled to notice is abroad at the time of the dishonour, if he have a place of residence in England, it will

(m) Newen v. Gill, 8 C. & P. 367; Chapman v. Keane, 3 Ad. & El. 193; 4 N. & M. 607, S. C.; post, Ch. X. s. i.

(n) 1 Pardess. 443, 444.
(o) Baker v. Birch, 3 Campb. 107. (Chit. j. 848); Corney v. Da Costa, 1 Esp. R. 303, (Chit. j. 538), same point. As to the money being had and received to use of holder, see

ante, 321.

(p) See Brown v. Maffey, 15 East, 216, (Chit. j. 852); Goodall v. Dolley, 1 T. R. 712, (Chit. j. 440); Wilkes v. Jacks, Peake Rep. 202; Walwyn v. St. Quintin, 1 Bos. & P. 216; 2 Esp. 514, (Chit. j. 578); ante, 830. And if the bill be drawn and indorsed for the accommodation of the indorser the want of effects furnishes no excuse for not giving notice of dis-Manual Control of the Grant States and the States of the Manual Control of the Grant States of the Manual Control of the Grant States of the Manual Control of the Manual Contro post, Ch. X. s. i. Non-payment.

(q) Leach v. Hewitt, 4 Taunt. 781, (Chit. j. 881); post, Ch. X. s. i. When Notice of Non-payment necessary.

(r) Roach v. Ostler, 1 Mann. 1 Ry. 120,

(Chit. j. 1859).

(s) See Ex parte Moline, 19 Ves. 216, (Ch. 871); Rhode v. Proctor, 4 Bar. & Cres. 517; 6 Dow. & Ry. 610, (Chit. j. 1269); Camidge v. Allenby, 6 Bar. & C. 373; 9 D. & R. 391, (Chit. j. 1319); 6 Bar. & Cress, 373; Exparte Johnston; 1 Mont. & Ayr. 622; 3 Des. & Chit. 433, S. C. In Thompson's law of Bills, 535, it is laid down, in case of the bankruptcy of the drawer or of an indorser, notice must be given to the bankrupt, or to the trustee vested with his estates, for behoof of his credit-

(t) See post, Ch. X. s. i. Non-payment. When notice need not be given of a substituted bill, see Bishop r. Rowe, 3 Maule & S. 362; Hickling v. Hardy, 7 Taunt. 312; 1 Moore, 61, S. C.

⁽¹⁾ Notice may be given the same day the paper is dishonoured, and it must if possible be given on the next day, or put into the post-office. Shed v. Brett, 1 Pick. Rep. 401. Talbot v. Clark, 8 ib. 54. Williams v. Matthews, 8 Cowen's Rep. 252. Osborne v. Moncure, 8 Wend. Rep. 170. United States v. Barker, 4 Wash. Cir. Rep. 464. 1 Minor's Alab. Rep. 296. 1 Miller's Louis. Rep. 515. If the parties resided in the same place, the notice must be personal. Hartford Bank v. Stedman, 3 Conn. R. 489. On a note indorsed when overdue, and notice of non-payment given two or three months after, held sufficient, as the facts showed that immediate notice was not contemplated. Van Hosen v. Van Alstyne, 3 Wend. Rep. 75.

ceedings

be sufficient to leave notice of non-acceptance at that place, and a demand I. Of Nonof acceptance or payment from his wife or servant would in such case be acceptance and Pro-

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It was once thought, that notice of non-acceptance must, in all cases, be thereon. given to the drawer of the bill, and demand of payment made of him, or that 6thly, 76 in default thereof the indorser would be discharged, notwithstanding they had whom Noregular notice. This opinion, however, so far as it related to foreign bills, tice must be given. was over-ruled in the case of Bromley v. Frazier(x); and in its relation to inland bills, in the case of Heylyn and others v. Adamson(y), and as to checks on bankers, in Rickford v. Ridge(z), on the principle, that to require a demand of the drawer would be laying such a clog upon bills, as would deter every person from taking them, since the drawer may perhaps live abroad; besides, the acceptor is primarily liable, and as the act of indorsing a bill is equivalent to drawing a new bill, the indorser thereby undertakes as well as the drawer, that the drawee shall honour the bill, and the holder may consequently immediately resort to him, without calling on any of the other parties.

With respect to inland bills protested for non-acceptance, the 3 & 4 Anne, c. 9, directs the protest or notice thereof to be given to the person from whom the bill was received (a). The principle, that notice from the holder enures to the benefit of the antecedent parties here applies(b). Notice to one of the several partners, joint indorsers, is notice to all; and if one of several drawers be also the acceptor, and there be no fraud in the transaction, no notice in fact is necessary to the other drawers (c); and as we have already seen, a mere guarantee, whose name is not on the bill or note, is not in general entitled to *notice(d). A party who owes a debt for goods, and [*340] delivers a bill without indorsement, may also be entitled to notice(e). as we have seen, it is not necessary to give notice to a party who has by his conduct dispensed with it, as by engaging to call on the holder, and ascertain whether the acceptor had paid the bill(f), or the like. See further,

post, Chapter X. Section I. As to Proceedings on Non-payment.

The liability of the various parties to a bill, on the refusal of the drawer 7thly, Liability of to accept, may be collected from the previous pages. In France their lia- the parties bility differs materially from that in this country, for there upon protest for on Non-acnon-acceptance, the holder can only demand immediate payment of the ex- ceptance. penses of protest, and he may resort either collectively against the drawer and all the indorsers, or against one of them for payment or security, that the

(x) Bromley v. Frazier, 2 Stra. 441; Selw. N. P. 9th edit. 336.

(2) 2 Campb. 539.

(b) Ante, 338.

(e) Ibid.

⁽u) Cromwell v. Hynson, 2 Esp. R. 511, 512, (Chit. j. 571); Walwyn v. St. Quintin, 1 Bos. & Pul. 652; 2 Esp. 514, (Chit. j. 578); but see 5 Esp. R. 175.

⁽y) Heylyn v. Adamson, 2 Burr. 669, (Chit. j. 349); Pardo v. Fuller, Com. R. 579, (Chit. j. 286); Bromley v. Frazier, 1 Stra. 441; Selw. 9th edit. 336.

⁽a) Et vide Heylyn v. Adamson, 2 Burr. 674, (Chit. j. 349).

⁽c) Porthouse v. Parker and others, 1 Campb. 82, (Chit. j. 741); Alderson v. Pope, id. 404; and see Jacaud v. French, 12 East, 317, 322, 323, (Chit. j. 789); and per Lord Ellenborough in Bignold v. Waterhouse, 1 Maule & S. 259; ante, 326.

⁽d) See post, Ch. X. s. i. Non-payment.

⁽f) Phipson v. Kneller, 4 Campb. 285; 1 Stark. 116, (Chit. j. 946). This was an action against the drawer of a bill of exchange, and the question was, whether the plaintiff was excused for not having given him notice of the dishonour of the bill. It was proved, that a few days before the bill became due, the defendant called at the counting-house of the plaintiff, whom he knew to be the holder; and being asked the place of his residence, he said he had no regular residence; he was living among his friends, and he would call and see if the bill was paid by the acceptor. Per Lord Ellenborough. "This dispensed with notice, and threw upon the defendant himself the duty of inquiring if the bill was paid." Verdict for the plain-

coodings thereon.

7thly, Liability of Parties on Non-acceptance.

I. Of Non- bill at maturity shall be paid, and if the latter be given the holder must wait acceptance accordingly. "La caution etant fournie, le porteur ne peut plus exiger le paiement avant l'échéance(g). But in this country, if the drawee, on presentment for acceptance, dishonour the bill, either wholly or partially, the holder may insist on immediate payment by the parties liable to him, as well from the drawer(h), as from the prior indorsers, (i); or in default thereof, may instantly commence actions against each of them; and though the instrument may be somewhat like a note, yet if it also resemble a bill, and acceptance be refused, an action is immediately sustainable (k)(1). On the same principle it was decided, that if a man draw a bill, and commit an act of bankruptcy, and afterwards the bill be returned for non-acceptance, the debt is contracted before the act of bankruptcy, and may be proved under the commission, which could not have been the case, if the time when notice of [*311] plaintiff a draft for part of the money due, on which he was discharged *out

non-acceptance was given had been considered as the period when the debt was contracted (l). So where the defendant, having been arrested, gave the of custody, but the draft having been dishonoured, he was retaken upon the same writ, it was decided that the proceedings were regular and justifiable; and Lord Kenyon said, that in cases of this kind, if the bill which is given in payment do not turn out to be productive, it is not that which it purported to be, and that which the party receiving it expected, and, therefore, he may consider it as a nullity, and act as if no such bill had been given(m): and in a more recent case, where a bill given in payment for goods sold was refused acceptance, it was held that the payee having declared against the drawer on the bill, and joined counts for goods sold, might treat the bill as a nullity, and recover his demand on the latter counts, although the credit on the bill had not expired; and that it was sufficient in such an action to prove a presentment to the drawee for acceptance, without shewing that the bill was protested for non-acceptance, or that the drawer had notice of the dis-And if a buyer pay for goods by a bill which the drawee rehonour(n).

(g) 1 Pardessus, 405, 406; Poth. Traitè du

Contrat de Change, part 1, chap. 4, num. 70.
(h) Bright v. Purrier, Bul. N. P. 269, (Ch. j. 371); Milford v. Mayor, Dougl. 56; (Chit. j. 400); Anon. 12 Mod. 517. But Pother considers the drawer as merely liable to indemnify the holder against the probable non-payment, at maturity. Traite du Contrat de Change, part 1, chap. 4, num. 70; and see 1 Pardes. 405, supra, note (g),

(i) Ballingalls c. Gloster, 3 Fast, 491; 4 Esp. Rep. 268, (Chit. 673); Bishop v. Young,

2 Bos. & Pul. 83, (Chit. j. 621); note (a).
Ballingalls v. Gloster, 3 East, 481. John Gloster drew a bill on Jackson payable to Anthony Gloster's order, and the latter indorsed it to the plaintiffs. Jackson refused acceptance, on which the plaintiffs immediately sued Anthony Gloster, without waiting till the bill, which was drawn at ninety days' sight, would have been due. The plaintiffs had a verdict, with liberty to the defendants to move for a nonsuit. On a rule nisi, accordingly, it was urged, that an indorser stood in a situation different from

that of a drawer, and that although a drawer might be sued immediately on non-acceptance, an indorser could not, until the expiration of the time limited for the payment of the bill. But the court was clear that the case of an indorser was not distinguishable from that of a drawer, and that every indorser was a new drawer. Rule discharged.

(k) Allen v. Mawson, 4 Campb. 115, (Chit. j. 920); ante, 131.

(1) Macarty v. Barrow, 2 Stra. 949; 7 East, 437, (Chit. j. 272); Chilton v. Whiffin, 3 Wils. 16, (Chit. j. 378.)
(m) Puckford v. Maxwell, 6 T. R. 52, (Chit. 52)

j. 531).

(n) Hickling v. Hardy, 1 Moore, 61; 7 Taunt. 312, (Chit. j. 983). Sed quære as to the omission to protest, being the case of a foreign bill. The ground upon which a protest was held unnecessary was, that the defendant had admitted the drawee's refusal to accept. And as to the want of notice of dishonour, it appeared that the defendant had no effects in the hands of the drawee.

⁽¹⁾ The same doctrine has been repeatedly recognized in the United States. Mason v. Franklin, 3 John. Rep. 202. Miller v. Hackley, 5 John. Rep. 375. Sterry v. Robinson, 1 Day's Rep. 11. Watson v. Loring, 3 Mass. Rep. 557. Winthrop v. Pipoon, 1 Bay. Rep. 468. Lonox v. Cook, 8 Mass. Rep. 460. Welden v. Buck, 4 John. Rep. 144. Greely v. Thurston, 4 Greenl. 479.

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fuses to accept, and afterwards desires it may be again presented, and it will t. Of Nonbe honoured, the holder is not bound again to present it, nor to return the acceptance bill(o).

and Proceedings

It seems to have been considered in one case(p), that the drawer and in-thereon. dorser have a reasonable time allowed them to pay the bill after notice of the dishonour, and that the circumstance of their not paying the amount immedi-Liability ately they receive such notice will not preclude them from pleading a tender, of Parties provided they offer to pay the amount on the following day, and before a on Nonwrit has been issued; but it is very doubtful whether such a plea can be sup-acceptported at the present day, for if it be true that the drawer and indorser are bound to pay the bill immediately on receiving notice of its dishonour, it would be impossible, where the tender is not made till the following day, to plead, as the plea of tender requires, that the defendant was always ready to pay(q). And in the case of an acceptor, it is clear that he must pay the bill on presentment, and cannot plead a subsequent tender (r). If an action is improperly commenced, the proper remedy is by application to the court to stay proceedings(s).

When due notice of the non-acceptance has been given to the *drawers and [*342] indorsers, it is not necessary afterwards to present the bill for payment, or if

such presentment be made to give notice of the dishonour(t)(1).

With respect to the amount of the sum which the drawer and indorsers are bound to pay, they are liable, where a bill has been protested, not only to the payment of the principal sum, but to damages, interest, &c.(u). Where A. deposited a sum of money at the banking-house of B. in Paris, for which B. gave him his note, "payable in Paris:" "or at the choice of the bearer, at the Union Bank, in Dover, or at B.'s usual residence in London, according to the course of exchange upon Paris;" and after this note was given, the direct course of exchange between London and Paris ceased altogether, having been, previously to its total cessation, extremely low; the note was at a subsequent period presented for acceptance and payment at the

(o) Id. ibid.

(p) Walker v. Barnes, 1 Marsh. 36; 5 Taunt.

240, (Chit. j. 898).

The drawer of a bill is only bound to pay within a reasonable time after receiving notice of its being dishonoured, therefore, where he received notice the day after the bill became due, a tender on the following day was held to be in time. Per Lord Mansfield, C. J. "This is an action by the indorsee of a bill of exchange against the drawer, whose undertaking is to pay the holder on failure by the accept-or. When the bill is dishonoured, the drawer cannot find out by inspiration who is the holder, and therefore cannot pay it till he has notice of the dishonour. When he has received notice, he is bound to pay within reasonable time, and if he do not, will be answerable for damages. The bill became due on the 11th, on the 12th he received a note from the plaintiff 's attorney, informing him of the dishonour, and on the 13th he tenders. Is not this a reasonable compliance with his undertaking? No jury could give even a farthing damages. Rule discharged. And see Soward v. Palmer, 2 Moore, 274; 8 Taunt. 277, (Chit. j. 1025).

(q) See Siggers v. Lewis, 1 C. M. & R. 370; 2 Dowl. 681, S. C., where to an action against

the defendant as indorser of a bill, a plea that the action was commenced before a reasonable time for the payment of the bill by the defend-ant had elapsed after notice of dishonour, was held bad. And see cases in next note.

(r) Hume v. Peploe, S East, 16S; Poole v. Tumbridge, 2 M. & W. 223; S. C. 5 Dowl. 468; 1 Mur. & Hurl. 32. See post, Ch. IX.

s. ii. Of Payment.
(s) Per Lord Lyndhurst, C. B. in Siggers v. Lewis, 1 C. M. & R. 371; et per Lord Ellenborough, C. J. in Hume v. Peploe, 8 East, 170.

(t) Price v. Dardell, Sittings at Guildhall, London, 11th December, 1794, cor. Lord Kenyon. His lordship said, it is in no case necessary to give notice when it is a second dis-honour; and in De la Torre v. Barclay and another, 1 Stark. Rep. 7, (Chit. j. 905). Lord Ellenborough said, that as the bill had been protested for non-acceptance, a second protest was Forster v. Jurdison, 16 East, 105, (Chit. j. 862); Hickling v. Hardy, 7 Taunt. 312; 1 Moore, 81, (Chit. j. 983).

(u) 8 & 9 Will. 3, c. 17, and 3 & 4 Anne, 9 of the goal Park H. Ch. VI. Sur. Park.

c. 9, et post, Part II. Ch. VI. Sum Recover-

able.

^{(1) {} Exeter Bank v. Gordon, 8 New Hamp. Rep. 66. }

acceptance and Proceedings thereon.

7thly, Liability of Parties on Nonacceptance.

L Of Non- residence of B. in London, at which time there was a circuitous course of exchange upon Paris by way of Hamburgh, and it was holden, that A. was entitled to recover upon the note according to such circuitous course of exchange upon Paris, at the time when the note was presented(x). Where, however, acceptance or payment has been rendered illegal by an act of this country, the drawer, &c. may not be liable to be sued on the bill(y); and we have already seen, that if a person draw a bill in a foreign country upon another in England, and it be protested for non-acceptance, the drawer will be discharged from liability to be sued in this country, by his having obtained a certificate of discharge, according to the law of the country where he drew the bill(z). In De Tastet v. Baring(a), a verdict having passed for the defendants, in an action to recover the amount of the re-exchange upon the dishonour of a bill drawn in London on Lisbon, upon evidence that the enemy were in possession of Portugal when the bill became due, and Lisbon was then blockaded by a British squadron, and there was in fact no direct exchange between London and Lisbon, though bills had in some few instances been negotiated between them through Hamburgh and America about that period, the court refused to grant a new trial, on the presumption that the jury had found their verdict on the fact, that no re-exchange was proved to their satisfaction to have existed between Lisbon and London at the time; the question having been properly left to them to allow damages in the nature of re-exchange, if the plaintiff, who had indorsed the dishonoured bill to the holder, had either paid or was liable to pay re-exchange, and saving the question of law, whether any re-exchange could be allowed between this and an enemy's country.

If the holder of a bill neglect to present it for acceptance when necessary, or to give notice of non-acceptance to those persons entitled to object to the want of it, such conduct we have seen, discharges them from their respective As to Proceedings See further, post, Chapter X. Section I. liabilities (b).

on Non-payment.

Sthly, How Consequences of Laches may be waived, &c.

*The consequences, however, of a neglect to give notice of non-acceptance, or to protest a foreign bill, may be waived by the persons entitled to take advantage of them, by the same means as the omission to give notice of non-payment or protest may be waived. And it has been considered better to arrange the law and decisions on this subject in that part of this work, and to which, therefore we refer(c).

If a promise to pay, which would otherwise waive the laches of the holder, be made without knowledge of the fact of non-acceptance, or of the laches of the holder, it will not be binding (d). It is observable, that the

j. 672).

(y) Ibid. 840.

(z) Ante, 168; Potter v. Brown, 5 East, 124; 1 Smith, 851, (Chit. j 694).

(a) De Tastet v. Baring, 1-1 Fast, 265; 2 Campb. 65, (Chit. j. 678). (b) Ante, 272, 325, 326. (c) Post, Ch. X., s. i.

(c) Post, Ch. X, s. 1.
(d) Blesard v. Hirst, 5 Burr, 2672, (Chit. j. 384); Goodall v. Dolley, I.T. R. 712, (Chit. j. 440); Williams v. Bartholomew, I.B. & P. 326; Stevens v. Lynch, 2 Campb. 333, admitted in 12 East, 39, (Chit. j. 782); Hopley v. Dufresne, 15 East, 276, 277, (Ch. j. 858).

Blesard v. Hirst and another, 5 Burr. 2670.

The defendant indersed a bill to the plaintiff. and he indorsed it over; his indorsee presented

(x) Pollard v. Herries, 3 B. & P. 335, (Ch. it for acceptance a month before it became due, and acceptance was refused; it was afterwards presented for payment, and payment was re-fused, of which notice was given to the defendants, but they had no notice of the refusal to accept. The drawer was a bankrupt before the bill became due, but he continued in credit three weeks after the presentment for acceptance. Three days after the notice one of the defendants called on the plaintiff at Bradford, on his way to Leeds, and he said he would take up the bill as he returned, but on his return he said he was advised he was not bound to do it, upon which this action was brought; and on a case reserved, the court held, that though the holder might not have been obliged to present the bill for acceptance, yet as he did, he ought to have given notice of the refusal, and that by

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cases of a promise or acknowledgment after want of notice of refusal to ac- I Of Noncept, are very different from a promise after a refusal to pay; of the former acceptance the defendant might be wholly ignorant, whereas a defendant must in general ceedings know when the bill became due, and might readily ascertain whether or not thereon. there were laches before he promised.

A person who has been once discharged by laches from his liability is always discharged; and therefore where two or more parties to a bill have been so discharged, but one of them not knowing of the laches, pays it, such payment is in his own wrong, and he cannot recover the money from another See further, post, Chapter X. Section I. As to Proof such parties(e). ceedings on Non-payment.

II. OF PROTEST FOR BETTER SECURITY.

THE custom of merchants is stated to be, that if the drawee of a bill of II Of Proexchange abscond before the day when the bill is due, the holder may protest it, in order to have better security for the payment, and should give notice to the drawer and independent of the payment. tice to the drawer and indorsers of the absconding *of the drawee(\check{f}); and [*344] if the acceptor of a foreign bill become bankrupt before it is due, it seems that the holder may also in such case protest for better security (g); but the acceptor is not, on account of the bankruptcy of the drawer, compellable to give this security (h). The neglect to make this protest will not affect the holder's remedy against the drawer and indorsers (i), and its principal use appears to be, that by giving notice to the drawers and indorsers of the situation of the acceptor, by which it is become improbable that payment will be made, they are enabled by other means to provide for the payment of the bill when due, and thereby prevent the loss of re-exchange, &c. occasioned by the return of the bill(k). It may be collected, that though the drawer or indorsers refuse to give better security, the holder must nevertheless wait till the bill be due, before he can sue either of those parties (l).

not so doing he had taken the risk upon himself, and notwithstanding the promise of one of

them, the defendant had judgment.
Goodall v. Dolley, 1 T. R. 712, (Chit. j.
440). A bill drawn in favour of the defendant, payable the 11th of January, 1787, was presented for acceptance by the plaintiffs, the 8th November, 1786, when acceptance was refused; they gave no notice to the defendant till the 6th January, and then did not say when the bill was presented, upon which the defendant proposed paying it by instalments, but the plain-tiff rejected that offer and brought his action. Heath, J. thought the defendant discharged for want of notice, and that his offer to pay being made under ignorance of the circumstances, was not binding, and the jury under his direction found a verdict for the defendant. Upon cause shown against the rule for a new trial, the court thought the verdict and direction right, discharged the rule. See observations on these

cases, supra, in context.

(e) Roscoe v. Hardy, 12 East, 434, 2 Camp.
458, (Chit. j. 983); Turner v. Leach, 4 B. &
Ald. 541, (Chit. j. 1109). In these cases the plaintiff sought to recover against a prior party

to the bill: but where a party, who, as agent, draws a bill upon his principal, which the latter refuses to accept, and the former is compelled to pay, sues his principal in an action founded upon an implied indemnity, against loss, &c. arising from the drawing of the bill, the want of notice of non-acceptance to the plaintiff, the drawer, will be no defence to such action; Huntley v. Sanderson, 1 C. & M. 467;

8 Tyr. 469; see ante, 331, note (z). (f) Anon. Ld. Raym. 743; Mar. 27, 111, 112; Beawes, pl. 22, 24, 26, 27, 29; Kyd,

The following is an extract from the code of laws at Antwerp, relating to bills of exchange: -" In the case of failure (de faillité) of the acceptor before the usance (l'échéance), the holder may cause it to be protested, and put in

force his recourse (exercer son récours)."

(g) Id. ibid.; Ex parte Wackerbath, 5 Ves. 574, (Chit. j. 627); Kyd, 139. (h) Beawes, pl. 22. (i) Ibid. pl. 23, 25.

(k) Ibid. pl. 24.

(1) Ibid. pl. 26.

III .- OF ACCEPTANCE SUPRA PROTEST.

III. Of Acceptance supra Protest (m).

Any person may, without the consent of the drawer or indorsers, accept the bill supra protest for better security (n). This security, it is said, is usually given by making another acceptance under the protest, that the person who becomes new security will be bound for the payment of the sum mentioned in the bill, upon which the protest is made (o).

1st, By whom made.

[*345]

When a foreign bill has been protested for non-acceptance, or for better security, and not before (p), the drawee (q) or any other person may accept it supra protest, which acceptance is so called from the manner in which it is made. This description of acceptance is frequently made upon a foreign bill, for the purpose either of promoting the negotiation of the bill when the drawee's credit it suspected, or to save the reputation, and prevent the issuing legal proceedings against all or some of the parties, where the drawee either cannot be found, is not capable of making a contract, or refuses to accept; and such acceptance is, in this country, called an acceptance for the honour of the person or persons for whose use it is made, and in France an acceptance par intervention, and it enures to the benefit of all who become parties subsequently to that person(r). A promise to pay a bill after refusal to accept, but before protest, is not to be considered an acceptance supra protest, but in the nature of an "aval" known in the French law(s).

*The drawee, though he may not choose to accept on account of him in whose favour he is advised the bill is drawn, may nevertheless accept for the account and honour of the drawer, or in case he do not choose to accept on account of the drawer, he may accept for the honour of the indorsers, or one of them; in which latter case, he should immediately send the protest on which he made the acceptance to the indorser(t). It is said, that if the holder be dissatisfied with the acceptance supra protest, and insist on a simple acceptance, and protest the bill for want of it, the acceptor should renounce the acceptance he had made, and insist that it be cancelled(u).

It is laid down that there is reason to think (though the point does not appear to have been decided) that in Scotland the holder may take an acceptance supra protest, and yet sue the drawer or indorsers for want of acceptance by the drawee, because he has not got the security stipulated by the bill(x), and it has been supposed that such is the French law(y); and that all events, it is certain that the holder, by taking an acceptance for the honour of an indorser, does not abandon his right to protest either against the drawer or any prior indorser(z). But where an acceptance supra protest is generally for the honour of the bill, or of all the parties, it would defeat the object of such acceptor, if the holder could afterwards, before the bill is due

(m) 1 Pardes. 407 to 411; Pailliet Man. de Droit Français, 816.

(n) Ex parte Wackerbath, 5 Ves. 574, (Ch. j. 627), et infra. See the observations on acceptances supra protest in Houre v. Cazenove, 16 East, 391, (Chi. j. 874); post, 347, n. (u).
(o) Com. Dig. tit. Merchant, F. S, cites Mar.

(p) Ex parte Wackerbath, 6 Ves. 574, (Ch. j. 627); 1 Pardess. 407, tit. "Acceptation par Intervention."

(q) In 1 Pardess. 407, It appears to be considered, that in France the drawee cannot so accept, though he may declare that he accepts

only to oblige the drawer, and not admitting that he is debtor.

(r) Hussey v. Jacob, Lord Raym. 88, (Ch. j. 189); Lewin v. Brunetti, Lutw. 899, (Ch. j. 178); Beawes, pl. 34; Poth. pl. 112, 113, 114;
1 Pardess. 407; Pailliet Man. de Droit Frangais, 846.

(s) 1 Pardess. 407, 419.

(t) Beawes, pl. 33, 34.

(u) Id. pl. 37. (x) Thompson on Bills, 89.

(y) Roscoe, 392, refers to Code de Com. B. 1 & 8, s. 4, num. 128.

(z) Roscoe, 392; Scarlet, c. 12, note 15.

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sue either of the parties, and therefore it should seem he could not sue either, III. Of after receiving such general acceptance supra protest; and, according to the Acceptlaw of France, the holder cannot, on refusal to accept, demand immediate ance supra payment from the drawer or indorsers, unless they refuse security (a).

When the drawer will not accept the bill, any other person may, after re-lat, By fusal by him(b), and after protest, accept it for the honour of the bill, or of the made. drawer(c)(1), or of any particular indorser(d); and even a bill previously accepted supra protest may be accepted by another person supra protest, in honour of some particular person(e). No one, however, should accept a bill under protest for non-acceptance for the honour of the drawer before he has ascertained that the hand-writing of the drawer and indorsers, for whose honour he proposes to accept, are genuine, for otherwise he would not be able to resort to them (f), and he should also ascertain from the drawee his reason

for suffering the bill to be protested; but if the acceptance be in honour of

the indorser, such inquiry is unnecessary (g).

It is said, that the holder of a bill must receive an acceptance supra protest, if offered by a responsible person, it being of no importance to him whether it be accepted simply or under a protest, as the acceptor pays the charges, unless he had orders from the remitter not to admit of such an acceptance (h). But this dictum seems to be erroneous, for it has been adjudged that the holder need not acquiesce in any case (i). And though there cannot be a series of acceptors of the same bill, and it must either be accepted by the drawee, or, failing him, by *some one for the honour of the drawer(k); yet, [*346] after acceptance for the honour of one party, there may be unother acceptance supra protest for the honour of another party (l).

The method of accepting supra protest is said to be as follows:- The ac-2dly, Mode ceptor must personally appear before a notary public with witnesses, and de- of acceptclare that he accepts such protested bill in honour of the drawer or a partic- ing supra ular named indorser, or generally for honour, and that he will satisfy the same Protest. at the appointed time; and then he must subscribe the bill with his own hand, thus—" accepted supra protest, in honour of J. B. (m)," or, as is more usual, "accepts, S. P." and sometimes it is "accepted under protest, for honour of Messrs. -, and will be paid for their account, if regularly protested and refused when due(n)." A general acceptance supra protest is considered as made for the honour of the drawer, unless otherwise expressed. acceptance, however, may be so worded, that though it be intended for the honour of the drawer, yet it may equally bind the indorser; but in this case, notice of such acceptance must be sent to the latter(o). If there be several offers of acceptance for honour, that which it most extensive should, it is

(a) Ante, 344; 1 Pardess. 405, 406.

(b) Beawes, pl. 38; Hussey v. Jacob, Lord

Raym. 98, (Chit. j. 189). (c) Mar. 125, 126, 127, 128; Lewin v. Brunetti, Lutw. 896, 899; Carth. 129, (Ch. j. 176); observed upon in Hoare v. Cazenove,

16 East, 391, (Chit. j. 874); post, 347, n. (u).
(d) Beawes, pl. 38, 42; Jackson v. Hudson,

2 Campb. 448, (Chit. j. 799).

(e) Beawes, pl. 42.

(f) 1 Pardessus, 474.
(g) Beawes, pl. 46.
(h) Ibid. pl. 27, 36.

(i) Mitford v. Walcot, 12 Mod. 410; Ld. Raym. 575, (Chit. j. 214); et vide Beawes, pl. 37; Gregory v. Walcot, Com. 76, (Chit. j. 214); Pillans v. Van Mierop, 3 Burr. 1672, 1674, (Chit. j. 372).

(k) Jackson v. Hudson, 2 Campb. 447; ante.

(1) Beawes, pl. 42; 2 Campb. 448, note.

(m) Beawes, pl. 38. see post, 821, (39).
(n) Mitchel v. Baring, 10 Bar. & Cress. 4;
6 Mood. & M. 381; 4 Car. & P. 35, (Chit. j. 1454); post, 347, note (u).

(o) Beawes, pl. 39.

III. Of Acceptance supra Protest.

said, be preferred (p). The holder, as well as the acceptor supra protest, should always take care to have the bill protested for non-acceptance before the acceptance for honour is made, as otherwise, it is said, the drawer might allege that he did not draw on the person making the acceptance (q); and the acceptor supra protest might not be able to recover from the drawer the money he might pay (r).

3dly, Liability of Acceptor supra Protest. [*347]

*It has been said that acceptance supra protest is as obligatory on the acceptor as if no protest had intervened, and that it is immaterial to the holder on whose account the bill has been so excepted(s), from which it might be inferred that such an acceptance, like that made by an original drawee, is an absolute engagement. But this is not so; for an acceptance supra protest is in effect only a conditional engagement, and to render such acceptance absolutely binding, the performance of several acts, as conditions precedent, are essential. Such an acceptance is equivalent to saying to the holder "keep this bill, do not return it, and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me and you shall have the money(t)." In order, therefore, to complete the liability of the acceptor supra protest, the bill must be duly presented for payment, at the time it falls due, to the original drawee, notwithstanding his prior refusal; because, between the time of such refusal and the time when

(p) 1 Pardess. 409, 410.

(q) Marius, 88, 125, 126, 127.

(r) A person should not accept or pay for honour of a party to the bill until a final protest of the previous dishonour has been made. Vandewall and Trippher v. Tyrrell, Gdildhall, be-fore Lord Tenterden, 28d July, 1827, MS. and Mood. & M. 87, (Chit. j. 1352). Assumpsit for money paid by plaintiffs for use of defend-ant. Defendant, at Jamaica, drew four bills, dated 9th September, 1824, for 1500l. on Willis and Co. in London, payable nine months after sight; they were duly accepted, and became due 30th July, 1825. The acceptors could not pay, and the bills were merely noted for nonpayment, and thereupon the acceptors requested plaintiffs to pay for honour of the defendant, the drawer, which they did on 8th August, 1825, and notice thereof was given by post to defendant at Jamaica; but it appears, by the evidence of the notary, that he was not requested to protest the hill for non-payment till May, 1826, when he drew up the protest as if it had been made before the payment by the plaintiffs. Lord Tenterden decided, that such a payment could not bind the defendant, or subject him to liability to refund, for that it was essential, according to the custom of merchants, that there should be a formal protest for non-payment before the payment by a third person supra protest; and he therefore directed the plaintiffs to be nonsuited.

See Forbes on Bills, 150; Beawes Lex Merc. tit. Bills, pl. 34, 66; 1 Pardessus, 109; and Pnilliet Manual de Droit Français, 851. In Forbes on Bills, 149, the law is thus laid down.—" But as in no case a bill should be accepted supra protest for honour, without a preceding protest for non-acceptance, against the person drawn upon (even when he himself accepts supra protest), and instruments taken and extended upon the acceptance, and timeous advertisement of the whole transaction sent

to the person or persons for whose honour the bill is accepted. So before any bill can be lawfully paid supra protest for honour, the same must be protested for non-payment against him on whom it was drawn; unless the payer supra protest, having formerly accepted, got an answer from the party for whose honour the acceptance was, approving thereof. And he who pays supra protest must declare, before a public notary, with what quality he pays, and for whose honour, and the cause why he does it; and the whole must be reduced into a notarial act to be extended thereon: and advice of what hath past ought to be sent as soon as possible to the person or persons for whose honour he paid, together with the protest for non-payment, and the instrument upon his payment supra protest. In a word, whatever caution is necessary to be exhibited in honouring of bills, protested for non-acceptance, is as needful in paying supra protest. And the same reasons for all these formalities both alike in both cases; for if the solemnity of a notarial instrument were omitted, any body that hath simply paid and retired a bill, might afterwards, at his own hand, object what quality he pleases to the great prejudice of parties concerned, which the instrument is a check to. And the neglecting to send advice might occasion their relief to perish, by the breaking of one in the mean time who perhaps stands engaged to them in warrandice: now he who meddles in another's matters should do all things to the best advantage." See post, 821, (40).

(*) Benwes, pl. 35, 45; Mitford r. Walcot, l. Ld. Raym. 575; 12 Mod. 410, (Chit. j. 214); Gregory r. Walcot, Com. 76, (Chit. j. 214); Pillans v. Van Mierop, 3 Burr. 1672, (Chit. j. 372).

(t) Per Lord Tenterden, in Williams r. Germaine, 7 Bar. & Cress. 477; 1 Man. & Ry. 394, (Chit. j. 1356).

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the bill would fall due, effects may have reached the drawee, out of which he III. Of might, if the bill were presented again, pay the bill; and the drawer and other Acceptparties are entitled to the chance of the benefit to arise from such second de-ance supra mand, or at any rate to the benefit of that evidence which the protest affords, mand, or at any rate to the benefit of that evidence which the protest anothes, that the demand had been made duly without effect, as far as such evidence bility of may be available to him for the purposes of ulterior resort(u). If such *sec-Acceptor

Protest.

(u) Per Lord Ellenborough, in Hoare v. Cazenove, 16 East, 891, (Chit. j. 874). This was an action on a set of foreign bills of ex-change, drawn at Hambro' on Pen and Hanbury in London, at one hundred and thirty days after date; the bills were presented to Messrs. P. and H. for acceptance and refused, and protest duly made for non-acceptance; the bills were afterwards accepted by the defendant un-der protest for the honour of the first indorsers. When the bill became due, it was not presented to the drawees for payment, nor protested for non-payment. The defendant refused to pay the bill, in consequence of orders from the first indorsers. At the trial, the plaintiff had a verdict, subject to the opinion of the court on the above case; and after two arguments, and time taken to consider, the court were of opinion, that a presentment to the original drawees for payment, and a protest for non-payment by them, was essential, as a previous requisite to maintaining an action against an acceptor for the honour of a first indorser, and ordered the postea to the defendants. Lord Ellenborough said, "the reason of the thing as well as the strict law of the case, seems to render a second resort to the drawee proper, when the unaccepted bill still remains with the holder, for effects often reach the drawee, who has refused acceptance in the first instance, out of which the bill may and would be satisfied, if presented to him again, when the period of payment had arrived; and the drawer is entitled to the chance of the benefit to arise from such second demand, or at any rate, to the benefit of that evidence which the protest affords; that the demand has been made duly without effect, as far as such evidence may be available to him for purposes of ulterior resort."

When he that is drawn upon dwells not in the same place where the bill is to be paid, yet [*348] the acceptor is obliged to bring his monies to that place where the bill is to be paid. "The possessor of a bill is not obliged to protest ngainst an out-dweller [i. e. one who does not live at the place where the bill is payable] at his house or dwelling, nor to seek him out of the city or town where the payment is to be made." Scarlett on Exchanges, p. 160 made." Scarlett on Exchanges, p. 160, A. p. 1684. This scarce book is in the library of the British Museum, 4 Car. & P. 39, note (a). See further extract, 10 B. & C. 11, note (a).

Suppose a bill of exchange to be drawn from Rouen, and directed thus:—"To Mr. William P. merchant, Southampton," but be made payable thus:—"Pay this my first bill of exchange at the house of Mr. Roger C. in London, to the order of Mr. Benjamin L. this bill must be sent to Southampton to be accepted, and if acceptance is refused, it may either be protested at Southampton for non-acceptance, or sent to London, and there be protested for non-acceptance." But now, when this bill is due, you must then only endeavour to get payment at London, according to the express words and tenor of the bill, and if no order be given at the house of Mr. Roger C. in London, for payment, or if a particular house be not expressed, but only the bill is payable in London, if you have not your money brought you within the three days after the bill is due, you must cause protest for non-payment to be made in London according to the usual manner." Marius on Bills. 106, 107; 4 Car. & P. 39, note (b).

Any third person may accept a bill supra protest for honour of the drawer or indorser after it hath been protested for non-acceptance against the person drawn upon. The acceptor has, beyond the day in the bill, three days allowed him to make payment, called days of grace or favour, or respite-days; upon the last of these days of grace the creditor in the bill ought to protest it against the acceptor for nonpayment. In all cases where bills are protested for non-acceptance or non-payment, advice thereof must be sent by the next post to the drawer and indorser. Forbes Inst. 191; 4 Car,

& P. 89, note (c).

Roach and others r. Ostler, executrix of Ontler. Sittings in Guildhall, after Trin. Term, 8 Geo. 4, K. B. MS.; 1 Man. & Ry. 120, (Chit. j. 1359). Acceptors supra protest for honour of the payee against the executrix of the drawer of a bill of exchange, payable thirty days after sight. The declaration stated the drawing of the bill by William Ostler, the tes tator, upon one William Ostler, in favour of T. Russell, or order, a memorandum, directing the bill, in case of need, to the plaintiffs, for the honour of T. Russell, the payee, the indorsements, the presentment to the drawer,

Mitchell v. Baring, 10 Bar. & Cres. 4; Mood. & M. 381; 4 Car. & P. 35, (Chit. j. 1454). A foreign bill of exchange was drawn by A. up-on C. and Co. who resided at Liverpool, in favour of L. R. and Co. and by A. indorsed to the plaintiffs. The bill was drawn "sixty days after sight pay to L. R. and Co. in London," &c. It was refused acceptance by the drawee, but accepted under protest for honour of the payee, by the defendants, as follows: "Accepted under protest for honour of L. R. and Co. and will be paid for their account if regularly protested and refused when due." This bill was presented for payment at the residence of the drawees in Liverpool, and protested at Liverpool for non-payment, but it was not presented for payment or protested in London where the drawees had not any house of business; and it was held, that the holders were entitled to recover against the acceptor for honour, and that under these circumstances a presentment in London and protest there were not necessary. But see now 2 & 3 Will 4; c. 98, post, 349.

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III. Of Acceptance supra Protest.

8dly, Lia-bility of Acceptor supra Protest.

ond presentment be not regularly made (except in the case presently noticed of a bill made payable at a place not being the residence of the drawee), the drawer and indorsers may be discharged of liability, and the accentor supra protest would have no recourse against them if he paid the bill, and consequently he also would be discharged for want of such protest(v).

With respect to the place of presentment for payment, where a bill is made payable at a place not being the residence of the drawee, it seems that if a foreign bill drawn upon a merchant residing at Liverpool, or other place, payable in London, be refused acceptance by the drawee, the customer is to make the presentment and protest in London. The bill is put into the hands of a notary, and he formerly used to make protest at the Royal Exchange; but that custom has become obsolete; the notary now is merely desired by the holder to seek payment of the bill, and on a declaration by the latter that [*349] the *drawee has not remitted any funds, or sent to say where the bill will be paid, the notary at once marks it as protested for non-payment. In that case it is presumed, that the drawee in Liverpool, to whom the bill has been presented for acceptance (who thereby has the means of ascertaining who the holder is), is aware of its being due; and it is his duty to transmit the funds to the holder, or to communicate to him where the bill will be paid in In Mitchell v. Baring(y), however, where a bill so drawn had London(x). been accepted supra protest for the honour of the payee, if regularly protested and refused when due, a presentment and protest in Liverpool were held sufficient, without any presentment or protest in London. This case, though decided upon the peculiar form of the acceptance, and therefore not involving the general question as to the usage and custom of merchants, was, nevertheless, considered as casting a sufficient doubt upon the validity of the previous practice to require the interference of the legislature; and, accordingly, the act of 2 & 3 Will. 4, c. 98, was passed, by which, after reciting that doubts had arisen as to the place in which it was requisite to protest for nonpayment bills of exchange, which on the presentment for acceptance to the drawee or drawees should not have been accepted, such bills of exchange being made payable at a place other than the place mentioned therein to be the residence of the drawee or drawees thereof, and that it was expedient to remove such doubts, it is enacted, "that from and after the passing of this act,

2 & 8 W. 4, c. 98. Bills of Exchange expressed to be paid in any Place other than the Residence of the Drawee, if not accepted on Presentment, may be protested in that Place,

William Ostler, for acceptance, his refusal to accept, and the protest for non-acceptance; then the presentment to the plaintiffs for acceptance, the acceptance supra protest by them for the honour of the payee, the presentment to the drawee, William Ostler, for payment, his refusal to pay, and the protest for non-payment; then the presentment to the plaintiffs, and the paid to the which premises the testator, William Ostler, Holder. had notice, whereby he became liable, &c. The proof in support of the declaration was, that the bill was drawn at Rio de Janeiro, by the testator, William Ostler, upon himself in London, the drawer, William Ostler, and the drawce, William Ostler, being the same person; that the bill was presented to the drawee, William Ostler, for acceptance, that acceptance was refused, and the bill protested for non-acceptance; that the bill was indorsed as stated, and then a letter was put in, proved to have been written by the drawer to the payce of the bill a short time before the bill was presented to William Ostler the drawee, for acceptance, stating, that he feared the bill would not be paid, and requesting the payer to hold it, and

to prevent its being returned; and that if it were returned, it should be paid with all charges. The acceptance by the plaintiffs supra protest, and the payment of the bills by them, were also proved. It was objected for the defendant that the above evidence was not sufficient to support the declaration, and that the plaintiffs were bound to prove presentment to the drawee, William Ostler, for payment, and the notice of non-payment, and the protest as averred in the declaration. Lord Tenterden thought the evidence sufficient, and the plaintiff had a verdict, with liberty for the defendant to move to enter a nonsuit.

(r) Id. ibid.

(x) See the evidence of London merchants and notaries in Mitchell v. Buring, Mood. & M. 381; 4 C. & P. 35; 10 B. & C. 6, 7. It was stated, however, by two notaries from Liverpool, that the uniform practice had been in the case of foreign bills drawn on persons in Liverpool, payable in London, to present for payment at the domicile of the drawee in Liverpool, and protest for non-payment there.

(y) Ante, 347, note (u).

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all bills of exchange, wherein the drawer or drawers thereof shall have ex- III. Of pressed that such bills of exchange are to be payable in any place other than Acceptthe place by him or them therein mentioned to be the residence of the draw-protest. ee or drawees thereof, and which shall not, on the presentment for accept- 8dly, Liaance thereof, be accepted, shall or may be, without further presentment to bility of the drawee or drawees, protested for non-payment in the place in which such Acceptor bills of exchange shall have been by the drawer or drawers expressed to be protest. payable, unless the amount owing upon such bills of exchange shall have been paid to the holder or holders thereof on the day on which such bills of exchange would have become payable had the same been duly accepted"(z).

But as this act applies only to bills made payable at a place other than the residence of the drawee, it should seem that in the case of a bill made payable at the same place as the residence of the drawee, a second presentment to the drawee, in order to charge an acceptor supra protest, will still be necessary. Such presentment, when necessary, should, if the bill be payable after date, be made upon the day when the bill, according to its date, falls due(a). But if the bill be payable after sight, then the presentment must be made at the expiration of the time when, with the days of grace, the acceptance supra protest would fall due, calculating not from the date of the bill, *but from the day of the acceptance, and without regard to the time [*350] of the presentment to the drawee for acceptance, or his refusal to accept(b).

(z) As after a protest for non-acceptance the drawer and indorsers are immediately liable to be sued, and no further presentment or protest for non-payment is necessary to fix them with liability, this act seems, in its practical utility confined to cases where there has been an acceptance supra protest, when, in order to complete the liability of the acceptor supra protest, it was necessary, in the case recited in the act, to make a second presentment of the bill to the original drawee, (see ante, 347) and which in such cases is now dispensed with.

(a) Hoare v. Cazenove, 16 East, 391, (Chit. j. 874); ante, 847, note (u); and see observa-tions of Lord Tenterden, in Williams v. Ger-

maine, 7 B. & C. 171, infra.
(b) Williams v. Germaine, MS. 1827; 7
Ber. & Cres. 468; 1 Man. & Ry. 394, (Chit. j. 1856). A foreign bill, payable thirty days after sight, was presented to drawee for acceptance on the 12th July, and acceptance refused. No notice was given immediately to drawer, his residence not being known. The bill was accepted by A. B. for the honour of the drawer, on the 20th July. At the expiration of the thirty days and days of grace, the bill was presented for payment to the original drawee and to the acceptor for honour, and not paid, and thereupon this action was brought against the drawer and plaintiff obtained a verdict. Parke moved for a new trial, on an objection taken at Nisi Prius, that the bill ought to have been presented for payment to the drawee at the expiration of thirty days from the 12th July, when it was refused acceptance, and that the delay in presenting until the thirty days and days of grace from the date of acceptance supra protest discharged the drawer. Abbott, C. J. "The bill must be presented to the original drawee for payment, but it suffices to make one presentment to him for payment, and that on the day the bill falls due, according to the accept-

ance." Bayley, J. "As to the delay, it is giving time to the drawer, and he cannot take advantage of what was for his benefit. He cannot object that the acceptance supra protest was at an extended time, for he became liable to be sued instantly the drawee refused accept-Rule refused.

The following is an extract from the report of the case in 7 Bar. & Cress. 468.

Williams v. Germaine, the elder, and Williams v. Germaine, the younger. Where a bill of exchange, payable after sight, having been presented for acceptance and refused, and duly protested, was eight days afterwards accepted by a third person for the honour of the drawer, and when at maturity, according to that acceptance, was presented for payment both to the drawee and the acceptor for honour; it was held, in actions against the latter and the drawer, that these presentments for payment were made at a proper time. But it was held necessary that presentment to the drawee for payment should be averred in the declaration, and for want of such averment judgment was arrested. Upon the motion for a new trial,

Lord Tenterden, C. J. said, "I am of opin-

ion that there is not any sufficient ground for the motion either on behalf of the drawer or the acceptor. This was a bill payable thirty days after sight. On the 12th July it was presented for acceptance, and that having been refused, it was duly protested, but the drawer's address not being known, notice could not be given. The bill was then taken to Germaine the elder, and on the 20th of July, he accepted it for the bonour of the drawer; thirty days elapsed, and then the usual days of grace having been allowed, it was presented to the original drawees and to the acceptor for honour, but both refused payment. The first question is, whether the drawer is liable under these circumstances? It is not necessary to decide on the effect of an acIII. Of Acceptance supra Protest.

*It will be seen, however, that bills of the description mentioned in the above statute are to be treated as due on the day on which they would have become payable, had they been duly accepted, without any distinction as to whether payable after date or after sight.

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Besides this presentment for payment to the original drawee (when not dispensed with under 2 & 3 Will. 4, c. 98), there must be also a formal protest, stating such presentment, and the neglect or refusal of the original drawee to pay(c); and such presentment(d) and protest(e) must be alleged in the declaration against the acceptor supra protest, or the judgment will be ar-

It is also requisite, that after presentment to the drawee, and protest for non-payment by him, a presentment should be made in due time to the acceptor supra protest, or he will be discharged from liability. It would, when he lives at a different place from the original drawee, be impracticable to make such presentment, and require him to pay supra protest, according to his acceptance, on the same day as that on which the presentment for payment to the original drawee is made; and, therefore, by the 6 & 7 Will. 4, 6 & 7 W. c. 58, intituled " An Act for DECLARING the Law as to the Day on which it is requisite to present for Payment to the Acceptors or Acceptor supra Protest or Honour, or to the Referees or Referee in case of Need, Bills of Exchange

4, c. 59. Bills of Exchange need not be present-

Honour or following become due.

ed to Ac- ceptance for honour where no presentment for ceptors for payment is made to the drawers. Here presentment was made to them at the time when Referees the bill became due, according to the accept-till the Day ance for honour, and I think that sufficed. This circumstance distinguishes the present case the Day on from Hoare v. Cazenove. The bill in that case which they was payable at a certain period after date, and no presentment for payment was ever made to the drawee; the decision therefore cannot be cited as an authority for saying that a bill should, under the circumstances proved in this case, be presented for payment to the drawees and to the acceptor for honour at two different times. Such a rule might be prejudicial to the acceptor for honour, and in the present case it would have compelled the holder to present the bill to the drawee eight days before the expiration of the time allowed to the actual acceptor for payment."

Parke then moved in arrest of judgment because there was no averment in the declaration, that the bill was presented for payment to the original drawee, and referred to Lewin v. Brunetti, Lutw. 896, (Chit. j. 178); and Houre v. Cazenove, 16 East, 391; and a rule nisi was granted, and afterwards the court arrested the

judgment. Lord Tenterden, C. J. "Whatever is requisite to enable a person who has accepted a bill for the honour of another to call upon that person to repay him, and to enable him to recover over against such person, may also be reasonably held necessary to enable another party to recover against such an acceptor for honour. For if you could recover against an acceptor for honour, by proof of less than will enable him to recover against the party for whom he accepts, there would be an inconsistency, for it might be said, with some reason, that if the acceptor for honour chose to pay, without requiring all the proof from the holder which would be necessary for him to recover against the drawer, the pay-

ment would be made in his own wrong, and he would not be entitled to recover over. It seems to me, therefore, that the same rule as to proof, which prevails in the case of an acceptor for honour, in suing a party for whose honour he accepts, must also be observed when the holder of a bill sues the person so accepting. The result, as it seems to me, of the decision in Hours r. Cozenove, 16 East, 391, is, that an acceptance for honour is to be considered not as absolutely such, but in the nature of a conditional acceptance. It is equivalent to saying to the holder of the bill, 'keep this bill,' do not return it, and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me and you shall have the money.' This appears to me to be a very sensible interpretation of the nature of acceptances for honour where the parties say nothing upon the subject. In an action by the holder against the drawer of the bill, to he sure he has a right to say, ' if you keep it till its time has run out you ought to have presented it to the person on whom I drew it, and have seen whether on the presentment he would pay, whereas you have forbore to do so, and have relied on an acceptance by some person for my honour, made without my authority. We think that we are bound by authority, and I am inclined to say by reason, to confirm the decision in Hoare v. Cazenove, consequently, the rule for arresting the judgment in this case must be made absolute."

(c) Mitchel v. Baring, 10 Bar. & Cress. 4; Mood. & M. 381; 4 Car. & P. 35, (Chit.). 1454); ante, 347, 349. (d) Williams v. Germaine, 7 B. & C. 468,

ante, 350, note (b).

(e) Id. 472, quoting Lord Ellenborough's observations, and Hoare v. Cazenove, 16 East, 391; Lewin v. Brunetti, Lutw. 896, (Chit. j. 178); Pothier Contract de Change, part i, c. 5, s. 183.

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which had been dishonoured," after reciting that doubts had arisen(f) when III. Of bills had been protested for want of payment as to the day on which it was Acceptrequisite that they should be presented for payment to the acceptors or ac-Protest. ceptor for honour, or to the referees or referee in case of need, and that it sdly, Liawas expedient that such doubts should be removed, it is declared and enacted, bility of "that it shall not be necessary to present such bills of exchange to such ac-Acceptor ceptors or acceptor for honour, or to such referees or referee, until the day following the day on which such bills of exchange shall become due; and that if the place of address on such bill of exchange of such acceptors or acceptor for honour, or of such referees or referee, shall be in any city, town or place other than in the city, town or place where such bill shall be therein made payable, then it shall not be necessary to forward such bill of exchange for presentment for payment to such acceptors or acceptor for honour, or referees or referee, until the day following the day on which such bill of exchange shall become due." And by the second section it is further enacted and declared, "if the day following the day on If the folwhich such bill of exchange shall become due shall happen to be a Day be a Sunday, Good Friday or Christmas Day, or a day appointed by his Sunday, Majesty's proclamation for solemn fast or of thanksgiving, then it shall not be then Majesty's proclamation for solemn tast or of thanksgiving, then it shall not on the Day be necessary that such bill of exchange shall be presented for payment, or following be forwarded for such presentment for payment, to such acceptors or acceptor such Sunfor honour, or referees or referee, until the day following such Sunday, day, &c. Good Friday, Christmas Day, or solemn fast or day of thanksgiving."

If the acceptor supra protest, on such protest for non-payment, *thinks fit [*352] to pay pursuant to his liability created by the acceptance supra protest, then

complete, he should declare before a notary that he pays supra protest(g). If such acceptor should refuse to pay, then there must be another formal protest, stating the presentment (when necessary, see 2 & 3 Will. 4, c. 98, ante, 349) for payment to the drawee, the protest for his non-payment, the presentment of the bill and acceptance to the acceptor supra protest, and demand of payment of him, and the protest for his non-payment (h); and notice thereof must be forthwith forwarded to the drawer and indorsers(i).

If the acceptance were for the honour of the bill, or of the drawer, the acceptor is liable to all the indorsees, as well as to the holder; if in honour

of a particular indorser, then to all subsequent indorsees (k).

A person accepting a bill supra protest, either for the honour of a drawer Right of or of an indorser, although without his order or knowledge, has, as it is said, Acceptor his redress and remedy against such person, and to all other persons who are supra liable to that person, who must indemnify him from any damage he may have Protest. sustained the same as if he had acted entirely by his direction(1). He who accepts a bill in honour of the drawer only has no remedy against any of the indorsers, because he accepts merely on the behalf of the drawer; but the acceptor for the honour of the drawer of a bill already accepted by the drawee, but protested by the holder for better security, may, when he has paid the bill, sue the drawer or drawee, though in the case of a bankruptcy of these parties, if the first acceptance were for the accommodation of the drawer, a court of equity will compel the acceptor supra protest first to resort to the drawer's estate(m).

(f) See Williams v. Germaine, 7 B. & C. 468, 478, 474; ante, 850, note (b).

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⁽g) As to which, see post, Ch. X. s. ii. (h) Ante, 847.

⁽i) Ante, 851.

⁽k) Ante, 844.
(l) Beawes, pl. 47; Smith v. Nissen, 1 T. R. 269, (Chit. j. 485); et vide post, Of payment supra Protest.
(m) Ex parte Wackerbath, 5 Ves. 574,

III. Of Acceptance supra Protest.

Athly,
Right of
Acceptor
supra
Protest.

An acceptor for the honour of an indorser has no claim upon any party to the bill subsequent to him for whose honour he accepted; but the indorser, for whose honour he accepted, and all the prior parties, the drawer included, are obliged to make satisfaction to the acceptor (n). See further, post, Chapter X. Section II. As to Payment supra Protest (1).

(Chit. j. 627). The acceptor of a bill having become bankrupt, and the holders having protested it for better security, Christian and Bowen accepted it for the honour of the drawers, and having paid it, now claimed to be entitled to dividends under the bankrupt's estate. The Chancellor said, he had spoken to persons in trade upon the subject, and the result was, that the person accepting for the honour of the draw-

er had a right to come upon the acceptor. He said, however, that the justice of the case required that they should go in the first place against the drawer, if the acceptor had no effects, and directed an inquiry to be made, whether the original acceptor, or Christian and Bowen, had effects of the drawer in hand.

Bowen, had effects of the drawer in hand.
(n) Beawes, pl. 35, 44, 449; Poth. pl. 113;
Molloy, B. 2, c. 10, s, 24.

(1) When a bill of exchange is protested for non-acceptance, and afterwards is taken up and paid for the honor of an indorser, it has been held that the holder is still bound to cause the bill to be protested for non-acceptance and non-payment, and to give regular notice to the antecedent parties in the same manner as if the bill had not been taken up. It is material bowever to observe that this doctrine was delivered in a case where the action was brought by the indorser for whose honor the bill had been paid, against a prior indorser, and that the neglect to make the protest and give notice, was on the part of the persons who had taken up the bill for his honor. Lenox v. Leverett, 10 Mass. Rep. 1.

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*CHAPTER IX.

OF PRESENTMENT FOR PAYMENT, AND OF PAYMENT.

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I. OF PRESENTMENT FOR PAYMENT.

I. Of Presentment

WE have seen that the contract of an acceptor and of the maker of a note, for Payment. is, that it shall be paid on presentment; and the contract of an indorser is, that it shall be paid if duly presented, and that if not, then he will pay it if 1st. When he have due notice of the dishonour. Hence a presentment for payment is a condition precedent(a)(1). In general, a creditor may sue his debtor without any previous demand, but in the case of a negotiable bill it should seem to be otherwise, and the party entitled to it cannot, by the custom of merchants, insist upon payment even by the acceptor, without producing and presenting the bill to him, and offering to deliver it up, which is one reason why at law a party cannot recover against the acceptor of a lost bill(b).

There is, however, a material difference between the liability of the acceptor of a bill and maker of a note, and that of the drawer and indorsers:

(a) 1 Pardess. 425, 426. (b) Per Lord Tenterden, in Hansard v. Robinson, 7 Bar. & C. 90; 9 Dow. & Ry. 860, (Chit. j. 1340); ante, 226, note (a); and see argument in Wegersloffe v. Keene, 1 Stra. 222, (Chit. j. 244), post. But see Rumball v. Ball, 10 Mod. 38, (Chit. j. 231); post, 359, 360.

^{(1) \(\}text{A condition precedent to the liability of the indorser, but not to the liability of the maker or acceptor. Thus, in an action by the payee of a bill of exchange against the acceptor, where the bill is drawn payable at a particular place, it is not necessary for the plaintiff to aver or prove a demand of payment at the time and place appointed; but the defendant, if he means to avail himself of the want of such demand must plead that he was ready at the time and place appointed to pay, but the plaintiff did not come there, &c.; which defence goes only to damages and costs, but not to the cause of action. Wolcott v. Van Soutwood, 17 John. 248; Caldwell v. Cassidy, 8 Cowen, 271; Bond v. Storrs, 13 Conn. Rep. 412; Eldred v. Hawes, 4 id. 465; Conn v. Gano, 1 Ham. 486; United States v. Smith, 11 Wheat. 171; Wallace v. McConnell, 13 Peters, 136. But see Hamier et al. v. Johnson, 15 Louis. Rep. 242; Mellen v. Crogban, 8 Martins Rep. (N. S.) 423 contra Martins Rep. (N. S.) 423, contra. >

I. Of Pre- for with respect to the first, though some presentment before action brought may be essential, he is not discharged by any delay short of the Statute of Limitations(c). Whereas, with respect to the drawer and indorsers of a bill, or indorsers of a note, they are discharged from all liability, unless the

1st. When bill or note be properly presented on the very day it ought to be.

[*354] It would be extremely prejudicial to commerce, if the holder of a bill or note were suffered to give longer credit to the drawee than the *instrument directs, and afterwards, in default of payment by the drawee, to resort to the drawer or indorsers, at a time when perhaps the accounts between them and the persons liable to them may have been adjusted, or those persons may have become insolvent(d); and the common law detests negligence and laches(e). On this principle, it is settled, that the holder must present a bill, check, or note, to the drawee of the former, or maker of the latter, for payment at the time when due, when a time of payment is specified; and, when no time is expressed, within a reasonable period after receipt of the bill(f); and that if he neglect to do so, he shall not afterwards be allowed to resort to the drawer or indorsers, whose implied contracts were only to pay in default of the drawee, when the bill is at maturity, and on condition of having due notice of the dishonour, and who are always presumed to have sustained damage by the holder's laches(g)(1). An acceptor supra protest,

(c) Dingwall v. Dunster, Dougl. 247, (Chit. j. 401; Anderson v. Cleveland, 1 Esp. Digest, 48, (Chit. j. 409); post, 360, note (x).
(d) Allen v. Dockwra, 1 Salk. 127, (Chit. j. 206); Collins v. Butler, Stra, 1807, (Chit. j. 489); Cowley v. Dunlop, 7 T. R. 581, 582, (Chit. j. 598).
(g) Heylyn v. Adamson, 2 Barr. 669, (Chit. j. 489); Cowley v. Dunlop, 7 T. R. 581, 582, (Chit. j. 598); Cooper v. Le Blanc, R. (e) Per curiam, in Chamberlyn v. Delarive, T. Hardw. 295, (Chit. j. 281); semb. contra-

But the want of a demand will be excused when the acceptor has absconded, or cannot be found. Putnam v. Sullivan, 4 Mass. Rep. 45. Widgery v. Monroe, 6 Mass. Rep. 449. Stewart v. Eden, 2 Caines' Rep. 121. \ Gillespie v. M'Hannahan, 4 M'Cord, 503. \} Gist r. Lyrand, Ohio Rep. Cond. 591. And such fact may be given in evidence under the common averment that the note was duly presented, and refused payment. Stewart v. Eden, 2 Caines' Rep. 121. Saunderson v. Judge, 2 H. Bl. 510, contra. Blakely v. Grant, 6 Mass. Rep. 386. But an averment in such case that the holder had used due diligence, but could not find the acceptor, would seem to be more correct. Blakely v. Grant.

So where the maker is a seaman, without any domicil in the State, who goes on a voyage about the time the note falls due, no demand on him is necessary to charge the indorser. Barrett r. Wills, 4 Leigh's Rep. 114.

But where the maker is absent on a voyage at sea, having a domicil within the state, payment must be demanded there. Dennie v. Walker, 7 N. Hamp. 199.

Note. If a notary go to the maker's house to demand payment, and find it shut up, and that he is out of town, this is a sufficient demand. Ogden v. Cowley, 2 John. Rep. 270. Analogous to this is the decision in the case of Williams v. Bank of the U. S., 2 Peters, 100. See Galpin v. Hard, 3 M'Cord, 394.

Not only must a demand be made upon the drawee, but it must be made within a reasonable time, otherwise the drawer will be discharged, especially if prejudiced by the neglect. Therefore where a creditor received an order from his debtor on a third person, on the 9th of December, which the drawee agreed to pay in ten or fifteen days, and the order was not presented un-

⁽¹⁾ The drawer of a bill, and the indorser of a note, are responsible only after a default of the acceptor or maker; and the holder must first demand payment of him, or use due diligence to demand it before he can resort to the drawer or indorser. Munroe v. Easton, 2 John. Cas. 75. Berry v. Robinson, 9 John. Rep. 121. Griffin v. Goff, 12 John. Rep. 423. May v. Coffin, 4 Mass. Rep. 341. Aubin v. Lazarus, 2 M'Cord, 134. Butler v. Denham, Id. 350. And if an indorser of a bill on its becoming due pay the amount to the indorsee, the latter never having demanded payment of the acceptor, he cannot recover the amount from the drawer. Munroe v. Easton, 2 John. Cas. 75. It is no excuse for not demanding payment of the drawer, that the drawer has no funds in the hands of the drawee. Cruger v. Armstrong, 3 John. Cas. 5. Notice to an indorser prior to a demand upon the acceptor of a bill, or maker of a note, is a mere nullity. Jackson v. Richards, 2 Caines' Rep. 343. Griffin v. Goff. And in respect to the necessity of a demand, there is no difference whether the note or bill be indorsed before, or after, it became due. Berry v. Robinson. Course & M'Farlane v. Shackleford, 2 Nott & M'Cord, 293. Poole v. Tolleson, 1 M'Cord, 199. Stockman v. Riley, 2 M'Cord, 398.

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we have seen, is also within this rule(h). And whenever it is incumbent on 1. Of Prothe holder to present a bill or note for payment at a precise time, and he sentment neglect to do so, he will lose his remedy as well upon the bill, as upon the ment. consideration or debt in respect of which it was given or transferred(i). appears that a distinction was formerly taken between a bill of exchange given in payment of a precedent debt, and one given for a debt contracted at the time the bill was given; in the latter case, it was always holden, that the person who received it must have used due diligence to obtain the money from the drawee, and that in default of his so doing, he could not support any action against the party from whom he received it; but, in the former case, the bill was not considered as payment, unless the money were actually paid by the drawee, although the holder might have neglected to present it for payment, or to give notice of non-payment: and the holder, though he could not sue on the bill, might maintain an action for the consideration on which it was This distinction, founded it is presumed, on the principle that a

(h) Ante, 347, 348. (i) Camidge v. Allenby, 6 Bar. & C. 373;

9 Dow. & Ry. 391, (Chit. j. 1319); Bridges v. Berry, 3 Taunt. 130, (Chit. j. 804); post, Ch. X. s. i. When Notice of Non-payment necessary. In general, the consequences of laches there laid down are applicable to a neg-

lect duly to present for payment.

(k) Clerk v. Mundall, 12 Mod. 203; 1 Salk. 124, (Chit. j. 181, 206); Anon. 12 Mod. 408, (Chit. j. 215); Anon. Holt, 299, (Chit. j. 214); Trials per Pais, 499; Kyd. 171.

til the March following, or afterwards, when the drawee had become insolvent, and the drawer was held discharged. Brower v. Jones, 3 John. Rep. 230; and see Cruger v. Armstrong, 3 John. Cas. 5, and Conroy v. Warren, 3 John. Cas. 259. Stothart v. Lewis, Overt. Rep. 215. If at the time of the note's falling due, the holder is at a place distant from the place of abode of the maker, a reasonable time will be allowed to make the demand. Thus, where at the maturity of the bill, the holder was at 200 miles distance from the maker's place of abode, a demand six days after was held to be within reasonable time: but a demand thirty days after was held unreasonable. Freeman v. Boynton, 7 Mass. Rep. 483.

In order to make a demand good, it is necessary that the party making it should have a written or verbal authority from the holder; and should have with him the note itself, for the debtor has a right, upon payment, to receive and cancel it. \ But see Gallagher v. Roberts, 2 Farif. 489, where it was held that a demand upon the maker by the cashier of the bank in which the note was left for collection was sufficient, although he had not the note with him-all the parties residing in the town where the bank was situated. \ Freeman r. Boynton. Eastman r. Potter, 4 Vermont Rep. 313. \ Farmer's Bank v. Duvall, 7 Gill & John. 78. \ If the maker of a note be alive at the time of its fulling duc, his insolvency does not absolve

the holder from showing that he has used due diligence to obtain the amount due. Clair v. Barr, 2 Marsh, 256.

In an action upon a guaranty of the solvency of the maker of a note, indorsed on the back thereof, a demand of the maker, and notice of non-payment to the guarantor, are not necessary to charge the guarantor, the promise is absolute. Bell v. Johnson & al., 4 Yerger's Rep. 194.

Bayley v. Hazard, 3 Idem, 487; Foster v. Barney, 3 Verm. 60.

Where a bill of exchange indorsed in blank by the payees, but made payable to a particular person by the last indorsement, was presented to the drawee for payment, by the last indorser, who was in possession of the bill bona fide, the charge wes held sufficient to charge the preceding indorsers. Bachelor v. Priest, 12 Pick. Rep. 399.

Though the payee of a promiseour note indorsed it merely to give it corrency knowing at the

Though the payee of a promissory note indorsed it merely to give it currency, knowing at the same time, the insolvency of the maker, this, it seems, does not excuse the want of a demand, and notice to the indorser. Groton r. Dalhiem, 6 Greenleaf's Rep. 476.

To support an action against the drawers of a bill of exchange, dishonoured by the drawers, but accepted by third persons supra protest for the honor of the drawers, payment must be demanded of the drawess, and notice of non-payment given. Scofield v. Bayard, 3 Wend. Rep.

A. being indebted to B., passed to the latter in payment, the note of C., payable to A., or bearer, at a future day, and indersed by A. Before the note became due, C. failed, and thereupon A. told B., he should have no trouble about it, and that the note should be paid. It was held, that B. might maintain an action against A. upon the note, as upon an order not accepted, without showing that payment had been demanded of C. Whitney r. Abbott, 5 N. Hamp. Rep.

And see Elting v. Shook, 2 Hall, 459. Tickner v. Roberts, 11 Curry's Louis. Rep. 14. And when there is no proof of a demand, the court cannot presume one. The onus probandi lies on the plaintiff. Ibid. >

sentment for Payment.

I. Of Pre- bill delivered in consideration of a precedent debt could only be understood as a collateral security, which the assignee might waive, does not any longer exist; and in all cases a regular presentment must be made, or the parties will be discharged(1).

1st, When necessary.

It has been holden that even the known bankruptcy(m) or *insolvennecessary. (n)(1) of the acceptor of a bill, or maker of a note, however notorious, will not excuse the neglect to make due presentment, or to give due notice of the disbonour. And although the drawee of a bill, or maker of a note, being bankers, may have shut up and abandoned their shop, yet a presentment there, or to them in person, must be made; and it will not suffice to allege in a declaration, or to prove, that they became insolvent, and ceased and wholly declined and refused to pay at their bank any notes then payable(p).

> (1) Ante, 825, 326. Bul. Ni. Pri. 182; Smith v. Wilson, Andr. 187, (Chit. j. 285, 236). It seems to have been apprehended (Kyd, 172), that the statute 3 & 4 Anne, c. 9, s. 7, put an end to this distinction; but the clause referred to in support of that opinion relates only to such bills as are alluded to in the 4th section of the act, namely, bills made payable after date, and expressed to have been given for value received; and the 7th clause also takes away the cumulative remedy given by the 9 & 10 Will. 3, c. 17, and 3 & 4 Ann. c. 9. It is therefore probable that this alteration is rather to be ascribed to the change of opinion in our courts of justice. In Camidge v. Allenby, 6 Bar. & C. 378, post, 356, note (s), however, Mr. Justice Bayley appears to have adverted to the same distinction.

(m) Russell v. Langstaffe, Dougl. 515, (Chit. j. 415). Per Lord Mansfield, "because many means may remain of obtaining payment by the assistance of friends or otherwise;" and per Lord Ellenborough, in Warrington v. Furbor, 8 East, 245, (Chit. j. 733); and see ante, 338; and per Eyre, C. J. in Nicholson r. Gouthit, 2 Hen. Bla. 609, (Chit. j. 556). "It sounds harsh that a known bankruptcy should not be equivalent to a demand or notice, but the rule is too strong to be dispensed with." And see Ex parte Johnston, 1 Mont. & Ayr. 622; 3 Dea. & Chit. 438, S. C. As to how notice of dishonour should be given in case of bankrupt. cy of the drawer or indorser, see ante, 339, and post, Ch. X. s. i.

(n) Per Lord Ellenborough, in Esdaile v. Sowerby, 11 East, 117, (Chit. j. 767; Bowes v. Howe, 5 Taunt. 30; 16 East, 115, S. C.; infra, Ex parte Bignold, 2 Mont. & Ayr. 683; 1 Dea. 712, S. C. In the latter case an offer of composition by the acceptor, not acceded to, accompanied with a declaration, in the presence of the drawer and holder, that he, the acceptor, had not and should not provide for the bill, was held not sufficient to dispense with presentment and notice of dishonour.

(p) Howe v. Bowes and others, 16 East, 112; 1 Maule & S. 555, (Chit. j. 864, 892). Judgment of K. B. reversed on error in Exchequer Chamber, 5 Taunt. 30. The plaintiff

declared as holder of a promissory note, made by defendants on 2d January, 1809, at the Workington Bank, Cumberland, whereby defendants promised on demand to pay R. W. or bearer there, five guineas, value received. The declaration averred, that after the making of the note the defendants became insolvent, and then and from thenceforth, until and at the time of exhibiting of the bill aforesaid, ceased and wholly declined and refused to pay at the Workington Bank aforesaid the sum or sums of money specified in any note or notes issued by them from such bank. Ld. Ellenborough, C. J. observed, "that the mere allegation of issolvency, as an excuse for not presenting the notes for payment at the place, would be impertinent; but, in this case, the allegation, the truth of which, as reported by the learned judge, was left to the jury, and found by them, went far-ther, that the defendants had ceased and wholly declined and refused payment of any of their notes at the place. How then can the question arise? The shutting up of the house might be considered as a refusal to pay the notes there; and as it is not disputed that the banking shop was shut up, and that any demand of payment which could have been made there would have been wholly inaudible, that is substantially a refusal to pay their notes to all the world." But afterwards, upon a writ of error in the Exchequer Chamber, the judgment of the K. B. was overruled; and Macdonald, C. B. said, "This is extremely simple; it depends entirely on the force and effect of an allegation in the declaration, which, it is said, dispenses with the necessity of presenting the notes in question. It is clear that a demand at the place is necessary, unless it is dispensed with. The question then is, whether this allegation that the plain-tiffs in error ceased and wholly declined and refused to pay at the Workington Bank any notes issued by them from such bank, carries the matter further than a mere allegation of insolvency; and as it is not alleged that this declaration, that they would pay none of their notes, was made to the plaintiff below, it is merely this, that they generally declared they neither could nor would pay any of their notes; this allegation does not appear to the judges to be

⁽¹⁾ Atwood v. Haseldon, 2 Bai. 457; Johnson v. Hartle, 1 Idem, 482; Holland v. Turner, 10 Con. 308; Jervey v. Wilber, 1 Bai. 458. Contra. Clark v. Minton's Adm'x., 2 Brev. 185. }

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At least, in case of a bankruptcy, or general stoppage of country bankers, I. Of Prea notice thereof, if a formal presentment be not made, must be immediately sentment for Paygiven to the parties who transferred their notes (q); and even where such ment. country notes have been transferred, after the maker has actually stopped payment, by a party ignorant of that fact, they must be presented for pay-necessary. ment in due time, and due notice of the dishonour given (r); and therefore where a party received in payment for goods sold a country bank note, after the bank had stopped payment, but of which neither he nor the person from whom he received it was then aware, he must, nevertheless, present it for payment, or put it in a course of negotiation on the day after he received it, and give due notice of the dishonour, or he will lose all remedy against the party *from whom he received it(s). But it should seem, that if in due [*356]

sufficient to enable the plaintiff below to maintain his action, therefore judgment must be for the plaintiffs in error." And see Camidge v. Allenby, 6 B. & Cres. 373, post, 856, note (s);

and Henderson v. Appleton, post, 356, note (t).
(q) Camidge v. Allenby, 6 B. & C. 373; 9 Dow. & Ry. 391, (Chit. j. 1319); post, 356, note (s).

(r) Id ibid.

(s) Camidge v. Allenby, 6 B. & C. 373; 9 Dow. & Ry. 891, (Chit. j. 1819). In an action for the price of goods, it appeared that the same were sold at York on Saturday, the 10th of December, 1825, and on the same day, at three o'clock in the afternoon, the vendee delivered to the vendor, as and for the payment of the price, certain promissory notes of the bank of D. and Co. at Huddersfield, payable on demand to bearer. D. and Co. stopped payment on the same day at eleven o'clock in the morning, and never afterwards resumed their payments; but neither of the parties knew of the stoppage, or of the insolvency of D. and Co. The vendor never circulated the notes, or presented them to the bankers for payment; but on Saturday, the 17th December, he required the vendee to take back the notes, and to pay him the amount, which the latter refused. Held, under these circumstances, that the vendor of the goods was guilty of laches, and had thereby made the notes his own; and, consequently, that they operated as a satisfaction of the debt.

Per Bayley, J. "I think that the defendant, in this case, is entitled to the judgment of the court. One short observation disposes of Warrington v. Furbor, 8 East, 242; and Swinyard v. Bowes, 5 Maule & S. 62; the authorities cited to shew that it was not necessary in this case to prove presentment for payment. those cases the person insisting on the want of presentment was not a party to the bill; but here the defendant was a party to the notes; for they were payable to the bearer on demand, and he was the holder of them: and when such notes are passed from hand to hand, the person taking them must trace his right through the former holder. If the notes had been given to the plaintiff at the time when the corn was sold, he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money. But if he consented to receive the notes as money, they would have been taken by him at his peril. If

indeed he could show fraud or knowledge of the maker's insolvency in the payer, then it would be wholly immaterial, whether they were taken at the time of sale or afterwards. Here the notes were given to him in payment subsequent-ly, and the question is, whether they operate as a discharge of the debt due to the plaintiff in respect of the corn. The rule as to all negotiable instruments is, that if they are taken in payment of a pre-existing debt, they operate as a discharge of that debt, unless the party who holds the instrument does all that the law requires to be done, in order to obtain payment of them. Then the question is, what it was the duty of the plaintiff to do in order to obtain payment of these notes? They were intended for circulation. But I think that he was not bound immediately to circulate them, or to send them into the bank for payment, but he was bound, within a reasonable time after he had received them, either to circulate them or to present them for payment. Now here it is conceded, that if there had not been any insolvency of the bankers, the notes should have been circulated or presented for payment on the Monday. It is clear that the plaintiff on that day might have had knowledge that the bankers had stopped payment, and having that knowledge, if presentment was unnecessary, he had then another duty to perform. In consequence of the negotiable nature of the instruments, it became his duty to give notice to the party who paid him the notes, that the bankers had become insolvent, and that he the plaintiff would resort to the defendant for payment of the notes; and it would then have been for the defendant to consider whether he could transfer the loss to any other person; for, unless he had been guilty of negligence, he might perhaps have resorted to the person who paid him the notes. That party would, however, be discharged if he received no notice of non-payment, or of the insolvency of the bankers till a week after he had paid them to the defendant. The neglect, therefore, on the part of the plaintiff to give to the defendant notice of the insolvency of the bankers, may have been prejudicial to the The law requires that the party, defendant. on whom the loss is to be thrown, should have notice of non-payment, in order to enable him to exercise his judgment whether he will take legal measures against other parties to the bill or note. Now here, if the notes had been returned on the Tucsday to the defendant, he might have taken steps against the bankers;

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sentment for Payment.

I. Of Pre- time the party receiving such notes, on hearing of the stoppage of the bank, should offer to return them, the necessity for presenting them would be thereby dispensed with (t).

1st, When necessary. [*357]

*So the death of the drawee of a bill, or maker of a note, will not excuse the neglect to make due presentment to his personal representative, whether executor or administrator, and if there be neither, then at the house of the deceased(u)(1).

and he had a right to exercise his judgment whether he would do so or not, although they had stopped, or he might have had a remedy against the person who had paid him the notes. It may be hard, in some cases, that the entire loss should fall upon any one individual, but it is a general rule applicable to negotiable instruments, and not to be relaxed in particular instances, that the holder of such an instrument is to present promptly, or to communicate without delay notice of non-payment, or of the insolvency of the acceptor of a bill, or the maker of a note; for a party is not only entitled to knowledge of insolvency, but to notice, that in consequence of such insolvency he will be called upon to pay the amount of the bill or note. The case of Beccling v. Gower, Holt, C. N. P. 815, is an answer to the whole of the argument for the plaintiff, founded upon the fact, that the notes were paid away after the bank had stopped. For these reasons, I am of opinion that the plaintiff is not entitled to recover, and that

a judgment of nonsuit ought to be entered." (t) Henderson v. Appleton, tried in the Court of Pleas, at Durham. Upon a motion for a new trial, argued before Bayley, J. and Hullock, J. at Chambers, Serjeants' Inn, 23d July, 1827. Assumpsit for goods sold. Plaintiff sold goods to defendant at Dellington market, on Monday, 12th December, and on account of the alarm respecting bankers, it was agreed that the payment should not be made till the Monday following, the 19th December, when the parties again met at Dellington market, and defendant offered several country notes, and offered plaintiff the choice, and he selected and took two 5l. notes of Hutchinson's Stockton Bank, and in the evening went home to Husworth. By the course of the post, the notes could not have been presented at the bank at Stockton till Wednesday, the 21st December. It was proved that the bank paid all day on Saturday, the 17th December, but did not pay on Monday or afterwards, and refused to pay any notes after Saturday. On Wednesday, the 21st, the plaintiff met the defendant at Stockton, and offered to return or exchange the same with the defendant, but he refused, saying, that the bank was going (meaning paying) on Tuesday. Verdict for plaintiff. Cresswell, for the defendant, on motion for a new trial, contended that Howe and Bowes, 5 Taunt 30, ante, 355, note (p), establishes the obligation in all cases to present for payment, and referred to Camidge and Allenby, 6 Bar. & Cres. 382, ante, 356, note (s), in which it was held, that though the defendant delivered the notes to the plaintiff after the bank stopped payment, yet, inasmuch as the

plaintiff kept the notes a week, after knowledge of the failure of the bank, without offering them to the defendant, or giving him notice, he had made the notes his own; and Cresswell relied also on the words of the statute of Anne, and on the general rule requiring the due presentment of a bill, although the acceptor has notoriously become bankrupt. Chitty, contra, relied on Howe and Bowes, 16 East, 112; Owenson and Morse, 7 T. R. 64, and Ex parte Blackburne, 10 Ves. 206; and insisted, that as the defendant had himself delivered the notes to the plaintiff at a time when the bank had already stopped payment, he had broken the implied warranty, that the notes, at the time of delivery to the plaintiff, were capable of producing the money, and that at least the defendant's subsequent conversation dispensed with the necessity for a formal presentment. Bay-ley, J. said, he believed the ground of the decision in Camidge and Allenby was, that the notes should be deemed a payment, unless returned in a reasonable time; and that the plaintiff, by keeping the notes a week after he heard of the stoppage, without notice to the defend-ant, had precluded himself from recovery; but that here the plaintiff had offered to return, and the defendant had refused to take back the note, and therefore plaintiff was entitled to recover; and Hullock, B. concurring, the rule for a new trial was discharged. Confirmed in Rogers v. Langford, 1 C. & M. 637. In that case it appeared, that on Wednesday the 23d November A. bought goods from B. which he paid for in country bank notes. On Monday the 28th B. requested A 's servant as a favour to exchange the notes for money, which he accordingly did. On the same day the bank stop-ped payment. A. heard of it on Tuesday, and on Wednesday wrote to B. informing him of the failure of the bank and desiring him to exchange the notes; but the notes were not produced or tendered to B. until long afterwards, nor were they ever presented at the bank. In an action brought by A. against B to recover the value of the notes it was held that A. was not entitled to recover. Per Bayley, B. "I think the notes ought to have been either presented by the holder to the bank for payment, or else to have been returned without delay to the defendant, so as to give him an opportunity of getting payment for them, or of making the best of them."

(u) Molloy, b. 2, c. 10, s. 34. If a bill be accepted, and the party die, yet there must be a demand made on his executors or administrators, and, in default of payment, a protest must be made. See post, Ch. X. s. i. To whom Notice of Dishonour to be given.

^{(1) {} Landry v. Stansbury, 10 Louis. Rep. 484. }

If the holder of a bill at the time it becomes due be dead, it is said that I. Of Prehis executor, although he have not proved the will, must present it to the sentment for Paydrawee(x). If the drawee has gone abroad, leaving an agent in England, ment. with power to accept bills, who accepts one for him, the bill when due must be presented to the agent for payment, if the drawee continue ab-1st, When sent(y). When a bill, transferable only by indorsement, is delivered to a person without being indorsed, he should nevertheless present the bill for payment to the acceptor, and offer an indemnity to him; and if the acceptor then refuse to pay, the bill should be protested for non-payment, and due notice given (z). If a bill, draft, or note, be given, which ought to be, but is not stamped, we have seen it is not necessary to present it for payment(a); but the *insufficiency of the bill, in other respects, will constitute no excuse [*358] for the non-presentment (b).

The delay, or omission, to make a presentment, may, however, as far as respects the drawer's liability, be excused by the drawer's not having had any right to draw; as where the drawee had not any effects of the drawer in his hands from the time of drawing the bill to the time when it became due(c) (1). And where a bill drawn on Leghorn was not presented in due time, owing to the political state of the country at that time, which rendered it impossible to present it, it was holden, that it being afterwards presented for payment as soon as practicable, and refused, the holder might recover, and evidence of this impossibility of presenting the bill at the time of maturity might be given, under the usual averment that the bill was duly presented (d).

And if a bill be taken under an extent, before it is due, and the party holding it on behalf of the crown neglect to present it for payment in due time, the drawer and indorsers will continue liable, because no laches are imputable to

the crown(e).

So the consequences of the neglect to present may be waived by a payment of part(f), or by a promise to pay made after full notice of the default(g), and indeed by the same circumstances, which will do away the effect of a neglect to present for acceptance, or to give notice of the refusal(h)(2) or

(x) Poth. pl. 146; Molloy, b. 2, c. 10, pl. 24; Mar. 134, 135.

(y) Phillips v. Astling, 2 Taunt. 206, (Chit.

(z) Supra, note (x).

(a) Anle, 124, note (x). b) Chamberlyn v. Delarive, 2 Wils. 353,

(Chit. j. 377), sed quære.

(c) De Berdt v. Atkinson, 2 II. Bla. 336; ante, 273; and post, Ch. X. s. i.; Terry v. Parker, 1 Nev. & Perry, 752; 6 Ad. & El.

(d) Patience v. Townley, 2 Smith's Rep. 223, 224, (Chit. j. 714).

(e) West on Extents, 1st edit. 29, 30.

(f) Vaughan v. Fuller, Stra. 1246. (Chit. j. 318); Taylor v. Jones, 2 Campb. 106, (Chit. j. 771); Lundie v. Robertson, 7 East, 231, (Chit. j. 724); Haddock v. Bury, 7 East, 236, note; Hodge v. Fillis, 3 Campb. 464, (Chit. j. 900); Hopley v. Dufresne, 15 East, 275, (Ch. j. 856), accord.; but see Brown v. M'Dermont, 5 Esp. R. 265, (Chit. j. 721); Hill v. Heap, Dowl. & Ry. N. P. C. 57; infra.

(g) Ante, 273, 278, 843; Hopes v. Alder, 6 East, 16; and see post, Ch. X. s. i. Notice of Non-payment.

(h) Ante, 313.

(1) { Terry v. Parker, 1 Nev. & Per. 752. But where a note is signed by one person as principal and others as sureties, it is not a sufficient excuse to show that the sureties had no funds in the place of payment; for it was the duty of the maker of the note, and not them, to provide funds for the payment. Fort v. Cortes, 14 Louis Rep. 180.

A note payable at the plaintiff's residence need not be formally presented for payment; especially when it is shown the defendant had no funds there. Marvin v. Perot, 16 Louis. Rep.

(2) An indorsement of a note in these words: "I indorse the within note to J. R. unconditionally" does not dispense with demand and notice. Dowd v. Aaron, 2 Hill, 531.

An agreement by an indorser to dispense with demand and notice must be express and une-

quivocal; nor will an express promise to do so, made to a third person, though with a knowledge of the maker's insolvency, bind the indorser. Jervey v. Wilbur, 1 Bai. 453. A special indorse-

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1. Of Pre- to give notice of the refusal to pay(i)(1); for it is presumed that the defendant would not pay a part, or promise to pay the whole unless all the circumfor Payment.

(i) Post, Ch. X. s. i.

1st, When necessary.

ment of a note before due, in which payment is guaranteed, and no stipulation made for due dili-gence, does not dispense with the necessity of demand and notice. Barrett v. May, 2 Bai. 1.

Proof of demand and notice of non-payment may be dispensed with by the conduct, declarations, and promises of the indorser, made under a full knowledge of the fact that he is discharged, from his legal liability by the laches of the holder: but such promises must be unconditional. Barkalow r. Johnson, I Harrison, 397. Nothing short of an unconditional promise to pay, made with a full knowledge of the laches of the holder is sufficient. A knowledge that the maker could not pay does not dispense with strict proof of demand and notice. Sussex Bank v. Baldwin, 2 id. 487. An assignment of property by the maker of a promissory note not due, to a trustee, in trust to indemnify the indorser against his liabilities for the maker, does not dispense with demand and notice. Creamer r. Perry, 17 Pick. 332. So where the indorser of a note, who had received no notice of non-payment, upon being asked what would be done about the note, replied "the note will be paid," it was held that this was not equivalent to a waiver of notice, and did not render the indorser liable, as upon a renewed promise. Ibid.

The holder of an endorsed bank check is entitled to recover against the endorser, on a promise to pay made after maturity, without direct proof of demand and notice; and the admission of the endorser that he knows the check has been dishonoured, that he has received part of the money for which it was given, and his promise to take up and pay the check, is presumptive evidence of demand and notice proper to be submitted to a jury. Tebbetts v. Dowd, 23 Wend. 379. \
(1) The prevalence of a contagious malignant fever in the place of residence of the parties,

which occasioned a stoppage of all business, has been held to be a sufficient excuse for not giving notice until November, of a protest for non-payment made in the preceding September. Tun-

no v. Lague, 2 John. Cas. 1.

Payment of part of a check by the drawee after it becomes due, dispenses with the necessity of proving a demand on the bank, in a suit against him. Levy v. Peters, 9 Serg. & Rawle, 125. And so it seems would a part payment before the check became due. Ibid. But the plaintiff cannot by voluntarily giving credit for part payment, evade the necessity of proving a demand on the drawee, if the defendant disclaims such credit, and insists on the want of a demand. But if the defendant acquiesces in such credit, and insists that the whole has been paid, and relics on length of time and other circumstances to discharge him, he thereby admits a part payment. Ibid.

The indorser of a note waives the notice to which he is entitled, by promising payment when notice of non-payment is given him at an earlier hour of the day than the law requires. Seely

v. Bisbee, 2 Vermont Rep. 105.

A partial indemnity given by the maker to the accommodation indorser of a note, to secure said indorser in part, against his liability, &c. does not excuse the holder from making due demand, and giving notice to such indorser. Brunson v. Napier, 1 Yerger's Rep. 199.

A new promise waives the want of regular demand and notice. Ladd r. Kenney, 2 New

Hamp. Rep. 340.

In an action by the indorsee against the indorser of a promissory note, the plaintiff must show, that he has used due diligence to find the maker, and to demand payment of him, although informed by the inderser when he received the note, that the maker was a transient person without any known place of abode. Otis v. Hussey, 3 Id. 346.

And a promise to pay, made by the indorser, will not be a waiver of the consequences of a want of demand in such a case, unless it be shown affirmatively, that the indorser knew that no

demand had been made, when he made the promise. Ibid.

A stipulation by the indorser of a note to waive notice of demand of payment, does not dis-

pense with the demand itself. Backus v. Shiperd, 11 Wend. Rep. 629.

Where, however, the payee transfers a negotiable note, and at the same time guarantees its payment if not collected of the maker by due course of law, and also waives notice of demand; demand, as well as notice, is waived. Ib.

Whether certain facts in reference to an alleged notice to the indorser, and demand of payment of a promissory note by the drawer, amounted to a waiver of the objection to the want of demand and notice, is a question of fact, and not matter of law, for the consideration of the jury. Union

Bank v. Magruder, 7 Peters' Rep. 287.

Where I. an indorser of a protested bill, after having had sufficient opportunity to ascertain the circumstances of the presentment, protest and notice, promised M., a subsequent indorser, who had taken up the bill, to repay him, and afterwards received the bill from M., proved it in his own name against the estate of the drawees who had failed, and received a dividend upon it, and retained the bill; it was held, that I. was liable on his promise to repay M., unless he could prove that his promise was made under a mistake of the facts. Martin v. Ingersol, 8 Pick. Rep. 1.

A bill of exchange is drawn by a creditor on his debtor payable sixty days after date; the drawec being advised thereof, before acceptance, writes to the drawer, that he will be unable to pay the bill at its maturity; whereupon the drawer, by letter to the drawer, authorizes him,

stances had occurred to render him liable; and that if they had, he waived I. Of Pre-

all objection to the laches of the holder (k).

But the circumstance of the drawer having had notice before the bill be-ment. comes due, that it will probably not be paid, and promising the holder that he will endeavour to provide effects, and see him again, will not excuse the 1st, When neglect to present the bill for payment to the drawee on the day the bill is due(l), though it might excuse the want of notice of dishonour(m). therefore, where in an action against the drawers of a bill, there was no proof of presentment for payment or of notice of non-payment; but it appeared that the defendants had given orders to the drawee not to pay the bill if presented, and that *these orders had been communicated to the plaintiff, it [*359] is reported to have been decided, that the defendants' order to the drawee not to pay the bill if presented, amounted to a dispensation of the notice of

(k) See post, Ch. X. s. i. Notice of Non-

(1) Prideaux v. Collier, 2 Stark. Rep. 57, (Chit, j. 989). This was an action by the plaintiff as the indorsee of a bill of exchange, dated March 20th, 1816, drawn by the defendant upon Wood and Co. payable to his own order, and indorsed by him to the plaintiff. Upon the 22d of May, the day before the bill became due, application was made by the plaintiff to Wood and Co. and the answer was, that Collier had no effects in their hands; but the Clerk of Wood and Co. remarked, that the bill would not be due until the next day, and that it was probable that Collier would be in before

that time, and provide effects. On the next day, the 23d, when the bill became due, the defendant said to the plaintiff, that he understood that he, the plaintiff, was the holder of the bill, which he hoped would be paid; that he would see what he could do, and would endeavour to provide effects, and would see him again. The bill was not presented to the drawees on the 23d, but was presented on the 24th. Lord Elleuborough held, that this did not supersede the necessity of a presentment on the day. See Phipson v. Kneller, 4 Campb. 285, (Chit. j. 946); Hill v. Heap, Dowl. & Ry. N. P. C. 57. (m) Id.

when the bill approaches maturity, to redraw on himself, in order to raise funds to honor the bill; the drawer redraws accordingly, and then the drawer refuses to accept his bill, but no credit is given, by the holder or any other person, to the drawee, on the faith of the drawer's authority to him so to redraw: Held, the drawer has not, by this authority to the drawee to redraw, waived notice of dishonor of his own bill, nor do the facts constitute any excuse for neglect to give such notice, nor is there any assumpsit to the holder, but only a promise to the drawee, which being

without consideration is not binding. Brown et al. v. Ferguson, 4 Leigh's Rep. 87.

To show a waiver of demand and notice by an indorser, clear and unequivocal evidence is re-

quired of such waiver. Gregory v. Allen, 1 Martin & Yerg. 74.

Where the drawer of a check is informed that a demand was made and payment refused, a romine to arrange it, is not a waiver of the demand, if in fact none were made. Brown v. Lusk, 4 Yerg. 215.

A full indemnity given by the maker to the indorser to secure him against his liability as indorser, or, a promise to pay by the indorser with a knowledge that no demand was made, will, is either case, dispense with demand and notice. Durham r. Rice, 300.

A promise by the drawer of a bill of exchange, after due, to make an arrangement satisfactory to the holder, will not subject him to the payment of the bill, where there is no evidence of demand upon the drawee, or notice to the drawer, or knowledge on his part that notice had not been given. Jones et al. v. Savage, 6 Wend. Rep. 658.

Nor is the fact of the drawer including the demand of the bolder in an account of his creditors, on an application for an insolvent's discharge, sufficient to charge him, where it is not shown that at the time of making such account he knew that the necessary steps to charge him as drawer had not been taken. Ib.

Where A. in payment of a debt, indorsed to B. the note of C., and by the indorsement "waived demand and notice:" Held, that although C. was solvent and remained so falcen months after the indorsement, and before which period no suit was brought against him, still the indorser A. was liable. Johnston v. Searey & Marshall, 4 Yerg. 182.

Where an indorser, on being called on for the payment of a note, avowed himself legally exonerated from its payment, but declared that he did not wish to take advantage of such exoneration, and promised to pay the note, it was held, that the promise was valid, without further proof of the indorser's knowledge that he had not been regularly charged. Leonard v. Gary, 10 Wend.

If, after the dishonor of a note, the indorser promise to pay it, such promise is presumptive evidence of due demand and notice. Breed v. Hillhouse, 7 Conn. Rep. 523.

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for Payment.

necessary.

1. Of Pre-dishonour, but that it formed no excuse for the non-presentment for payment(n)(1).

But we have seen, that if there has been a previous presentment for acceptance, and a refusal, duly notified to the drawer or indorsers, no subse-1st, When quent presentment for payment will be essential (o)(2). And if on notice of the dishonour, the drawer or indorser request the holder again to present the bill, no second presentment will be necessary, because on notice of the first dishonour, complete liability to pay attached (p).

> A delay in presentment, it is said, may, like a delay in giving notice, be excused by an accident not attributable to any fault of the holder(q): we will consider this, after examining the decisions relative to the time of present-

ment for payment.

If it be doubtful whether the holder of a bill is legally entitled to it, as where he has received it from a person who has become bankrupt, and the assignees insist that it was delivered to the holder by way of fraudulent preference, still he should present it duly for payment, and obtain the amount, which will not be deemed a conversion, but at most only subject him to an action for money had and received (r); and if it should be dishonoured, he should give notice thereof to all the parties to the bill.

Where the an Omission to present for payment.

We have next to consider in what cases the acceptor of a bill or maker of of a Bill or a note, may resist an action on account of the neglect of the holder to pre-Maker of a sent the instrument for payment (3). It is a general rule of law, that where there is a precedent debt or duty, the creditor need not allege or prove any demand of payment before the action brought, it being the duty of the debt-Account of or to find out his creditor, and tender him the money, and, as it is technically said, the bringing of the action is a sufficient request(s)(4). It might not,

> (n) Per Abbott, C. J., in Hill v. Heap, Dowl. N. P. C. 57; sed quære if there is not some mistake in that report.

some mistake in that report.

(o) Price v. Dardell, ante, 342, note (t).

(p) Hickling v. Hardy, 7 Taunt. 512; 1

Moore, 61, (Chit. j. 983); ante, 274, n. (p).

(q) Post, Ch. X. s. i. Time of giving Notice of Non-payment.

(r) Jones v. Fort, 9 B. & C. 764; 4 Man.

& Ry. 547, (Chit. j. 1445); ante, 210, n. (c). And see Tennant v. Strachan, Mood. & M. 377;

4 C. & P. 31, (Chit. J. 1450).
(a) Birks v. Trippet, 1 Saund. 33; Carter v. Ring, 3 Campb. 459; Capp v. Lancaster, Cro. Eliz. 548; Co. Litt. 210 b. note 1; Com. Dig. tit. Condition, (G. 9); Cranley v. Hilary, 2 M. & Sel. 120, (Chit. j. 895).

(1) { A declaration by the indorser to a third person that he would pay the note without suit, is no waiver of demand and notice. Allwood v. Haseldon, 2 Bai. 457.

Where the maker of a promissory note has transferred to the indorser all his property, to indemnify him against loss for his liability, demand and notice of non-payment are excused. Duvall v. The Farmers' Bank of Maryland, 9 Gill. & John 31. }
(2) { The Exeter Bank v. Gordon, 8 N. Hamp. 66. }

 (2) { The Exeter Bank v. Gordon, 8 N. Hamp. 66. }
 (3) An order drawn by a debtor on a person having funds in his hands, is, after presentment to the drawee, an assignment of such funds to the extent of the order, and the drawee cannot afterwards legally part with such funds to the drawer or any other person. Peyton v. Hallett, 1 Cnines' Rep. 379. And where a bill is drawn upon special funds, the authority in the drawee to pay it is not revoked by the death of the drawer before presentment of the bill. And it seems that such a bill is to be deemed an assignment of such funds. Cutts v. Perkins, 12 Mass. Rep. 206. See Debesse v. Napier & Co., 1 M'Cord, 106.

(4) It has been held no bar to an action on a note payable at a day and place certain, that the holder was not present at the time and place to receive payment, and did not there demand payment. It was the duty of the debtor to be there ready to pay. Ruggles v. Patten, 8 Mass. Rep. 480. Bank of the U. S. v. Carneal, 2 Peters, 549. Caldwell v. Cassidy, 8 Cowen, 271. When payment of a note drawn payable at a particular place is demanded personally of the maker elsewhere, and no objection is made by him, it is sufficient to bind the maker. Herring v. Sanger, 3 John. Cas. 71. But see Woodbridge v. Brigham, 12 Mass. Rep. 403.

If a note be payable at a particular bank, no demand or attempt to demand payment of the maker is necessary to charge the indorser. It is sufficient if the holder of the note be at the bank on the prescribed day, ready to receive payment, if the maker be not there ready to make

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perhaps, be unreasonable, if the law in all cases required presentment to the I- of Preacceptor of a bill, or maker of a note, before an action be commenced against seatment him, because otherwise he might, on account of the negotiable quality of the for Payment, and the consequent difficulty to find out the holder of it on the day of payment, in order to make a tender to him, be subjected to an action swithout any default whatever: and the engagement of the acceptor of a bill, or maker of a note, is to pay the money when due to the holder, who shall for that purpose make presentment(t). And one reason why a party cannot recover at law on a lost bill or note is, that the acceptor of the one and maker of the other, has a right to insist on having it delivered up to him on his paying it(u).

It seems, however, that in general the acceptor or maker of a note *cannot resist an action on account of neglect to present the instrument at the precise time when due, or of an indulgence to any of the other parties (x). And on the above-mentioned principle, that an action is of itself a sufficient demand of payment, it has been decided that the acceptor or maker of a note cannot set up as a defence the want of a presentment to him even before the commencement of the action, and although the instrument be payable on demand (y). But in such a case, upon an early application, the court would stay proceedings without $\cos(x)$.

Before the decision in the House of Lords in Rowe v. Young(a), there had been much discussion and difference of opinion in the courts upon the effect of a direction upon the bill or note, that the same shall be payable at a particular place, and whether the acceptor of the bill, or maker of the note, can resist an action on account of that direction not having been complied

(t) See the argument in Wegersloffe v. Keene, 1 Stra. 222, (Chit. j. 244); Callaghan v. Aylett, 2 Campb. 549; 8 Taunt. 397, (Chit. j. 820, 822); Lancashire v. Killingworth, Ld. Raym. 687; Salk. 628; 12 Mod. 530; Com. Dig. Condition, (G. 9).

(u) Per Lord Tenterden, in Hansard v. Robinson, 7 B. & C. 90; 9 Dowl. & Ry. 860, (Chit. j. 1340); ante, 266, note (a).

(z) Dingwall v. Dunster, Dougl 247, (Chit. j. 401); Anderson v. Cleveland, I Esp. Digest,

59, 4th edit.

Anderson v. Cleveland, Sittings after Easter, 1779, 1 Esp. Digest, 58, 4th edit.; 13 East, 480, note, (Chit. j. 400). The indorsee of a bill of exchange brought an action against the acceptor, and it appeared that there was no demand of payment until three months after the bill became due, and the drawer was then insolvent; it was ruled by Lord Mansfield, that this was no defence, for the acceptor of a bill of exchange or maker of a promissory note remains always liable; acceptance is proof of having effects in his hands, and he ought never to part with them, unless it appear that the drawer had provided another fund by paying the bill himself.

(y) Rumball v. Ball, 10 Mod. 88, (Chit. j.

direction not having been complied

231); Frampton v. Coulson, 1 Wils. C. B. 38;
Capp v. Lancaster, Cro. Eliz. 543; Prac. Reg.
538; Reynolds v. Davies, 1 Bos. & Pul. 625,
(Chit j. 571); Turner v. Hayden, 4 B. & C.
3; 6 Dow. & Ry. 5; 1 R. & M. 215, (Chit. j.
1246); sed quære, the observations of Lord
Tenterden, in Hansard v. Robinson, 7 B. & C.
90; 9 Dow. & Ry. 860, (Chit. j. 1340); ante,
266, n. (a). It is certainly not necessary
(excepting in the case of a bill accepted payable at a particular place, "and not otherwise
or elsewhere," and of a note payable, in the
body of it, at a particular place) for the plaintiff to aver or prove a presentinent, see Williams v. Waring, 10 B. & C. 2; 5 Man. & Ry.

(z) Mackintosh v. Haydon, Ryan & Moo. 863, (Chit. j. 1287); 2 Chit. R. 11; Tidd, 9th edit. 145.

9, (Chit. j. 1453); but semble, that if an acceptor of a negotiable bill or maker of a note,

when defendant, should prove that he was always ready to pay if the bill or note had been

presented; that ought to constitute a good de-

(a) Rowe r. Young, 2 Brod. & Bing. 165; ante, 292, 293; 2 Bligh, R. 391, (Chit. j. 1044).

it. And by the indorsement of such a note, the indorser guarantees that on the day of payment the maker would be at the bank and pay the note, and that if he did not pay it there, he would be answerable for the amount upon notice. Berkshire Bank v. Jones, 6 Mass. Rep. 524. Woodbridge v. Brigham. But see a report of this case, 13 Mass. Rep. 556. { Conn v. Gano, Ohio Rep. Cond. 210; M'Nairy v. Bell, 1 Yerg. 502; Bowie v. Duval, 1 Gill & John. 175; Eastman v. Fifield, 3 N. Hamp. 383; Haxtun v. Bishop, 3 Wend. 13. Contra, Shaw v. Reed, 12 Pick. 182; Ogden v. Dobbin, 2 Hall, 112. }

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for Payment.

1st, When necessary.

I. Of Pre- with. Both the Courts of King's Bench and Common Pleas agreed, that where a particular place of payment was introduced into the body of a bill or note, and not as a mere memorandum at the foot of the instrument, whether the action were against the drawer or acceptor of the bill, or the maker or indorser of the note, the instrument must be presented at that particular place, and a demand be made there, in order to give the holder a cause of action(b). And that in such case, at least as respects a promissory note, [*361] *the presentment and demand must be alleged in the declaration(c). And where the stipulation at the bottom of a note, for payment at a particular place, was printed before the note was complete, it was held, in the King's Bench, that in such case a presentment there was necessary (d), though that distinction was afterwards overruled, and it was held, that though it was proved that the memorandum at the foot as to the place of payment was written before it was signed, still it constituted no part of the contract, and did not qualify it(e). So if the body of the bill, or the address at the foot

> (b) Sanderson v. Bowes, 14 East, 500 infra; Dickenson v. Bowes, 16 East, 110, (Chit. j. 863); Roche v. Campbell, 3 Campb. 247, (Chit. j. 870); Trecothick v. Edwin, 1 Stark. Rep. 468, (Chit. j. 979); but see Nichols v. Bowes, 2 Campb. 498, (Chit. j. 817).

Sanderson v. Bowes, 14 East, 500, (Chit. j. 839). A promissory note of the defendant's promising, in the body of it, to pay so much at their banking-house at Workington, in Cumberland, requires a demand of payment there, in order to give the holder a cause of action if it be not paid. Per Lord Ellenborough, C. J., "This is a duty created by the instrument itself, with certain limits and qualifications: the duty did not arise anterior to the instrument. This case is very materially different from that of Fenton v. Goundry (13 East, 459), lately decided by this Court, which was the case of a bill drawn generally, but accepted payable at a particular place, which special acceptance we considered merely as importing the intention of the party, that he would be found when the bill became due at that place, as his house of business, where he should be prepared to pay it; there the acceptance payable at the place was no part of the original conformation of the bill itself; but here the words restrictive of payment at the place named are incorporated in the original form of the instrument, which alone creates the contract and duty of the party. This action upon the note will not lie, unless the plaintiff has demanded payment at the appointed place; and I cannot but say that it is very convenient that such a condition should be incorporated in the note itself; for it would be very inconvenient that the makers of notes of this description should be liable to answer them every where, when it is notorious that they have made provisions for them at a particular place, where only they engage to pay them; then if the request at the place be a condition precedent, it should have been averred, and for want of such an averment, the declaration is bad; but I still think this is distinguishable from the case of Fenton v. Goundry.

Dickenson v. Bowes, 16 East, 110, (Chit. j. 863). Payment of a promissory note made payable at a certain place named in it, must be demanded there before the makers can be sued

on it. Lord Ellenborough, C. J. said, "that it had already been decided upon demurrer, that if the particular place of payment be embodied in the note, it was part of the condition on which it was made payable, that it should be presented for payment at that place." See also Howe v. Bowes, 16 East, 112; 5 Taunt. 80, S. C. in

Bowes v. Howe, 5 Taunt. 30, (Chit. j. 864, 892). Error in Exchequer Chamber from King's Bench, (16 East, 112). A note, promising in the body of it to pay on demand, at a particu-lar place, must be presented, and a demand of payment made at that place, unless the maker discharge the holders from the presentment and demand; and the presentment and demand must be alleged, unless a discharge is shown.

(c) Same cases, and Roche v. Campbell, 3 Campb. 247, (Chit. j. 870). Indorsee against indorser of a promissory note, describing the note as payable generally, but in the body it was made payable at a particular place. Per Lord Ellenborough: "I think there is a fatal variance between them; the declaration represents the promissory note as containing an ab-solute and unqualified promise to pay the mo-ney; butby the instrument produced, the maker only promises to pay, upon the specific condi-tion that the payment is demanded at a partic-ular place. We have lately held, that where the place. We have lately neig, that where the place of payment is mentioned in the body of the note, it forms a material part of the instrument. There seems to be no doubt, therefore, that it should be set out in the declaration." Plaintiff nonsuited.

(d) Trecothick v. Edwin, 1 Stark. R. 468,

(Chit. j. 979).
(e) Williams v. Waring, 10 Bar. & C. 2; 5 Man. & Ry. 9, (Chit. j. 1543). The case of Trecothick v. Edwin, 1 Stark. N. P. C. 468, was cited; but Lord Tenterden said, "In point of practice the distinction between mentioning a particular place for payment of a note in the body and in the margin of the instrument, has been frequently acted on. In the latter case it has been treated as a memorandum only, and not as part of the contract; and I do not see any sufficient reason for departing from that course."

Bayley, J., "The case of Exon v. Russell,

of it, contained a request to the drawee to pay the bill in London, an accept- I. Of Preance payable at a particular place in the metropolis, was considered as re- entment quiring a presentment there (f). But still it was said, that there was no ne-mont. cessity to allege or prove notice of the dishonour to the acceptor or maker(g); and provided a presentment and request to pay at the particular place 1st, When be averred in the declaration, with the general refusal to pay, at the end of necessary. the declaration, that was holden to be sufficient, without alleging a special refusal at the particular place (h).

On the other hand it was contended, that if a promissory note were payable generally in the body of it, and there was a memorandum only at the foot, denoting that payment should be made at a particular place, such memorandum would not qualify the contract, and it was not necessary for the holder to allege or prove any presentment at the particular place(i), and this distinction has since been *settled(k); and if it were alleged in the declara- [*362] tion that the defendant thereby made the note payable at the particular place, and that direction were not in the instrument itself, but merely at the foot, this even would be a fatal misdescription of the instrument (l); though, since

4 Maule & S. 505, (Chit. j. 949), is expressly in point for the present plaintiff, with this single exception, that the memorandum in that case was not proved to have been written by the defendant. But it was there at the time when the note was made, and therefore the effect of it was the same; and the plaintiff having averred that the note was payable at the particular house, the court held that it was misdescribed; that is a sufficient authority for a decision in this case in favour of the plaintiff." Rule refused.

(f) Garnett v. Woodcock, 1 Stark. R. 475; 6 Man. & Sel. 44, (Chit. j. 979, 981); Hodge v. Fillis, 3 Camp. 463, (Chit. j. 900).
(g) Pearce v. Pembertly, 3 Campb. 261, (Chit. j. 900).

(Chit. j. 870).

(h) Butterworth v. Lord Le Despencer, 8
Maule & S. 150, (Chit. j. 913); Benson v.
White, 4 Dow. Rep. 334, S. P. (Chit. j. 960).
(i) Williams v. Waring, 10 Bar. & C. 2; 5
Man & P. D. (Chit. j. 563); swarp r. (c).

Man. & Ry. 9, (Chit. j. 1543); supra, n. (c); Saunderson v. Judge, 2 Hen. Bla. 509, (Chit.

j. 545). Wild v. Rennard, 1 Campb. 425, note. In this case, Bayley, J. held, that if a promissory note be made payable at a particular place, there is no necessity for proving, in an ac-tion against the maker, that it has been presented there for payment. And upon this case being cited in Saunderson c. Bowes, 14 East, 500, (Chit j. 839), Bayley, J. said, that as far as he could recollect, the place was not incorporated with the body of the note: it was only mentioned in a memorandum at the bottom. And in Callaghan v. Aylette, 2 Campb. 551; 3 Taunt. 397, (Chit. j. 820, 822); and Saunderson v. Judge, 2 Hen. Bla. 503, (Chit. j. 545), the same distinction is taken.

In Price v. Mitchell, 4 Campb. 200, (Chit. j. 933), Gibbs, C. J. ruled accordingly.

Richards v. Lord Milsingtown, Holt, C. N.

P. 364, in notes.
(k) Williams v. Waring, 10 Bar. & C. 2;
5 Man & Ry. 9, (Chit. j. 1543).
(l) Exon v. Russell, 4 Maule & S. 505,

Where the indorsee declared against the ma-

ker of a promissory note, and alleged that he thereby promised to pay, &c. and made the same payable, and to be paid according to the tenor and effect at the house of Messrs. B. and Co. London, and upon production of the note at the trial, it appeared that the address at the house of Messrs. B. and Co. was not a part of the note, but only a memorandum at the foot of the note. Held, that this was a variance. Lord Ellenborough, C. J. "The plaintiff has taken upon himself to aver that such is the import of the note; he has therefore not truly stated the note, for he has stated that it was made payable at a particular place; therefore he ought to have been nonsuited upon the ground that he has misdescribed the note as payable at a particular place, which it is not, the address being no part of the contract, but a memorandum." Bayley, J. "The plaintiff takes on him to aver it to be part of the note, that it was made payable at a particular place. It is a misdescription of the instrument declared up-

But in Pannell v. Woodroffe, Sittings after Hilary Term, 1818, at Westminster, before Abbott, J. Hardy v. Woodroffe, 2 Stark. Rep. 319, (Chit. j. 1020), payee against maker of a note. The declaration stated that the defendant made his promissory note bearing date, &c. by which said note the defendant, three months after the date thereof, promised to pay to the said plaintiff or order the sum of £100 value received, and made the said note payable at 32, Castle Street, Holborn, not averring that he thereby made it so payable; and then and there delivered the said note to the said plaintiff, by means, &c. (stating the liability and promise to pay according to the tenor and effect of the note, but not averring any presentment for payment). The place of payment was not mentioned in the body of the note, but only by way of memorandum at the bottom; whereupon E. Lawes, on the authority of the above case of Exon r. Russell, contended, that the first count was open to the objection of variance, but Abbott, C. J. overruled the ob-

Lawes, in Easter Term, moved for a rule for

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for Payment.

I. Of Pre- the 3 & 4 Will. 4, c. 42, s. 23, such misdescription might now be remedied by an amendment of the record at nisi prius, where there is no traverse of the acceptance(m). But the Courts, or at least some of the Judges, differed as to the effect of an acceptance payable at a particular place, or a 1st, When memorandum at the foot of the instrument, that it should be there payable, The Court of King's Bench held that such direction does not qualify the contract of the acceptor, and that consequently it is not necessary to allege or prove compliance with such direction(n). And it was decided, that if a person accept a bill payable at his bankers', and the holder neglected to present it, and eight months after it was due, the bankers, having funds of the acceptors in their hands, became bankrupt, the acceptor was nevertheless not discharged from liability by such neglect of the holder(0). Some of the [*363] Judges of the *Court of Common Pleas, on the contrary, held, that such a memorandum qualifies the contract of the acceptor, and that in an action against him as well as any other party, a presentment at the particular place

> a new trial or in arrest of judgment, on the round that the note given in evidence varied from the special statement of it in the declaration, and that that statement importing a special place of payment, the count was bad for want of an averment of presentment. But the Court held that the declaration did not import any special or limited promise to pay at a particular place, and that the case was in that respect distinguishable from that of Exon v. Russell. See also Sproule v. Legg, 8 Stark. R. 156; 2 Dowl. & Ry. 15; 1 B. & C. 16, (Chit. j. 1152, 1154).

(m) Siggers v. Nicholls, H. T. 1839. Buil.

Court, Patteson, J.

(n) Fenton v. Goundry, 13 East, 459; 2 Campb. 656, 657, (Chit. j. 827).
Lyon v. Sundias, 1 Campb. 423, (Chit. j.

Head v. Sewell, Holt, C. N. P. 863.

Huffan v. Ellis, 3 Taunt. 415, in the House

of Lords, 10th April, 1810, (Chit. j. 822).

Rowe v. Williams, Holt, C. N. P. 866. Upon the judgment in that case, a writ of error was brought in the House of Lords; see Holt, C. N. P. 366, 367, and 2 Brod. & Bing.

165; ante, 292, 293.

(o) Sebng v. Abitbol, 4 Maule & S. 462; 1 Stark. R. 79, (Chit. j. 942, 947); Turner v. Hayden, 4 B. & C. 1; 6 D. & R: 7; 1 R. & M. 215, (Chit. j. 1246); Rhodes v. Gent, 5 B. & Ald. 244, (Chit. j. 1124). A bill of exchange payable at a banker's in London, which, by reason of being mislaid, was not presented for payment, but the acceptor was, some months afterwards, informed of its being mislaid, was held not to be discharged, but that the drawer might set it off in an action brought against him by the acceptor, although the bankers at whose house the bill was payable failed in the interval, and the acceptor had at all times up to the failure of the bankers, a balance in their hands sufficient to cover the acceptance. Lord Ellenborough, C. J. "Laches is a neglect to do something which by law a man is obliged to do, whether any neglect to call at a house where a man informs me that I may get the money amounts to laches, depends upon whether I am obliged to call there. This acceptance, though

it might be an authority to the bankers to pay the bill, being made payable at their house, is not in express terms an order upon them to pay, as was the case of Bishop v. Chitty, 2 Stra. 1191, where the language of the acceptance was immediately that of a check upon the bankers. I confess I am unable to see any laches in the defendant upon either ground. The plain-tiff is informed that the bill is not to be found; after which there surely was not any occasion for him to keep a fund at the house where it was made payable. How can it be said that the plaintiff, after notice that his bill no longer existed, was bound to keep money at his bankers, to answer the bill in perpetuum? It seems to me, that after such a notice he was at liberty to withdraw his funds, and therefore whatever loss may happen to him by keeping them there must be his loss, and not the loss of the defendant." Bayley, J. "As to other points on which there has been some difference of opinion in the two Courts, I shall be very ready to change my opinion if ultimately I should see occasion, but I cannot help feeling considerable difficulty up-on that point. If this is to be considered as a qualified acceptance, it follows, that the holder would have a right to refuse it, he being entitled to have an unconditional acceptance; and, indeed, as I rather think, being bound to require it. And if he take such an acceptance as this, payable at a particular place, it may be a question whether he ought not to give notice to all the parties to the bill, and whether, by omitting to do so, he does not discharge them. In this view of the question, it becomes an important one, and deserves to be well considered; it is true that the holder is not bound to present the bill for acceptance, but I have always understood, that if he does present it, and a qualified acceptance is given, he is bound to give notice. If then, the circumstance of the bill's being accepted payable at a banker's is to throw on the holder the obligation to present at the particular place, the consequence will be, that any intermediate indorser who may be called on to pay, and does pay the bill, will, in his action over against another party to the bill be saddled with the proof of the additional fact, beyond what he would have to prove if the ac-

must be alleged and proved (p)(1). The different reasons in support of I. Of Proeach side of these opinions will be found in the cases in the notes (q). It sentment was observed that the acceptance of a bill seemed to be as much the origin- for Payment. al contract of the acceptor, as a note is the original contract of the maker; and as it was admitted that the drawee might make a qualified or conditional 1st, When acceptance, and thus narrow the liability which a general acceptance would necessary. create, it was difficult to say that he might not qualify his contract and liability as to the place of payment(r); and whether this were done in the body of the bill, or by memorandum at the foot, yet if it were intended to qualify the contract, it should have that operation without regard to the arrangement of the words.

*This question was finally discussed and decided in the House of Lords, [*364] in the case of Rowe v. Young(s), in which it was held, that if a bill of exchange accepted payable at a particular place, (as thus, "accepted payable at Sir John Perring and Co. bankers, London," the declaration in an action on such bill against the acceptor must aver presentment at that place, and the averment must be proved. In consequence of this decision, the statute 1 & 2 Geo. 4, c. 78, (called Serjeant Onslow's Act(t),) the provisions of which have already been considered (u), was passed, which requires that the bill be accepted payable at a banker's house or other place only, and not other otherwise or elsewhere, in order to constitute a special acceptance payable at such banker's house, or other place(2); and we have seen, that although the drawer in the body of the bill request the

ceptance were a general acceptance. This is a point of view which seems to me to be very important, and I rather think that it has not been presented in this view to the minds of those learned persons from whom we are said to differ." Rule absolute.

(p) Callaghan v. Aylett, 3 Taunt. 397; 2

Campb. 549, (Chit. j. 820, 822). Gammon v. Schmoll, 5 Taunt. 344; 1 Marsh.

80, (Chit. j. 909).
(q) And see the cases and arguments in Rowe r. Young, 2 Brod. & Bing. 165; 2 Bligh, 819, (Chit. j. 1084), and the observations of Mr. Halcomb in his work on this important

case; ante, 292, 293. (r) In Mitford v. Walcot, Lord Raym. 575, (Chit. j. 214), Holt, C. J. said, "If a bill be payable at London, and the person on whom it is drawn accepts it, but names no house where

he will pay it, the party that has the bill is not bound to be satisfied with this acceptance." See also Bayl. 5th ed. 202. It should seem therefore, that there is no objection to the holdders, receiving a special acceptance, stating the place of payment. But in Head r. Sewell, Holt, C. N. P. 335, Gibbs, C. J. seems to have been of opinion, that a special acceptance payable at a particular place does not render it necessary to prove a presentment there. See Parks r. Edge, 1 C. & M. 429, 432, 484; 3 Tyr. 364, as to the distinction between alleging and proving a special presentment in an action by indorsee against indorser.

(s) Rowe v. Young, 2 Brod. & Bing. 165; 2 Bligh. Rep. 891, (Chit. j. 1084); ante, 292, 293.

(t) See Selby v. Eden, 3 Bing. 613.

(u) Ante, 152, 153, 293.

Haxtun v. Bishop, 8 Wend. 13. \
And, as against the maker of a promissory note or acceptor of a bill, payable at a place certain it seems that no averment in the declaration, or proof at the trial, of a demand of payment at the place designated, is necessary: But as against the inderser of a bill or note, such averment and proof is, in general, required. Bank of the United States v. Smith, 11 Wheat. 171.

⁽¹⁾ If the place of payment of a note is designated in a memorandum at the foot, or if to the acceptance of a bill, a particular place of payment be added, with the assent of the holder, such memorandum or qualification becomes a part of the contract. Tuckerman r. Hartwell, 3 Greenl.

⁽²⁾ In New York it has been held in an action against an acceptor that the holder need not prove any demand of payment at the place where the bill was accepted to be paid, but it is the business of the acceptor to prove that he was ready at the day and place appointed, and that no one came to receive the money, and that he was always ready to pay. Foden v. Sharp, 4 Johns. Rep. 188. See also Lang v. Brailsford, 1 Bay's Rep. 222. See Fullerton v. Bank of the United States, 1 Peters, 604, 116. Bank of the United States v. Carneal, 2 Peters, 543. Caldwell v. Cassidy, 8 Cowen, 271. \{ Bowie v. Duval, 1 Gill & John. 175. \} It seems, that the rule adopted in these cases would not apply, where a note on demand is payable at a particular place; for in such case, there should be a demand at the place before action brought. for in such case, there should be a demand at the place before action brought. Id. | But see

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ment.

I. Of Pre- drawee to accept it payable in London, which the drawee does, but without adding the express words in the act, a presentment there is unnecessary in order to charge the acceptor(x), though to make the drawer liable such presentment must be made(y). And even in the latter case it should seem 1st, When that a declaration alleging a presentment generally will be sufficient after vernecessary.

The statute and decisions establish, that if a bill be accepted at a particular place, in the express terms of this act, it must be presented there for payment, or the acceptor will be discharged; but where the bill is accepted payable at a banker's, or at a particular place, but not according to this act, a presentment there is quite unnecessary (a). And it may be made to the acceptor at his dresidence or elsewhere, though it will always suffice to present at the named place, and it will be unnecessary to allege or prove that the bill was presented to the acceptor in person, and proof that it was duly presented at the banker's will suffice (b). In practice, it is the invariable course amongst [*365] bankers and *merchants, to present at the place named in the acceptance, and this is always sufficient (c)(1).

Promissory notes are not mentioned in the act, and therefore if they be payable in the body at a banker's or other particular place, a presentment there will be requisite. But if the particular place be only mentioned at the foot, or otherwise than in the body, then no such presentment is necessary, as far as respects the maker or any other person(d)(2).

(x) Selby v. Eden, 3 Bing. 611; 11 Moore, 511, (Chit. j. 1297); Fayle v. Bird, 2 Carr. & P. 303; 6 B. & C. 531, (Chit. j. 1329); ante, 152, note (x).

(y) Gibb v. Mather, 8 Bing 214; ante, 152,

note (a). (z) Lyon v. Holt, 5 M. & W. 250.

(2) 1.yon v. flost, v. M. & W. 250.

(a) See Sebng v. Abitbol, 4 Maule & S. 462; 1 Stark. 79, (Chit. j. 942, 947); Turner v. Hayden, 4 Bar. & C. 1; 6 D. & R. 7; Ryan and Mo. 215, (Chit. j. 1246); Rhodes v. Gent, 5 B. & Ald. 244, (Chit. j. 1124), ante, 262, note (a). In Turner v. Hayden, where the holder of a bill accented at a banker's but the holder of a bill accepted at a banker's, but not made payable there "only," did not present it for payment, and the bankers three weeks afterwards failed, having had in their hands, during all that time, a balance in favour of the acceptor exceeding the amount of the bill, it was held, that the latter was not discharged by the omission to present the bill for payment, the acceptance being in law a general acceptance.

(b) De Bergareche v. Pillin, 3 Bing. 476; 11 Moore, 350, (Chit. j. 1292). Best, C. J. "The result of the act is, that though a bill be by the acceptance made payable at a particular place, still the acceptance is to be esteemed a general obligation, and the acceptor may be called on elsewhere, as well as at the place indicated. But though the legislature has provided that the acceptor may be called on elsewhere, it has not made it compulsory on the holder to go elsewhere. It has been argued, indeed, that at all events the acceptor should himself be called on at the place indicated, though the holder is excused by the act from presenting his bill to the persons who carry on business at that place, or that at least it should be averred that the acceptor was called on there and could not be found. But such an averment would be absurd, for the acceptor is never expected to be there, but his money; it is sufficient therefore to allege, as in the present declaration, that demand was made there for the money." Park, J. "The construction of the act which has been contended for is absurd, for if an acceptor must be always present at his banker's, where would be the convenience of making the bill payable at the banker's? The bill was, according to the averment, 'duly presented for payment.'" Burrough, J. "Presentation to the acceptor in person has been dispensed with by his pointing out the banker's as the place at which payment of the bill might be obtained." Gaselle, J. concurred. Judgment for the plaintiff.

(c) See preceding note, and ante, 151, 152,

and 293.

(d) Ante, 153, 154, 360 to 362.

(2) { Fort v. Cortes, 14 Louis. Rep. 180; Warren v. Allnutt, 12 Louis. Rep. 454; Warren

⁽¹⁾ On a promissory note payable at a particular house, an actual or virtual demand must be made at such house, and notice of non-payment there must be given to the indorser in order to charge him; and notwithstanding the maker's insolvency and absence from the commonwealth, nnless the note is at such house on the day when it becomes due, in the hands of some one authorized to receive payment, no demand, actual or virtual, can be made. Shaw v. Reed, 12 Pick. Rep. 132. Ogden v. Dobbin, 2 Hall, 112; Erwin v. Adams, 2 Miller, 318; Smith v. Robinson, Idem, 405; contra, Conn v. Gano, Ohio Rep. Cond. 210; M'Nairy v. Bell, Yerg. 502; Eastman v. Fifield, 3 N. Hamp. 333.

In case of a foreign bill, where the course of exchange has altered, the ac- I. Of Preceptor will only be liable to pay according to the rate of it when the sentment bill become due (a); and it has been supposed that if the accenter unders for Paybill became due(e); and it has been supposed, that if the acceptor under-ment. took by his acceptance to pay within a certain period after demand, he may insist on the warrant of presentment (f). A person who has guaranteed the 1st, When due payment of a bill, may in some cases be released from the responsibility necessary. by the neglect of the holder duly to present it for payment, if he can show that he was thereby prejudiced (g).

If a bill or promissory note be payable at usances, months, or days, after demand or sight, or after notice, independently of any consideration whether a presentment for acceptance be necessary, (which is never requisite in the case of notes,) it will be necessary to present them and demand payment, for otherwise they would never be due(h). So a promissory note payable on demand at sight must be presented for payment(i). If the bill or note has been lost, payment should nevertheless be demanded at the exact time, and an indemnity should be offered, and due notice of non-payment given(k).

Presentment for payment, when necessary, must be made by the holder of 2dly, By the bill or note, or an agent competent to give a legal receipt for the money(l), and a person in possession of a bill payable to his own order, is a to be holder for this purpose, though it was once thought he had only an authority made. to indorse(m)(1).

Any person who happens, whether by accident or otherwise, (as by the failure of an agent) to be the holder, at the time a bill or note becomes due, and although he has no right to require payment for his own benefit, may and

(e) Poth. pl. 174.

(f) The Duke of Norfolk v. Howard, 2 Show. 235, (Chit. j. 166)

(g) See ante, 328.

(h) Ante, 272; Holmes v. Kerrison, 2 Taunt. 323, (Chit. j. 791); Thorpe v. Booth, Ryan & Mood. 389, (Chit. j. 1293); Sturdy v. Henderson, 4 B. & Ald. 512, (Chit. j. 1110). (i) Dixon v. Nuttall, 1 C., M. & R. 307; 6

C. & P. 820, S. C.; citing Holmes v. Kerrison, 2 Taunt. 323.

(k) Ante, 262, 263.

(1) Per Lord Kenyon, in Coore v. Callaway. 1 Esp. R. 115.

- r. Ormston, 10 Mod. 286; Smith (m). v. M'Clure, 5 East, 476; 2 Smith, 43, (Chit. j.

v. Briscoe, id. 472; Picquet v. Curtis, 1 Sum. 478; Gale v. Kempe's Heirs, 10 Louis. 205. In an action on a note payable at a particular place, no averment or proof of a demand there is necessary. If the maker was ready to pay at the time and place specified, that would be matter of defence. Bacon v. Dyer, 3 Fairf. 19; Remick v. O'Kyle, Idem, 340; Bowie v. Duval, 1 Gill & John. 175; Bank of S. Carolina v. Flagg, 1 Hill's Car. Rep. 177.

If it appears from the protest that demand of payment was made at the proper place, on the cashier of the bank, it is sufficient, although it be not expressly stated that the demand was made in the banking-house. Coleman v. Flint, 16 Louis. Rep. 250.

Where a note is made payable at a particular bank, and before the day of payment arrives, that bank has no place of business, and ceases to exist, and another bank does business in the same room, it is sufficient to present the note for payment at that room. Central Bank v. Allen, 16 Maine Rep. 41. }

(1) Where the cashier of a bank indorses a promissory note, the property of the bank, for the purpose of causing demand and notice to be given, the authority of the bank, for the purpose may

be implied. Hartford Bank v. Parry, 17 Mass. 95.

It is not necessary that the demand or notice should be made by the party to the note or bill:

it is sufficient if done by a notary. Hartford Bank v. Stedman, 3 Conn. Rep. 489.

A perol authority is sufficient to constitute a person agent for the purpose of making a demand on the drawer of a promissory note. Shed v. Bret, 1 Pick. 401. Sussex Bank v. Baldwin, 2

A demand of payment of a note, by an agent having any parol authority as a notary or the mere possession of the paper is sufficient; and such agent is competent to give notice of non-payment. Bank of Utica v. Smith, 18 Johns. 230. | Sussex Bank v. Baldwin, 2 Han. 487. |

Any person may present, at its maturity, a promissory note of which he is put in possession. A notarial demand and protest is not necessary to fix the liability of the indorser. Sussex Bank v. Baldwin, 2 Han. 487. }

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ment.

I. Of Pre- ought to demand payment, and give notice of the non-payment, so as to prevent loss. And it has been held, that assignees of a bankrupt, who was merely an agent, may, after the bankruptcy, present and receive payment of bills and notes in their possession, without being liable to an action of trover, though they must pay over the proceeds on demand to the person legally entitled(n).

3dly, To whom made and at what Place. [*366]

Where a bill has not been accepted, or has been accepted generally, and where a note is payable generally, the presentment for payment should be to the drawee of the bill, or the maker of a note, at his residence(0)(1). But since the 2 & 3 Will. 4, c. 98, where a bill, drawn on a person at one place, and requiring him to pay in another place, *has been protested for non-acceptance, and accepted supra protest, such bill may, without further presentment to the drawee, be protested for non-payment at the place where made payable(p).

If the bill has been accepted, or note made payable, at a different place than the domicile of the drawee or maker of a note, whether or not according to the terms of the statute, or in the body of the note, then it always suffices, and is advisable, to make presentment at the latter (q); though we have seen, that if the place be named in the acceptance, without adding the words either "only," or "and not otherwise or elsewhere," or be named only at the foot of a promissory note, it is not absolutely essential to present it there, and an actual presentment to the drawee or maker any where would in that case suffice (r). But if the bill be drawn as well as accepted payable at a particular place, though not in the terms of the act, a presentment there must be made in order to charge the drawer(s); and if a particular place be named in the body of the note, presentment there is indispensable, even to charge the maker(t). In cases where, according to the terms of the

(n) Jones v. Fort, 9 Bar. & Cres. 764; 4 Man. & Ry. 547, (Chit. j. 1445); Tennant v. Strachan, Mood. & M. 377; 4 Car. & P. 31, (Chit. j. 1450). (o) Poth. pl. 129.

(p) See ante, 348, 349.
(q) Per Best, C. J. in De Bergareche v. Pilv. Judge, 2 Hen. Bln. 509, (Chit. j. 1792); Saunderson v. Judge, 2 Hen. Bln. 509, (Chit. j. 545); Ambrose v. Hopwood, 2 Taunt. 61, (Chit. j. 772); 2 Campb. 550; Parker v. Gordon, 7 East, 386; 3 Smith, 358; 6 Esp. 41, (Chit. j. 727); and Hartley v. Spittal, 7 Law J. 83, K. B. M. T. 1828, when it was held, "that although a bill of exchange accepted 'payable at, &c.' is a

general acceptance, and does not compel the holder, in an action against the acceptor, to prove presentment at the place expressed, yet presentment at that place is a good presentment to the acceptor for the purpose of an action against the drawer."

(r) Ante, 152, 153, 364; and Price v. Mitchell, 4 Campb. 200, (Chit j. 933).

(s) Gibbs v. Mather, S Bing. 214; ante, 364, note (y), but see Lyon v. Holt, 5 M. & W. 250; ante, 364, note (z).

(t) Saunderson v. Bowes, 14 East, 500; Dickinson v. Bowes, 16 East, 110, (Chit. j. 863); 5 Taunt. 80; ante, 364.

A note payable at plaintiff's domicil need not be formally presented for payment; especially when it is shown the defendant had no funds there. Maurin v. Perot, id. 276.

Where the maker of a note has removed before it falls due, and his residence cannot be ascertained by reasonable diligence, a demand may be made at his former residence. Central Bank v. Allen, 16 Maine Rep. 41. The replies made, on inquiry for the maker's place of abode, are v. Allen, 16 Maine Rep. 41.
admissible in evidence. Ibid.

A notice sent through the post office to the maker of a note, is not such a demand as the law requires, where his residence is supposed to be ascertained. Thus where the notary was informed, on inquiry, that the maker resided in or near a post town in an adjoining county, it was held that a demand sent through the post-office was not sufficient to charge the indorser. Stuckert v. Anderson, 8 Whart. 116.

A note payable in cotton at some convenient gin, if no particular gin or place is agreed on, must be demanded at the domicil of the debtor. Hunter r. Spurlock, S Miller's Louisiana Rep. 97.

^{(1) {} Where the notary states that he "demanded payment for said note, at the domicil of the maker thereof, and was answered that he was not there, and had left no funds to pay it,' the demand is sufficient. Degrand v. Banks, 16 Louis. Rep. 461.

bill or note, a presentment has been made at a different place, it will not be I. Of Prenecessary to make another presentment at the domicile of the acceptor or maker sentment of the note, or to him in person (u)(1); and although the person at whose house ment. the instrument is made payable may not be any party to it, and consequently not personally liable; yet an answer by him or at his house as to the pay- whom ment or non-payment of it is sufficient (x)(2). And in the spirit of this rule made and it has been decided, that if the person at whose house the bill or note is made at what Place. payable be himself the holder, it is a sufficient demand of payment to examine his own books, and a sufficient refusal if thereupon it appear that he has no assets in hand(y)(3). And where a bill, check, or note is payable at a banker's, a presentment to their clerk at the clearing-house is sufficient(z)(4).

We have seen, that in making a demand of an acceptance the party ought. if possible, to see the drawee personally (a). But a demand of payment need not be personal, it being sufficient if it be made at the house of the acceptor(b); and although it has been held, that if the *house be shut up [*367] and no person there competent to give an answer, and the acceptor of the bill, or maker of the note, has removed, the holder must endeavour to find out to what place he has removed, and make the presentment there(c); yet, according to a more recent authority (d), it is sufficient to show that the bill

(u) Mar. 106; Saunderson v. Judgo, 2 Hen. Bla. 549, (Chit. j. 545); Parker v. Gordon, 7 East, 385; 3 Smith, 358; 6 Esp. 41, (Chit. j. 727); Com. Dig. tit. Merchant, F. 7; Giles v. Boune, 2 Chit. R. 300, (Chit. j. 982); De Bergareche r. Pillin, 3 Bing. 476; 4 Bing. 716, 417; 11 Moore, 350, (Chit. j. 1292)

(x) Stedman v. Gooch, 1 Esp. Rep. 4, (Ch.

(y) Saunderson v. Judge, 2 II. Bla. 509, (Chit. j. 545)

(z) Reynolds v. Chettie, 2 Campb. 596, (Ch. 823); Robson v. Bennett, 2 Taunt. 338, (Chit. j. 794); post, 384, 385, in notes.

(a) Ante, 274, note (1).

(b) Brown v. M'Dermot, 5 Esp. R. 265, 266, (Chit. j. 721); Cromwell v. Hynson, 2 Esp. R. 512, acc. (Chit. j. 571); ante, 280, note (d). Sed ride Duke of Norfolk v. Howard, 2 Show.

235, (Chit. j. 166). Brown r. M'Dermot, 5 Esp. Rep. 265, (Chit. 721). Indorsee against Indorser. It was held in this case to be sufficient to demand payment at the usual place of residence of the acceptor, and if it is not then paid it is sufficient to entitle the party to proceed against the in-dorser. The plaintiff's counsel called a wit-

ness, who proved that he carried the bill to the house described as the place where Smithson, the acceptor, lived, but that there were no orders left, and the bill was not paid, but it appeared that the witness never saw the acceptor. Garrow, for the defendant, objected to the evidence, and that the plaintiff should be called. first, on the ground that the promise to pay (proved to have been made) was not made to the plaintiff, the indorsee himself, which he contended to be necessary; and secondly, that the hand-writing of the acceptor should be proved, and an actual demand on him. Lord Edenborough, in summing up, told the jury, "that it was necessary to prove a demand of the bill and non-payment by him; but that if a bill was payable at a certain house it was sufficient to demand the money there: that had been done here, for it was the duty of the drawee of a bill to leave provision for the payment of it." Verdict for plaintiff.

(c) Collins r. Butler, 2 Stra. 1089, (Chit. j. 285); ante, 280, note (c); Bayl. 5th ed. 218, note 10; Bateman r. Joseph, 2 Campb. 461;

13 East, 433, (Chit. j. 801).

(d) Hine r. Allely, 4 B. & Adol. 624; 1 N. & M. 433, S. C. See post, \$21, (41). See

A note signed by two, jointly and severally, and made payable at their dwelling-houses, was presented to both, at the farm-yard of one of them, and no objection was made by either, as to the place of demand. Held, a sufficient demand. Baldwin v. Farmsworth, 1 Fairf. 414.

(3) | Bank of South Carolina v. Flagg, 1 Hill's Car. Rep. 177 |

is sufficient to charge the indorser. State Bank r. Hurd, 12 Mass. Rep. 172.

{ A demand of payment of the "proper book-keeper" at the bank where a note is made psyable is sufficient. Armer v. Lewis, 16 Louis. Rep. 331. }

^{(1) {} Jolger v. Chase, 18 Pick. 63; Roberts v. Mason, 1 Ala. Rep. (New Series), 373. } (2) { Where a note is made payable at the counting-house of A, and the firm is changed to A. B. before the note becomes due, a demand at the counting-house of A. B. will be good. Sanderson v. Oakey, 14 Louis. Rep. 373.

⁽⁴⁾ It seems that where no place of payment is mentioned in a note executed in a foreign country, parol evidence is admissible to show at what place it was agreed to be paid, and thus to give effect to the lex loci contractus. Thompson v. Ketcham, 4 John. 285. If the maker of a note appoint a particular place where the demand of payment of it is to be made a demand there

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sentment for Payment.

8dly, To whom and at what Place.

I. Of Pre- was taken to the residence of the acceptors as stated in the bill, for the purpose of presentment, and that the house was shut up, and no one there; and this, although the declaration allege the bill to have been presented and shewn to the acceptor. And where a note was made payable at Guildford, and the holder presented it when due at two counting-houses there, the maker then living in London, this was held to be equivalent to a presentment to the maker himself(e). And it is clear that if the drawee has never lived at the place of address, or has absconded, this circumstance will sufficiently excuse the holder from not making any further inquiries after him(f), and if he has left the country on any account, presentment and demand of payment of his wife, or agent, at the place where he formerly resided, will be sufficient(g)(1). If the drawee has by his acceptance appointed a place for payment, the bill should be presented accordingly (h), or in some cases it may be to his agent who has been used to pay money for him(i); and if a banker's note be made payable at Tunbridge and also at London, the holder has a right to present it at either place, and if payment be refused at the more distant place, London, it is no defence to prove, that if payment had been demanded at the nearer place, Tunbridge, the note would have been paid (k).

If at the time of presentment the drawee be dead, the holder should inquire after his personal representative, and present the bill to him(l)(2); and in case there be no representative, should demand payment at the house But if the bill has been made payable at a particof the deceased (m)(3). ular place, and presented there, it is not then necessary to present it also at

the house of the executor (n).

[*368] (It is sufficient to require payment of the person on whom the bill *is drawn, and (it is unnecessary, in case of default of payment, to make any demand on the drawer previously to an action against an indorser (o).

> post, Part II. Ch. II. s. iv. Of the Declaration. (c) Hardy v. Woodrooffe, 2 Stark. R. 319, (Chit. j. 1020).

(f) Anon. Lord Raym. 743, (Chit. j. 216); and see Hine v. Allely, 4 B. & Ad. 624, su-

(g) Cromwell v. Hynson, 2 Esp. R. 211, (Chit. j. 571); ante, 280, note (d); Phillips v. Astling, 2 Taunt. 206, (Chit. j. 777). When not, see Cheek v. Roper, 5 Esp. R. 175, (Chit. j. 702).

(h) Saunderson v. Judge, 2 H. Bla. 509, (Chit. j. 545); Giles v. Bonne, 2 Chit. Rep. 300, (Chit. j. 982); ante, 366, n. (t). What a sufficient averment of presentment in case of bill made payable at the house of a third party, Bush v. Kinnear, 6 Maule & S. 210, post, Part II. Ch. II. s. iv.

(i) Governor and Company of the Bank of

England v. Newman, 12 Mod. 241; Phillips v. Astling, 2 Taunt. 206, (Chit. j. 777).

(k) Beeching v. Gower, Holt, C. N. P. 313,

(Chit. j. 966). But that it is sufficient to give or leave no-tice of non-payment at the house of a party, see Goldsmith v. Bland, Bayl. 5th edit. 276, note 113; Crosse v. Smith, post, Ch. X. s. i. Notice of Non-payment; 1 Maule & S. 545,

(1) Ante, 280; Molloy, b. 2, c. 10, s. 34;

Poth. pl. 146.

(m) Poth. pl. 146; Mar. 134. (n) Philpot v. Bryant, 3 Car. & P. 244; 1

Moore & P. 754; 4 Bing. 717, (Chit. j. 1387). (o) Heylyn v. Adamson, 2 Burr. 699, (Chit. j. 349); Hamilton v. Mackrell, R. T. Hardw. 322, (Chit. j. 284).

\(\) So, if his new place of residence cannot be ascertained, on reasonable diligence. Central Bank v. Allen, 16 Maine Rep. 41. \(\)
(2) Where the maker of a note died on the last day of grace, the notary on calling at his dom-

icil, being informed of his death, protested the note for non-payment, and notified the indorser thereof: Held, that there was not a proper demand of payment sufficient to bind the indorser. Toby v. Maurian, 7 Louisiana Rep. 493.

⁽¹⁾ Where the maker of a note has removed into another state or jurisdiction, subsequent to the making of the note, a personal demand on him is not necessary; it is sufficient if presented at his former residence. M'Gruder v. Bank of Washington, 9 Wheat. 598.

⁽³⁾ It has been decided in Massachusetts, that if the maker of a note die, and an administrator be appointed before it becomes due, no demand on the administrator is necessary to charge the indorser, so that notice of the death and non-payment be duly given to the indorser, unless the maturity of the note happens more than a year after the maker's death. This decision is

The presentment must also, in order to fix the loss on the drawer and in- 1. Of Predorser, be actually made for payment(1); and payment of the money must sentment in due time be demanded, and credit must not be given to or taken by the ment. drawee of a bill or maker of a note, or the indorsers will be discharged (p); and therefore where A. on the 18th March, 1824, delivered to the Totness Mode of Bank, of whom he was a customer, several notes of the Dartmouth Bank, Presentand the Totness Bank, early on the 15th March, instead of demanding im-ment. mediate payment of such notes in cash, sent and left them with the Dartmouth Bank, who, according to the usual course of business, gave them credit in account for the amount of the notes, and the latter, in the evening of the 19th March, stopped payment, it was holden, that as between A. and the Totness Bank, the latter, by taking and receiving credit in account for the amount of such notes, was equivalent to payment to them; and therefore that A. was entitled to recover the amount from them (p). The practice relating to bankers' notes, payable on demand appears formerly to have been, to leave them at such banker's for a few hours, and then call again for payment(q), but that was condemned as dangerous(r), and has long been abandoned. The practice with respect to checks, when in the hands of a banker, has long been to present them on the same day at the banker's on whom they were drawn, and if they have effects of the drawer in their hands they mark it as good, which is equivalent to an acceptance, and will bind them to pay it the next day at the clearing-house; and it has been held, that the following such practice is not laches, though the bankers fail in the mean time(s); but if there be the least apprehension of a failure, the check ought to be presented at the earliest moment. The other points respecting the mode of presentment may be collected from the perusal of the three preced-The other note should not be left in the hands of the drawee or maker without immediate actual payment in money (t), at least if it be, the presentment is not considered as made until the money is called for(u); and though it has been decided, that neither a holder nor a banker, acting as agent, is guilty of neglect by giving up *a bill to the acceptor upon his de- [*369]

(p) Gillard v. Wise, 5 Bar. & Cres. 134; Stra. 416, (Chit. j. 249); and Hoare v. Da 7 Dow. & Ry. 523, (Chit. j. 1276); and see post, s. ii. as to payment, and what amounts to

(q) Turner v. Mead, 1 Stra. 416, (Chit j. 248); Hoare v. Da Costa, 2 Stra. 910, (Chit. j. 272); post, 881, note (c).

(7) Hayward v. Bank of England, 1 Stra. 550, (Chit. j. 252); Bayl. 5th edit 231; Russell v. Hankey, 6 T. R. 13, (Chit. j. 530).

Hayward kept cash at the Bank, and paid in a banker's note; the runner to the Bank of England left it the next morning, and called for the money in the afternoon, but in the interval the banker had stopped, and this appeared to be the usual practice at the Bank. King, C. J. said, it was dangerous to suffer persons to deal with notes in that manner, and that the Common Pleas were of that opinion in the like case, and he directed the jury to find for the plaintiff, which they did. Sed vide Turner r. Mead, 1

Costa, 2 Stra. 910, (Chit. j. 272); post, 381, note (c).

(s) Robinson v. Bennett, 2 Taunt. 388, (Chit. j 794); and Bayl. 5th edit. 224.

(t) Hayward v. Bank of England, 1 Stra. 550, (Chit. j. 252); Bayl. 5th edit. 231; 34pra, note (t).

(u) Id. ibid.; Bayl. 5th edit. 231. In Ridley v. Blackett, Peake's Addenda, 62, (Chit. j. 553), it was holden, that the indorser of a foreign bill is not discharged by the holder's having given up the bill to the acceptor, and received his check for the amount, which was returned at the clearing-house and protested, and notice given to the indorser, the same day, and Lord Kenyon said, the case of Mr. Hankey decides this case.

But see Powell r. Roche, 6 Esp. R. 76, (Chit. j. 731); and Marius, 21; post, s. ii. Payment-How Made, &c.

grounded upon some supposed material difference between the situation of an administrator in

Massackusetts and that of one in England. Hall r. Burr, 12 Mass. Rep. 86.
(1) { Where the notary states he "demanded payment of the draft, at the counting-house of the acceptor," it is sufficient, without saying "the draft was presented, and payment thereof demanded." Nott's Ex'r v. Beard, 16 Louis. Rep. 308. }

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for Payment.

I. Of Pre-livering to them his check on another banker(x), that doctrine may now be questionable (y); an most of the London bankers, on presenting a bill for payment in the morning, leave a ticket where it lies due, and declaring, that "in consequence of great injury having arisen from the non-payment of drafts taken for bills, no drafts can in future be received for bills, but that the parties may address them for payment to their bankers, or attach a draft to the bill when presented."

5thly, Time of Presentment.

Bills and notes, when payable at a time certain, must be presented on the very day they fall due, and those which are not payable on a day certain, but on presentment or demand, must be presented, or at least put in circulation for that purpose, within a reasonable time after they have been received, depending on distance and other circumstances presently noticed. In the first case, a premature presentment before the instrument falls due would be wholly inoperative (z)(1), and a delay in presenting until even one day after the instrument was at maturity, would discharge all the parties not primarily liable. It was once thought, that the propriety of a presentment for payment with respect to the time when it should be made, was in all cases, a question for the determination of a jury; but the decisions of juries having been found to be very much at variance from each other (a), and consequently to have rendered the commercial law in that respect very uncertain, it is now settled to be the province of the Court to determine the time when a presentment ought to be made(b)(2).

Before we proceed to state when each description of instrument falls due and must be presented for payment, it will be essential to examine the different styles and computations of time affecting bills, the different usances, how months are calculated, when days of grace are allowed and their number, and the consequences of these instruments falling due on a Sunday, Christmasday, Good Friday, Fast day, Day of Thanksgiving, or authorised Festival, &c.

Computation of Time, and different Styles in regard to Bills.

When a bill is drawn at a place using one style, and payable on a day certain at a place using another, the time when the bill becomes due must be calculated according to the style(c) of the place where it is payable; because

(x) Russell r. Hankey, 6 T. R. 13, (Chit. Crowther, id. 257, (Chit. j. 221); Tindal v. 530); and Ridley v. Blackett, ante, 368, Brown, 1 T. R. 168, 169, (Chit. j. 431). j. 530); and Ridley v. Blackett, ante, 368, note (u).

(y) See post, s. ii.

(z) Wiffen r. Roberts, 1 Esp. Rep. 262, (Chit. j. 536). A presentment for payment on the second day of grace, when the third is not a Sunday, is a nullity; and see Gritin v.

Goff, post, 374, note (x).
(a) Allen v. Dockwra, 1 Salk. 127, (Chit. j. 206); Mainwaring v. Harrison, Stra. 508, (Chit. j. 250); Coleman v. Sayer, il. 829, (Chit. j. 267); Darrach v. Sayage, 1 Show. 155, (Chit. j. 181); Phillips v. Phillips, 2 Freem. 247, (Chit. j. 209, 210); Crawley v.

(b) Darbishire v. Parker, 6 East, 11, 12; 2 Smith, 195, (Chit. j. 707); Parker v. Gordon, 7 East, 385; 3 Smith, 358; 6 Esp. 41, (Chit. j. 727); Tindal v. Brown, 1 T. R. 168, 169, 170, (Chit. j. 431); Brown v. Collinson, Beawes, pl. 229; Brown v. Harraden, 4 T. R. 148, (Chit. j. 470); Kyd, 45; Molloy, b. 2, c. 10, acc.; Russell v. Langstaffe, Dougl. 515, (Chit. j. 415); Muilman r. D'Eguino, 2 Hen.

Bla. 568, 569, contra, (Chit j. 549).
(c) As to the old and new style, see Kyd on Bills, 7, and Chitty's Col. Stat. tit. "Time." All places with which we, in Great Britain, are

⁽¹⁾ Where a note is made payable in a given number of days with grace, a demand made before the last day of grace, is insufficient to charge the indorser. Leavitt v. Simes, 3 New Hamp. Rep. 14. { Farmers' Bank v. Duvall, 7 Gill & John. 78; Jackson v. Newton, 8 Watts,

<sup>401. }
(2) {</sup> In the case of Davis v. Herrick, 1 Ham. 66, it is held to be one of law, to be decided by the court, where the facts are not disputed. But where the facts are contested the question of law becomes mixed with fact, and is for the denision of the jury, under instructions from the eourt. }

PART I

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the contract created by the making a bill of exchange is understood to have I. Of Prebeen made at that place, and consequently should be construed according to sentment the law of it(d). In other works it is laid down, that upon a bill drawn at a ment. place using one style, and *payable at a place using another, if the time is 5thly, to be reckoned from the date, it shall be computed according to the style of Time of the place at which it is drawn, otherwise according to the style of the place Presentwhere it is payable; and in the former case, the date must be reduced or carried ment. forward to the style of the place where the bill is payable, and the time reckon- [*370] ed from thence(e). Thus, on a bill dated the 1st of May, old style, and payable here two months after date, the time must be computed from the corresponding day of May, new style, viz. 13th May; and on a bill dated the 1st May, new style, and payable at St. Petersburgh two months after date, from the corresponding day of April, old style, viz. 19th April (f).

In some cases it has been considered, that when computation is to be made Day of from an act done, the day in which the act is done is to be included (g), but Date of the law relating to bills of exchange is different; for the custom of merchants ance to be is settled, that where a bill is payable at usance, or at so many days after the excluded. date(h), or after sight, the day of the date(h), or of the acceptance, must be excluded(h); and therefore, if a bill drawn payable ten days after sight, be presented on the 1st day of a month and then accepted, the ten days expire on the 11th, and the bill, by the addition of the days of grace when they are three in number, becomes due on the 14th(i). When a bill, &c. is drawn payable at usance, or at a certain time after date, and it is not dated, the time when it is payable must be computed from the day it issued, exclusive thereof(j). And before the recent statute 2 & 3 Will. 4, c. 98, when a bill payable thirty days after sight was protested for non-acceptance, and then accepted supra protest, it must, without reference to the place of payment, have been presented to the original drawee at thirty-three days after the day of the acceptance, exclusive thereof, and the time was not reckoned from the time of presentment for acceptance to the drawec(1); but since that act such bill, if made payable at a place not being the place of the residence

in the habit of negotiating bills, compute their time as we do, (except that Russia adheres to the old style) by years reckoned in a series, from the birth of our Saviour, and divided each into twelve months, and 365 (or in every fourth

year 366) days. 1 Pardess 353. (d) Poth. pl. 155; Hutteau, 1st ed p. 241; Beawes, pl. 251; Mar. 102; ante, 167, 168; acc; Kyd, 8, contra. Old style, it is said, still prevails in Muscovy, Denmark, Holstein, Hamburgh, Utrecht, Gueldres, East Friesland, Geneva, and in all the Protestant principalities in Germany, and the Cantons of Switzerland. Beawes, pl. 258; Kyd. 7, 8; Mar. 56; see the preceding note. The Gregorian Calendar is generally received throughout Europe, 1 Pardess. 353.

(e) Bayl. 5th edit. 249; Poth. pl. 155. (f) Hutteau, 1st edit. page 241; Bayl. 5th

(g) Glassington v. Rawlins, 3 East, 407; 4 Esp. 224, S. C.; Cramlington v. Evans, 2 Vent. 308, 310, (Chit. j. 174); Castle v. Burditt, 8

T. R. 623; Kyd, 6; but see the observations of Lord Ellenborough in Watson v. Pears, 2 Campb. 296, from which it appears that in many cases the day is to be excluded. See also Pugh r. Duke of Leeds, Cowp. 714; Lester v. Garland, 15 Ves. 254; 9 Bar. & C. 134, 608. (h) Bellasis r. Hester, Lord Raym. 280; Lutw. 1591, (Chit. j. 204;) Coleman v. Sayer, 1 Barnard. B. R. 303, (Chit. j. 267); Poth. pl. 13, 15; Campbell v. French, 6 T. R. 212; 2 Hen. Bla 163, (Chit. j. 541); Beawes, pl. 252; Kyd, 6; 1 Pardess. Cours de Droit Com. 1st edit. 353; 2 Pardess. 356, No. 336; May v. Cooper, Fort. 376, (Chit. j. 250), contra. In America, if a bill after sight be presented on one day and accepted the next, the time is computed exclusive of the latter. Mitchell r. De Grand, 1 Mason, 176.

(i) Kyd, 6, 7.

(j) Hague v. French, 3 Bos & Pul. 178, (Chit. j. 652); Armitt r. Breame, Lord Raym. 1076; Kyd, 7; ante, 148.

⁽¹⁾ A note dated August 25th, and payable in four years from date falls due August 28th, if three days of grace are allowed. Ripley v. Greenleaf, 2 Verm. Rep. 129.

CHAP

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ment.

I. Of Pre- of the drawee, may, without further presentment to the drawee, be protested for non-payment unless paid on the day on which such bill would have become payable had the same been duly accepted (k). In the case of a bill not falling within the description mentioned in the above statute, we have seen that the 6 & 7 Will. 4, c. 58, declares it unnecessary to make a presentment to the acceptor supra protest, or referee in case of need, until the day after the day on which the bill becomes due(1).

Of Usances, their Length in different Countries, and how calculated. [*371]

Foreign bills, as has been already observed, are usually drawn payable at one, two, or more usances. The term usance is French, and signifies the time which it is the usage of the countries, between which *bills are drawn, to appoint for payment of them(m). This term, however, is not so much in use as formerly, and it is becoming the practice to make foreign bills payable at so many months or days after date or sight, as in the case of inland It has in another place been said, that accordbills drawn in this country. ing to the language of merchants "usance" signifies a month (n). of the usance or time which it includes, varies, in different countries, from fourteen days to one, two, or even three months, after the date of the bill. Double or treble usance is double or treble the usual time, and half usance is half that time; when it is necessary to devide a month upon a half usance, the division, notwithstanding the difference in the length of the month, contains fifteen days(o). It has been said, that the Court cannot take judicial notice of foreign usances, which vary, being longer in one place than another(p), and therefore their duration must be averred and proved(q). following table contains a correct list of the different usances as approved and acted upon by the first mercantile houses of the present day:-

```
A usance between A Aleppo B Sometimes accounted as treble usance B is 1 calendar month after date.
                                     is 1 calendar month after date.
                     Altona
                     America, North(s), said to be 60 days.
                     Amsterdam
                                     is 1 calendar month after date.
                     Antwerp
                                        1
                                              do.
                     Bahia(t)
                                       none.
                                       14 days after acceptance.
                     Berlin
                                        2 calendar months after date.
                     Bilboa
                                        1
                                              do.
                                                            do.
                     Brabant
                     Brazil(u)
                                        none.
                     Bruges
                                        1
                                              do.
                                                             do.
                     Buenos Ayres(v) none.
                                        2 calendar months after date.
                     Cadiz
                     Constantinople
                      Constantinople and Smyrna(w) 31 days
                                                            do.
                                                             do.
                     Flanders
                                        1 calendar month
                     France(x)
                                       80 days
                                                             do.
                     Frankfort on ?
                                       14 days after acceptance.
                        the Main
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(k) Ante, 350.

(1) Ante, 351. (m) Poth. pl. 15; Hawes v. Birks, 3 B. & P. 338, (Chit. j. 690); Selw. N. P. 9th edit. 350, note 10.

(n) Smart v. Dean, 3 Keb. 645, (Ch. j. 163).

(o) Mar. 2 edit. 23; Poth. pl. 15; 2 Pardess.

(p) Buckley v. Cambell, 1 Salk. 131, (Chit. 228); Meggadon v. Holt, 12 Mod. 15, (Chit. j. 182).

(q) Id. Ibid. (r) Molloy, tit. Bills of Exchange, b. 2, c. 10. See also Beawes; and Frees's Cambist's

Compendium, Part ii.

(s) Glen. on Bills, 2 edit. 21.

(t) See Rio de Janeiro.

(u) Id. ibid.
(v) Camb. Comp. 159. Bills generally drawn at 30, 60, or 90 days after sight, ib., usually 60 days.

(w) Glen. on Bills, 2 edit. 21. Sometimes 61 days after sight.
(x) Bayl. 5th edit. 251; Camb. Comp. 78,

1 calendar month; Beawes; Molloy; Pothier pl. 15, 2 Pardess. 356, thirty days. In Camb. Comp. 98, the usance between Paris and England is stated to be sixty days after date.

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A usance between } Florence
                                 sometimes accounted } 80 days after date.
  London and
                                    is 3 calendar months after date.
                    Genoa(y)
                    Geneva
                                            do.
                                                          do.
                    Germany
                                            do.
                                                          do.
                    Hamburgh
                                            do.
                                                          do.
                    Holland and the }
                                       ı
                                            do.
                                                          do.
                      Netherlands
                                            do.
                    Italy(z)
                                                          do.
                    Leghorn
                                            do.
                                                          do.
                    Lisbon(a)
                                            do.
                                                          do.
                    Lisle
                                      1
                                            do.
                                                          do.
                    Lucca, sometimes 3
                                            do.
                                                          do.
                   *Madrid and ?
                                      2 calendar months after date.
                    all Spain(a) §
                    Middleburgh
                                      1
                                            do.
                    Milan
                                      3
                                            do.
                                                          do.
                   Naples(b)
                                      none.
                    Netherlands(c)
                                      1 calendar month after date.
                                      30 days after sight.
                    Oporto(d)
                   Palermo(e)
                                          do. or 90 days do.
                   Paris(f)
Petersburgh(g)
                                      I calendar month after date.
                                      Done.
                   Portugal
                                      2 calendar months after date.
                   Rio De Janeiro,
                    Bahia, & other
                                     none.
                    parts of Bra-
                    zil(A)
                   Rotterdam
                                      1 calendar month after date.
                   Rome
                                      3
                                           do.
                                                         da.
                   Rouen
                                           do.
                                                         do.
                   Seville(i)
                                           do.
                                                         do.
                                     31 days after date.
                   Smyrna*
                   Spain .
                                     2 calendar months after date.
                   Sweden
                                     75 days after date.
                   Trieste(j)
                                     same as Vienna.
                   Venice(k)
                                     8 calendar months after date.
                   Vienna(l)
                                     14 days after acceptance.
                   West Indies(m)
                                           do.
                                     81
                                                   do.
                   Zante
                                     3 calendar months after date.
                   Zealand
                                           do.
                                                        do.
                   Brabant, France,
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Flanders and 1 calendar month. Holland, or Zealand Italy, Spain, and } 2 calendar months(o). A wearce between Portugal Amsterdam(n) and Frankfort Nuremburg, Vienna, & other places [14 days after sight, 2 usances, 28 days, and half in Germany, on usance 7 days. Hamburg and Breslau

(y) See Beawes. But in Molloy it is stated as two months after date. And in Camb. Comp. 139, usances and days of grace are said to be abolished by the Code Napuleon.

(z) Camb. Comp. 78.

(a) In Camb. Comp. 155, it is stated to be thirty days after sight.

(a) Beawes; Molloy; Freese's Camb. Comp.

78, 124; 1 Wile. 185. (b) In Camb. Comp. 146, usances and days of grace are stated to be abolished by the Code

Napoleon. (c) See Holland.

(d) Camb. Comp. 155; but see Lisbon.

(e) With London; but with most other places 21 days after sight. Camb. Comp. 150.

(f) Poth. pl. 15, acc.; Molloy, 84, contra. See "France."

(g) Camb. Comp. 111.

(h) Camp. Comb. 156. It is said that bills are usually drawn at 60 or 30 days; sometimes also, but very rarely, 90 days after sight. Ib.

(i) Camb. Comp. 124.

*See Constantinople.

(j) Freese's Cambis's Compendium, 103.

(k) Lutw. 885; Camb. Comp. 143.

(1) Camb. Comp. 108. But according to Beawes, fourteen days after sight.
(m) Glen. on Bills, 2d edit. 21.

(n) Molloy, 84; Kyd, 4, 5. (o) Mitford v. Walcot, 12 Mod. 410, (Chit. j. 214); Camb. Comp. 80.

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I. Of Presentment for Payment. 5thly, Time of Presentment.	Amsterdam, Antwerp, Rot- terdam(p) and Genoa(q) Hamburgh, Al- tona and	Dantzig, Konings- bergh and Riga S England and France Italy, Spain and S Portugal S Abolished by the Co	2 months after date. ode Napoleon. 14 days after sight. 1 month after date.		
[# 2 72]	Leghorn and A usance between Lisbon, Oporto, e	Paris	2 months after date. 3 months after date. 1 month after date. 15 days after sight. 2 months after date. 3 months after date. 60 days after sight.		
[0.0]		Holland, Germany, 2 Italy France			
	Palermo and {	most other places, } except London	21 days after sight.		
	Venice, Holland and	Hamburgh 2	2 months after date.		

These usances are calculated exclusively of the day of the date of the bill. At the expiration of the approinted usance the bill would be apparently due, but the custom of merchants has allowed the drawee further time, called days of grace, which are in general calculated as before mentioned, exclusively of the last day of usance; and on the last of these three days, or on the second, if the third be a Sunday, the bill should, in this country, be presented for payment(i)(1).

Of Months. payable after them due.

When bills, &c. are payable at one, two, or more months after date or When Bill sight, the mode of computing the time when they become due differs from the mode of computation in other cases. In general, when a deed or Act of Parliament mentions a month, it is construed to mean a lunar month, or twenty-eight days, unless otherwise expressed (k); but in the case of bills and notes, and other mercantile contracts (l), the rule is otherwise, and by custom of trade, when a bill is made payable at a month or months after date, the computation must in all cases be by calendar and not by lunar months; thus, when a bill is dated the 1st of January, and payable one month after date, the month expires on the 1st February (m), and with the addition of the days of grace, the bill is payable on the 4th February, unless that day be a Sunday, and then on the 3d. When one month is longer than the succeeding one, it is said to be a rule not to go, in the computation, into a third

(q) See ante, 371, note (y).
(i) Post, 374, et seq.

8 Moore, 265, S. C. As to lunar and calendar months, and how they are calculated, see Lang v. Gale, 1 Maule & S. 111; Watson r. Pears, 2 Campb. 294; Cathcart v. Hardy, 2 Maule & S. 585. And see a long note as to time, in general, 2 Bla. Com. 141, Chitty's edition; Chitty's Col. Stat. tit. " T.me;" Pardess. 353.

(1) 1 Stra. 652; Lang v. Gale, 1 Maule & S. 111; 6 Id. 227; 3 Brod. & B. 187.

(m) Beawes, pl. 253; Mar. 74, 90, 2d edit. p. 19, 24; Cockell v. Gray, 3 Brod. & B. 187.

⁽p) See Camb. Comp. pp. 80, &c. Where the usance is the same with other countries as with London, it will be found under that head. The places where no usances are established are also there specified.

⁽k) 2 Ela. Com. 141; Lacon v. Hooper, 6 T. R. 225; 1 Esp. 249, S. C.; Castle v. Burditt, 3 T. R. 623; The King v. Adderley, 207; Dougl. 464; Crook v. McTavish, 1 Bing. 307;

⁽¹⁾ Crenshaw v. Kiernan, 1 Minor, 295; Eldridge v. Rogers, Idem, 392; Brown v. Lush, 4 Yorg. 210; Bank of Alexandria v. Swann, 9 Peters, 33; Fulton Company v. Wright, 12 Louis. Rep. 386; Church v. Clark, 21 Pick. Rep. 310; Farmer's Bank v. Duvall, 7 Gill & John. 78.

month; thus, on a bill dated the 28th, 29th, 30th, or 31st January, and pay- I. Of Preable one month after date, the time expires on the 28th of February in com- sentment mon years, and in the three latter cases, in leap year on the 29th(n). the time is computed by days, the day on which the event happens is to be sthly, excluded(o).

Present-

When a bill or note purports to be payable so many days after sight, the ment. days are computed from the day the bill was accepted, or the note present- When ed, exclusively thereof(1), and not from the date of the bill or note, or the Bills or day the same came to hand, or was presented for acceptance (p); for the Notes payable after right must appear in a legal way, which is either by the parties accepting the Sight due. bill, or by protest for non-acceptance (q)(2). *And in the case of a bank post [*374] bill, which is really a promissory note, and in case of a note payable after sight, though the maker has sight of the instrument when he makes it, yet a distinct and subsequent presentment must afterwards be made, and the time of payment is reckoned from the day of presentment, exclusive thereof (r). So a note payable at sight must be presented, though it be also expressed to be payable on demand(s).

In most countries, when a bill is payable at one or more usances, or a bill Of Days or note is payable at a certain time after date, or after sight, or after de- when almand, it is not payable at the precise time mentioned in the bill or note, but lowed. days of grace are allowed(t). The days of grace (at Hamburgh called res- their numpite days), which are allowed to the drawee, are so called, because they how calcuwere formerly merely gratuitous and not to be claimed as a right by the per-lated. son on whom it was incumbent to pay the bill, and were dependent on the inclination of the holder: they still retain the name of grace, though the custom of merchants, recognized by law, has long reduced them to a certainty, and established a right in the acceptor to claim them, in most cases of foreign or inland bills or notes payable at usance, or after date(u), or after sight(v), or

(n) Mar. 75; Kyd, 6.

(o) Bellasis v. Hester, Lord Raym. 280, (Ch. j. 204). When not, 15 Ves. 248; 9 B. & C. 134, 603.

(p) But see in case of acceptance supra protest, ante, 349, 2 & 3 Will. 4, c. 98.

(q) Campbell v. French, 6 T. R. 212, (Ch. j. 541); Com. Dig. tit. Merchant, F. 7; see Anonymous, Lutw. 1591. It was formerly holden otherwise; Bellasis r. Hester, 1 Lord Raym. 280; Lutw. 1589; Nelson's Id. 506, by two justices against one. See Bayl. 5th ed. 250; but now see May v. Cooper, Fortes. 376; Coleman v. Sayer, 1 Barnard, K. B. 303; I.ester v. Garland, 15 Ves. 254; Roscoe on Bills, 152, 154.

(r) Sturdy v. Henderson, 4 Bar. & Ald.

512, (Chit. j. 1110).

(a) Dixon v. Nuttall, 1 C. M. & R. 307; 6 C. & P. 820, S. C.; ante, 365, note (i).

(t) Brown v. Harraden, 4 T. R. 141, (Chit. j. 470); Leftley v. Milla, 4 T. R. 170, (Chit. j. 473); Marius, 76.

(u) Brown v. Harraden, 4 T. R. 151, 752, (Chit. j. 470). Terme de grace, n'est terme de grace que de nom, parce que c'est humanitatis ratione qu'elle l'accorde, et pour le distinguer de celui porté par la lettre; il est réellement terme de droit, puisque c'est la loi qui le donne. Poth. pl. 187. See Coleman v. Saver, 1 Barnard, Rep. B. R. 303, (Chit. j. 267); Vin. Ab. tit. Bills of Exchange, b. 9. In Brown v. Harraden, 4 T. R. 151, it was said to have been once decided, that days of grace are not allowable on inland bills.

(v) Coleman v. Sayer, 1 Barnardiston, K. B. 303, (Chit. j. 267); Beawes, pl. 256; Left-lev v. Mills, 4 T. R. 170, (Chit. j. 473); Bellasis v. Hester, 2 Ld. Raym. 280, (Chit. j. 204).

(2) \(\text{Where a bill is made payable after sight, a protest for non-acceptance, and due notice to all parties is indispensable to make them liable. Higgins v. Morrison's Ex'r 4 Dana, 102. \(\)

⁽¹⁾ The same rule is recognized in the United States. Henry r. Jones, 8 Mass. Rep. 452. Woodbridge v. Brigham, 12 Mass. Rep. 403. Jackson v. Richards, 2 Caines' Rep. 343. See Avery r. Stewart, 2 Conn. Rep. 69. Leffingwell v. White, 1 John. Cas. 99. See Loring v. Halling, 15 John. Rep. 120. And a bill payable at so many days after sight, means so many days after legal sight, that is, so many days after the acceptance, for that is the sight to which the bill refers. Mitchel v. Daggard 0 Masson's Rep. 176. the bill refers. Mitchel v. Degrand, 9 Mason's Rep. 176.

for Payment.

1. Of Pre-after a certain event, or even when expressly made payable on a particular day(x)(1), or even at sight(y); but not when expressly made payable on demand(z).

5thly, Time of Presentment.

The number of these days varies according to the ancient custom or express law prevailing in each particular country(a). Various alterations in the days of grace allowed in the time of Beawes having been introduced by the Code Napoleon, a table of the several days of grace as now prevailing, and acknowledged to be most accurate, is subjoined(b).—

(x) In Brown v. Harraden, 4 T. R. 148. (Ch. j. 470), the note was expressly made payable on the 2d November, and it was held that the maker was nevertheless entitled to three days grace. In the case of Griffin v. Goff, 12 Johnson's Rep. (America), a promissory note was drawn, dated 12th August, 1814, payable to defendant or bearer on 1st December, the

court held it was not demandable until the third day of grace; and notice of non-payment on 1st December was a nullity and judgment was given for the defendant.

- (y) Post, 376. (z) Post, 377.
- (a) Beawes, pl. 260.
- (b) See Freese's Camb. Comp. Part ii.

(1) The days of grace as allowed in England, are generally allowed in the United States. At least no traces can be found of a contrary decision, except in in the state of Massachusetts, where it is held, that no days of grace are allowable unless stipulated in the contract itself.

Jones v. Fales, 4 Mass. Rep. 245. In New York and in Pennsylvania the days of grace are certainly allowed. Corp v. M'Comb, 1 John. Cas. 328. Jackson v. Richards, 2 Caines' Rep. 343. Lewis v. Burr, 2 Caines' Ca. in Err. 195. Bank of North America v. Petit, 4 Dal. Rep. 127. 5 Binn. Rep. 541. { And in Tennessee, Alabama, New Hampshire, Vermont, Indiana, Louisiana, and Maryland, as well as in the United States courts. Brown v. Lush, 4 Yerg. 210; Crenshaw v. M'Kiernan, 1 Minor, 295; Eldridge v. Rogers, Idem, 392; Leavitt v. Simes, 3 N. Hamp. 14; Ripley v. Greenleaf, 2 Verm. 129; Pratt v. Eads, 1 Blackf. 81; Kenner and al. v. Their creditors, 20 Martin's Louis. R. 36. Fulton Company v. Wright, 12 Louis. Rep. 386; Farmers' Bank v. Duvall, 7 Gill & John. 78: Bank of Alexandria v. Swann, 9 Peters, 38.

By the usage of banks in a particular place, the payment of a promissory note or bill of exchange may be demanded on the fourth day after the time of payment. Renner v. Bank of Columbia, 9 Wheat. 581. Bank of Washington v. Triplett, 1 Peters, 25. Mills r. Bank of the U. States, 11 Wheat. 431. And this usage forms a part of the law of the contract; and is binding

on the parties, although they be not acquainted with its existence.

A bill drawn payable at five days after sight, and accepted on the first day of a month, is payable on the ninth of the same month, the day of the acceptance being excluded, and three days of grace allowed, a demand on the eighth, and protest for non-payment is too early, and therefore void. Mitchell v. Degrand, 1 Mason's Rep. 176.

The three days of grace are allowable as between the maker and holder of a promissory note. Hogan v. Cuyler, 8 Cowen, 203.

Days of grace are allowed upon bills single, such instruments having been made negotiable, and put upon the same footing with bills of exchange and promissory notes, by the act of 1786. Love v. Nelson, 1 Mart. & Yerg. 237.

An action brought against the maker of a promissory note on the third day of grace, is prematurely brought, and advantage may be taken of the error on the trial by non-suiting the plaintiff,

Osborne r. Moncure, 8 Wend. 170.

The maker has the whole of the third day of grace in which to make payment, though notice to the indorser on the third day of grace, after demand and default of payment by the maker, is good: such notice, however, need not be given until the following day.

The days of grace on negotiable notes constitute a part of the original contract; and the negotiability of the note is as unrestricted during those days, as before their commencement. The

Savings bank of New Haven v. Bates, 8 Conn. Rep. 505.

If on a comparison of the day of acceptance, the day designated for payment, and the tenor of the bill, it appears the days of grace were included with those of sight, between the day of acceptance and that designated for payment, that day is the percentory one of payment, and protest on that day is legal. Kenner & al. v. Their creditors, 20 Martin's Louis. Rep. 86; and see 1 Louisiana Rep. 120.

The demand of payment on the drawee of a bill of exchange, in order to charge the drawer in case of non-payment, must be made on the third day of grace. Pratt v. Eads, 1 Blackford's

Rep. 81.

Where the maker of a note is entitled to grace, the endorser has the same privilege. Cen-

tral Bank v. Allen, 16 Maine Rep. 41.

A note made payable on a particular day, without defalcation, is entitled to the usual days of grace—those words in plying merely that the note is to be paid without any diminution, or claim to set-off, or otherwise. McDonald v. Lee's Adm'r, 12 Louis. Rep. 435. }

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Altona(c).	Sundays and holidays included, and bills falling due on a Sunday or holiday must be paid, or in default thereof protested, on the day previous	$\left.\begin{array}{c} \\ \\ \end{array}\right\} 12 \ \mathrm{days}(d)$	I. Of Pre- sentment for Pay-
America(e).		. 3 days.	ment.
Amsterdam.	Abolished since the Code Napoleon	. none.	
*Anlwerp.	Abolished by the Code Napoleon	. none.	5thly,
Berlin.	When bills including them do not fall due on a Sanday, or)	Time of
	holiday, in which case they must be paid or protested the day previous	8 days.	Present- ment.
Brazil.	Rio de Janeiro, Bahia, including Sundays, &c. as in the last	} 15 days.	[*375]
England, Sc	otland, Wales, and Ireland	8 days.	
France.	Abolished by the Code Napoleon, Livre 1, tit. 8, sec. 5, pl. 135;) ·	
	1 Pardess. 189 Ten days were formerly allowed; Poth. pl. 14, 15	none.	
Frankfort on the Main.	Except on bills drawn at sight, Sundays and holidays not in-	4 days.	
Genoa.	Abolished by the Code Nupoleon	none.	
Hamburgh(e)	. Same as Altona	12 days.	
Ireland.		8 days.	
Leghorn(f).		none.	
Lisbon and) 15 days on local and 6 on foreign bills; but if not previously ac- ?	6 days, or	
Oporto.	cepted, must be paid on the day they fall due .	15 days.	
Naples.	Abolished by the Code Napoleon	none.	
Palermo.		none.	
	Bills drawn after date are entitled to 10 days grace, those drawn at sight to only 3 days, and those at any number of days after sight none whatever. But bills received and presented after they are due, are nevertheless entitled to 10 days grace. In these days of grace are included Sundays and holidays, as also the day when the bill falls due, on which days they cannot be protested for non-payment, but on the morning of the last day of grace payment must be demanded, and if not complied with, the bill must be protested before sunset	10 days. 8, & c.	

(c) In Camb. Comp. 90, it is said that respectable houses, or those which have any regard for their credit, do not avail themselves of any days of grace; and that, indeed, to do so would be considered as almost equivalent to having stopped payment. And see 1 Kelly's Camb. Comp. 206.

(d) Sometimes only eleven days. And see post, 875, note (e).

(e) The same rules prevail in the United States as in England, see Payl 15, Amer. edit.

(c) Kyd, 9; Beawes, pl. 260; Bayl. 5th ed. 245, 246. According to the Hamburgh Ordinance, Article 16, Iwelve days are allowed. In a late case, however, it was proved, that although the holder of a bill is not bound to present the bill for payment until the eleventh day after the time limited for its payment, where the eleventh is a post-day, yet if the eleventh be not a post-day, he must present it by the

next preceding post-day. Goldsmith v. Shee, C. P. cor. Lord Eldon, 20th Dec. 1799. Bayl. 5th edit. 246, (Chit. j. 619). A bill for 5001, drawn on Katter, at Hamburgh, at three usances, was dated 25th June, 1799; it was presented for payment on 4th of October, which was a post-day. In an action by the indorsees against the payee, the defence was, that the presentment was improper; but it was proved in evidence as a settled usage, at Hamburgh, that although it is usual to pay bills on the day they become due, the holder may, if he pleases, keep them a certain number of days called respite days, and that the number of respite days is eleven, where the eleventh is a post-day; but where the eleventh is not a post-day, the respite days extend to the preceding post-day only, the holder being oblig-

ed at his peril to protest, and send off the pretest by the eleventh day. Verdict for the plaintiffs. But it is observed (Bayl, 5th edit. 246), that this is not consistent with the Hamburgh Ordinance, Article 17, in which it is stated, that the holders may postpone the protest until the twelfth day, if it be not a Sunday or a holiday.

And in another case it was held, that where a bill is drawn on a person resident at a place near Hamburgh, the holder need not present it until the eleventh day, although the eleventh day, be not a post-day.

Goldsmith v. Bland, C. P. cor. Lord Eldon, 1st March, 1800, (Chit. j. 625). A bill for 9981 9s. 9d. drawn on Treverainus, of Bremen, but pavable in Hamburgh, at three months, was dated 15th June, 1799; it was not presented or protested until the 26th of September, which was not a post-day; another bill for 2611. 7s. 2d. addressed to Voeg, in Lubeck, payable in Hamburgh, at three months, was dated 26th June, 1799; it was not presented or protested until 7th October, which was not a post-day. In an action on these bills against the defendants, as indorsers, it was proved that it was optional in the holder of a bill at Hamburgh, whether he would present and protest it on the post-day, before the eleventh day after the day limited for its payment, the eleventh not being a post-day; or whether he would keep it until the eleventh; and one witness proved, that where the drawee lived at Lubeck or Bremen, it was the constant usage to keep the bill until the eleventh, whether it was a post-day or not, there being posts from Lubeck and Bremen and Hamburgh every day; Bayl. 5th edit. 246.

(f) In Camb. Comp. 135, it is observed, that bills falling due on a holiday must be paid,

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	Rio De Ja- neiro, Ba hia and oth er parts of Brazil. *Rotterdam. Scotland(f).	Days of g days, s thereof Abolished b	nd if du proteste	d, on th	y such le previ	day, m	ust be	holiday paid, or	and Sun- in default	15 days. none. i 8 days.
	Spain.	Vary in different on inland drawn at lowed. I nor are as	bills; a a certain Bills drav ny bills, n	t Cadis date, fi vn at sig unless ac	, only xed or tht are a ccepted	6 days precise ot enti prior to	grace, no da tled to matur	. Who ys of gr any day rity	en bills are ace are al- es of grace;	14 days, but vary.
	Trieste.	maturity are includ	r payabl must be led in the day, pa	e on a p paid w days of yment n	erticularithin 24 grace, nust be	r day; I bours and if	but b . Sun the las	ills pres days ar it day o	ot less than bented after ad holidays f grace fall otested, on	8 days.
	Venice.	6 days, in v	vbich Su	ndays, h		, and th	ie days	when t	be Bank is	6 days.
	Wales. Vienna.	shut, are Same as Tr				:	•	:	•	8 days. 8 days.

On bank post bills payable after sight, it has been said, that no days of grace are claimed(g), but they are certainly claimable(h)(1). It appears formerly to have been the practice, that whenever a bill was drawn payable to the Excise, they allowed six days beyond the three days of grace, if required by the acceptor, on payment of one shilling to the clerk at the expiration of the six days, for his trouble; and in a case where the Commissioners of Excise, being the payees of such a bill, gave the drawee the above time, Lord Mansfield decided, that as this custom was a general one, engrafted on such bills, and known universally, the drawer was not discharged by such in-But the practice of the Excise allowing any exdulgence to the drawee(i). tra days of grace does not now prevail(k).

The days of grace which are allowed on a bill of exchange must always be computed according to the law of the place where it is due(l). At Hamburgh, the day on which the bill falls due makes one of the days of grace,

but it is not so elsewhere (m).

Bills at sight entitled to Days of Grace.

With respect to a bill payable at sight, though from the very language of the instrument it should seem that payment ought to be made immediately on presentment, this does not appear to be so settled. The decisions and the treatises differ on the question, whether or not days of grace are allowed. In France, Pothier(n), enumerating the various kinds of bills, and writing at

or protested in default thereof, the day previous; but that the Jews are permitted to postpone the payment on their holidays, even when two or more occur successively, till the subsequent day: at the same time it is said, that the most respectable houses of this persuasion do not avail themselves of such privilege. And see 1 Kelly's Camb. Comp. 206.

(f) The three days of grace allowed by the custom of merchants for payment of bills of exchange are allowable on bills drawn and payable in Scotland; the limitation of an action on such bill, therefore, only begins to run from the third or last day of grace. Fergusson v.

Douglas, 6 Bro. P. C. 276, 11th Nov. 1796.

 (g) Lovelass, 247.
 (h) Ante, 374, note (r), and Sturdy v. Henderson, 4 Bar. & Ald. 512, (Chit. j. 1110).

(i) Wilford v. Hankin, at Guildhall, Sittings after Hilary Term, 1763, MS.; 1 Esp. Dig. Ni. Pri. 4th edit. 714; Roscoe, 164, but not now the practice.

(k) So stated on inquiry at the Excise Office.

(1) Kvd, 8.

(m) Beawes, pl. 260; Kyd, 9; Selw. N. P. 9th edit. 350, note 11.

(n) Pl. 12, 172, 198; and see 1 Pardess. **446**.

^{(1) {} A bank post-note was made payable in a certain period of time, with interest "until due, and no interest after" and a memorandum on the margin stated that it was "due" on a day named, which was the last day of such period. It was held that the bank was entitled to the days of grace on such note. Perkins e. Franklin Bank. 21 Pick. 483.

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a time when days of grace were allowed in France, states that a bill payable 1. Of Proat sight is payable as soon as the bearer presents it to the drawee; but in contract another part of his work(o), it appears that this opinion is founded on the ment. words of a particular French ordinance, which cannot extend to bills payable in this country; however, he assigns as a reason that it would be inconven- 5thly. ient if a person who took a bill at sight, payable in a town through which he Presentmeant to travel, and the payment of which he stands in need of for the pur-ment. pose of continuing his journey, should be *obliged to wait till the expiration [*377] of the days of grace after he presented the bill; a reason obviously as applicable to the case of a bill drawn payable at sight in this as in any other country; and in France, a bill payable at a fair, is due the day before the last day of such fair(p). In Spain, days of grace are not allowed when bills are drawn payable at sight, nor indeed on any bill not previously accepted(q). Beawes, in his Lex Mercatoria(r), says, that bills made payable here at sight have no days of grace allowed, although it would be otherwise in the case of a bill made payable one day after sight. Kyd, in his Treatise(s), expresses the same opinion. But it appears now to be considered as settled that days of grace are to be allowed (t). In Dehers v. Harriott (u) it was taken for granted that days of grace were allowable on a bill payable at sight. The same doctrine was entertained in Coleman v. Sayer(x). And in another case(y), where the question was, whether a bill payable at sight was included under an exception in the Stamp Act, 23 Geo. 3, c. 49, s. 4, in favour of bills payable on demand, the court held that it was not; and Buller, J. mentioned a case before Willes, C. J. in London, in which a jury of merchants were of opinion, that the usual days of grace were to be allowed on bills payable at sight. And in Forbes on Bills the same practice is said to prevail(z). And Mr. Selwyn, in his Nisi Prius, observes, that the weight of authority is in favour of such allowance (a). And they were allowed on such bills at Amsterdam (b).

But instruments expressed to be payable on demand, or having no time of But checks payment expressed, as in the case of bankers' notes and checks, are payable and Notes instantly on presentment, without any allowance of days of grace(c); and Demand the presentment for payment of such instruments must be made within a not entitled reasonable time after the receipt of them, usually the next day(d)(1).

And to Days of

(o) Id. pl. 172.

(p) 1 Pardess. 352, 353.

(q) Camb. Comp. 124, and see ante, 376, in list, tit. Spain.

(r) Pl. 256.

(s) Page 10.

(t) It is now stated, that a bill payable at sight is not to be considered as a bill payable on demand, but is entitled to days of grace. Bayl. 5th edit. 98, refers to J'Anson r. Thomas, B. R. Trin. Term, 24 Geo. 3, (Chit. j. 426); ante, 115, note (y); and see Roscoe, 164. A bill payable on demand at sight must be presented; Dixon r. Nuttall, 1 C. M. & R. 307, ante, 365, note (i); but as in that case there had not been any presentment it became unnecessary to de-

cide whether days of grace were to be allowed.

(u) Dehers v. Harriot, 1 Show. 163, (Chit. j. 485); Mod. Ent. 316.

(x) Coleman r. Sayer, Barnard. Rep. B. R. 303, (Chit. j. 267); Vin. Abr. tit. Bills of Ex change.

(y) J'Anson v. Thomas, B. R. Trin. Term' 24 Geo. 3; 3 Dougl. 421; Bayl. 5th ed. 98, (Chit. j. 426); ante, 115, note (y).

(z) Forbes on Bills, 142.

(a) Selw. 9th edit. 351.

(b) Forbes, 107

(c) Moyser v. Whitall, 9 Bar. & C. 409; Dans. & Ll. 216, (Chit. j. 1431); Bayl. 5th edit. 98; Sutton v. Toomer, 7 Bur. & C. 416; 1 Man. & Ry. 125, (Chit. j. 1352).

(d) Selw. 9th edit. 351; post, 379, &c.

^{(1) {} As to what is a reasonable time for the presentment of a bank check, see Harker s. Anderson, 21 Wend. 372. The holder of a check can recover of the endorser only when he has used due diligence in presenting and giving notice of demand and non-payment. Where the parties all reside in the same place the check should be presented on the day it is received, or the day after, and when payable at a different place from that in which it is negotiated, it should be for-

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for Payment.

I. Of Pre- a country banker's deposite-note given in this peculiar form, "payable with interest to the day of acceptance," is payable immediately on presentment, without any days of grace(e)(1).

5thly, Time of Presentment.

(e) Sutton v. Toomer, 7 B. & C. 416; 1 M. & Ry. 125, S. C.

warded by the mail on the same or the next day, for presentment. Smith r. Jones, 20 Wend. No greater diligence is necessary in presenting checks for payment than is required in relation to bills of exchange. Ibid. Where, by the course of the mail the check may be presented in three days, but the holder keeps it in his possession seven or eight days, he is chargeable with a want of due diligence. Ibid.

A demand on the maker of a note payable on demand, made on the seventh day from the date, has been held, in Massachusetts, to be within a reasonable time to charge the endorser. Seaber

r. Lincoln, 21 Pick. 267. }

(1) The same rules have been recognized in the United States. A note which expresses no time of payment, is by law payable immediately. Herrick r. Bennett, 8 John. Rep. 374. Thompson r. Ketcham, 8 John. Rep. 189. Field v. Nickerson, 13 Mass. Rep. 131. r. Blytherwood, Rice's Law Rep. 245. And checks and notes payable on demand, must be demanded within a reasonable time. Freeman v. Haskins, 2 Caines' Rep. 369. Cruger v. Armstrong, 3 John. Cas. 5. Conroy v. Warren, 3 John. Cas. 859. Murray v. Judah, 6 Cowen, { Mohawk Bank v. Broderick, 10 Wend. 304; Vreeland v. Hyde, 2 Hall, 429. }

The drawer of a check is not liable to suit before demand upon the drawee; but no particular time for demand is fixed. Murray v. Judah, at supra. \ Brown r. Lusk, 4 Yerg, 210. \ But if the drawer of the check sustain no injury by the delay, as where the bank has always remained in good credit, and the drawer has defeated the payment of the check by withdrawing his funds from the bank, he cannot object to a delay in presenting it. Ibid. Murray v. Judah, ut supra. If a creditor receive an order on a third person for his debt, and neglect to present it for payment in a reasonable time, the drawer will be discharged. Brower v. Jones, 3 John. Rep. 203, and see Tucker v. Manwell, 11 Mass. Rep. 143.

A note payable on demand is not entitled to any days of grace, but an action may be brought on it immediately without any other demand. Cammer v. Harrison, 2 M'Cord, 246.

Where a bill is drawn payable at sight or a certain number of days after sight, there is no fixed rule for its presentment, but the holder is bound to use due diligence and put the note into circulation. Robertson v. Ames, 20 Johns. 146. But presentment must be made within a reasonable time; and what is a reasonable time is a question of law, under the circumstances of each particular case, and not a question of fact for the jury. Aymar r. Beers, 7 Cowen, 705. Where a promissory note is payable on demand with interest, demand and notice must be made and given within a reasonable time after date. Sice v Cunningham, 1 Cowen, 397. Martin v. Winslow, 2 Mason, 241. And where such note is made and negotiated in the ordinary way without any agreement or understanding among the parties as to the time when it is to be paid, and all the parties reside in the same city, five months is not a reasonable time. Ibid. But such agreement between the original parties, not communicated to the indorser will not bind him. Ibid. And any offer by the inderser to give his own note in satisfaction of the indersed note, is not a waiver of notice, unless the offer is accepted at the time by the holder. Ibid. In Winslow v. Martin, 2 Mason, 141, a neglect to demand payment of a note payable on demand, for seven months, was held an unreasonable delay, and discharged the indorser: and that a promise to pay with a full knowledge of all the facts was binding on the indorser, although otherwise discharged: if he promised in ignorance of material facts affecting his rights, it was not a waiver of those rights

Where the defendant drew a bill of exchange on the 11th of June, on A. in N. York, in favor of the plaintiff, payable three days after sight; and sometimes during the month of June, the plaintiff went to N. York, and resided in the house of A. until the 24th of August, when the note was protested, and notice of non-payment and the failure of A. sent to the defendant; it was held, that the plaintiff, by his laches, had discharged the drawer. Fernandez v. Lewis, 1 M'Cord,

If the maker of a check has no funds in the bank upon which it is drawn at the date of the check, it is not necessary for the holder to present such check at bank for payment, in order to enable him to sustain an action upon it against the maker. Franklin &c. v. Vanderpool, 1 Hall's Rep. 78.

The drawing of a check under such circumstances is, when unexplained, a fraud which de-

prives the maker of all right to require presentment and demand of payment. Ibid.

Where an injunction from chancery, under the act to prevent fraudulent bankruptcies by incorporated companies, was served upon a bank half an hour after it opened for business, by which its operations were suspended, it was held that the holder of the check, received after banking hours, on the preceding day, was not bound to show a presentment of the check for payment, to entitle him to recover upon the original consideration, although it appeared that the drawer had sufficient funds in the bank to pay the check, and that it would have been paid, had it been presented before the service of the injunction. Lovett r. Cornwell et al., 6 Wend. Rep. 869.

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In this country, at common law, if the day on which a bill would other- I. Of Prowise be due falls on a Sunday, or a great holiday, as Christmas-day, the sentment bill falls due on the day before; and where a third day of grace falls on a ment. Sunday, the bill must be presented on Saturday, the second day of grace(f): whereas, otherwise, a presentment on a second *day of grace, being preTime of mature, would be a nullity (g). And by 39 & 40 Geo. 3, c. 42, s. 1, Presentwhere bills of exchange and promissory notes become due and payable on ment. Good Friday, the same shall, from and after the 1st day of June (1800), be Consepayable on a day before Good Friday; and the holder or holders of such guences of Bills, &c. bills of exchange or promissory notes may note and protest the same for non- due on a

Ld. Raym. 743, (Chit. j. 192); Heynes r. Birks, 8 Bos & Pul. 599, (Chit. j. 690); Kyd. 9; Mar, 95, 96. But a declaration stating under a videlicet the presentment for payment on a

(f) Mar. 2d edit. 25; Tassell r. Lewis, 1 Sunday is not bad; Bynner r. Russell, 1 Bing. Unristinas day, Good 23; 7 Moore, 267, (Chit. j. 1151). (g) Wiffen r. Roberts, 1 Esp. Rep. 262,

(Chit. j. 536); ante, 369, note (z).

Sunday, Christinas-Friday, Fast or Thanks-

> giving-day, &c.

The delivery of a bank check by one bank to the parter of another bank upon which the check [*378] is drawn, and the return of the same as not good, accompanied by evidence of the invariable practice of the porter to present checks thus received, and to return them, if dishonored, on the same day that they are delivered to him, is sufficient proof of presentment, to authorize the submission of the case to the jury. The Merchants' Bank v. Spicer, 6 Wend. Rep. 443.

A bank check need not be presented on the day it is received. Ib.

The initials of the name of the holder of a bank check, indorsed on the check, are enough to

charge him as indorser. Ib.

A check on a bank for the payment of money, to charge an indorser, must be presented with all dispatch and diligence consistent with the transactions of other commercial concerns; and it was accordingly held, where a check was received in Schenectady on the 14th January, drawn on a bank in Albany, a distance of sixteen miles from the former place, and between which places there is a daily mail, and not presented until the 6th February, that laches was imputable to the holder, and that the indorser was discharged. Mohawk Bank r. Broderick, 10 Wend. Rep 304.

It seems, had the check in this case been sent to Albany on the fifteenth day of January, and presented on the next day and notice given, the endorser would have been held liable. Ib.

Although it is said that checks are like inland bills of exchange, and are to be governed by the same principles, greater diligence is required in presenting them than in presenting bills of exchange. Ib.

A demand of payment of a check from the drawee, must be shown in an action by the holder against the indorser although the drawer had no funds in the hands of the drawee, nor any reasonable expectation that his draft would be paid; under such circumstances, in an action against the drawer, a demand would not be necessary. Ib.

A check post duted is not like a bill of exchange, payable on a particular day; the only effect of its post-date is, that it is payable on demand, on or after the day on which it purports to bear date. Ih.

Inland hills of exchange and promissory notes payable on demand, must be demanded within a reasonable time; what shall be deemed reasonable time depends on the circumstances of each

particular case. Ib.

In the United States, wherever days of grace are allowed, if the third day be a Sunday, or a holiday, as the fourth of July, the bill is due on the second day of grace. Jackson v. Richards, 2 Caines' Rep. 343. Lewis v. Burr, Caines' Ca. in Err. 195. Griffin r. Goff, 2 John. Rep. 423. Farnum v. Fowle, 12 Muss. Rep. 89. But in this last case the court expressed a doubt, if in Massachusetts, the principle applied to any other day except Sunday, as there are no fixed and established holidays, on which all business is suspended. See Jones v. Fales, 4 Mass Rep. 245. See also Johnson v. Haight & Matthews, 15 John Rep. 470, and Griffin v. Goff, 12 John. Rep. 423.

That if the third day of grace fall on Sunday presentment for payment should be made on Saturday, see Bussard v. Levering, 6 Wheat. 102. Furnam v. Harman, 2 M'Cord, 436.

| Ontario Bank v. Petrie, 3 Wend. 456; Mech's. & Farmer's Bank v. Gibson, 7 Wend. 460.

During the Christmas holidays vessels are not allowed to clear out the Havanna; it seems therefore, that during the continuance of the holidays, it is not necessary to write a notice of the

dishonour of a bill, to be sent to a foreign port. Martin v. Ingersoll, 8 Pickering's Rep. 1.

The holder of a dishonoured note is excused from giving notice of non-payment to the indorser on the fourth of July. Cuyler v. Stevens, 4 Wend. Rep. 566. And per Sutherland, J. "The reason in all these cases why a demand on the second day of grace is good, is, that the third day is, either by law or by general or universal custom, not a day of business; and if it be not a day of business for the purpose of demanding or receiving payment of a note, I should apprehend the holder would also be excused from giving notice to the inderser on that day." Ib.

PART I.

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I. Of Presentment for Payment.

5thly, Time of Presentment.

payment, on the day preceding Good Friday, in like manner as if the same had fallen due and become payable on the day preceding Good Friday; and such noting and protests shall have the same effect and operation at law, as if such bills and promissory notes had fallen due and become payable on the day preceding Good Friday, in the same manner as is usual in cases of bills and notes coming due on the day before any Lord's day, commonly called Sunday, and before the feast of the Nativity or Birth-day of our Lord, commonly called Christmas-day.

So with regard to fast days, it is enacted by 7 & 8 Geo. 4, c. 15, s. 2, that from and after the 10th day of April, 1827, in all cases where bills of exchange or promissory notes shall become due and payable on any day appointed by his majesty's proclamation for a day of solemn fast or a day of thanksgiving, the same shall be payable on the day next preceding such day of fast or a day of thanksgiving; and, in case of non-payment, may be noted and protested on such preceding day, and that, as well in such cases as in the cases of bills of exchange and promissory notes becoming due and payable on the day preceding any such day of fast or day of thanksgiving: and it shall not be necessary for the holder or holders of such bills of exchange and promissory notes to give notice of the dishonour thereof until the day next after such day of fast or day of thanksgiving: and that whensoever such day of fast or day of thanksgiving shall be appointed on a Monday, it shall not be necessary for the holder or holders of such bills of exchange or promissory notes, as shall be payable on the preceding Saturday, to give notice of the dishonour thereof until the Tuesday next after such day of fast or day of thanksgiving respectively; and that every such notice, so given as aforesaid, shall be valid and effectual to all intents and purposes. And by section 3, it is enacted, that from and after the said 10th day of April, 1827, Good Friday and Christmas-day, and every such day of fast or thanksgiving, so appointed by his majesty, is and shall, for all other purposes whatsoever, as regards bills of exchange and promissory notes, be treated and considered as the Lord's day, commonly called Sunday. By section 4, the act is not to extend to Scotland(h). In France also, if a bill be payable on a great public fête day, payment is demandable the day before(i). In Great Britain and Ireland, (and in Amsterdam, Rotterdam, Antwerp, Middleburgh, Dantzic, and Koningsberg, whilst days of grace were allowed in those places) Sundays and holidays are always included in the days of grace, unless the last; but not so at Venice, Cologne, Breslau, and Nuremberg(k).

Summar when Bills and Notes tain must ed.

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From these inquiries into the mode of calculating time and usances, and days of grace, in relation to bills, it appears, that the day of the date of the payable on bill or note, or in the case of bills after sight, the day of acceptance, is ala Day cer- ways to be excluded, and the usances or calendar months, or *weeks or days, are to be calculated from and exclusive of such days; and, with the exception of Hamburgh, the days of grace begin the day after the usances or months expire, and, if the last of the days of grace falls on a Sunday, Christmas-day, Good Friday, or legal fast or thanksgiving-day, the bill or note is due, and must be presented on the day before. Thus, if a bill be dated the 2d November, 1839, and be payable in England, at two months after date, the months expire on the 2d January, 1840, and, adding the three

⁽h) But see similar provisions with respect 851. to Ireland, 9 Geo. 4, c. 24, s. 9, 10, 11. And see 6 & 7 Will. 4, c. 58, s. 2, as to the presentment of bills accepted supra protest, ante,

⁽i) 1 Pardess. 189, 854. (k) Beawes, pl. 260; Kyd, 9.

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days of grace, the bill falls due on the 5th of that month, and must be the 1. Of Pre-

With respect to checks and promissory notes payable on demand, or payable generally, (in which case they are in law so payable whether they were 5thly, made by private persons or by country bankers,) the only general rule is, Time of that they must be presented for payment within a reasonable time after they Presentare issued(1).

It has been frequently disputed, whether it is the province of the court, payable on or of a jury, to determine upon the reasonableness of the time within which Demand, a note, payable on demand, should be presented for payment. Formerly it must be was thought, that it was entirely a question for a jury: but the verdicts, within a even of mercantile special juries, were found so contradictory, that for the reasonable sake of certainty it is now settled, that the reasonableness of the time for pre- Time. sentment, when cases precisely similar have occurred, and been decided up- Reasonaon, is entirely for the judge: and in new cases, and under particular new cir- ble Time cumstances, it is partly a question of fact, and partly of law. The jury are Question to find the facts, such as the distance at which the parties are from each of Law other, the course of the post, and other circumstances; but when the facts and Fact. have been ascertained, the reasonableness of the time is a question of law upon which the judge is to direct the jury (l)(2) though judges may take the opinion of a jury as to what is convenient with reference to mercantile transactions(m). This doctrine, though formerly by no means universally assent-

ed to(n), is founded upon the strongest principles of law(o); it is justified also in point of expediency, and to establish a fixed rule; for we find the most contradictory decisions of juries when the point was left to them.

Checks and Notes

(1) Ante, 369; Robson v. Bennett, 2 Taunt. 394; Tindal v. Brown, 1 T. R. 168, (Chit. j. 431); Darbishire v. Parker, 6 East, 3, 9, 10, 14, 16; 2 Smith, 195, (Chit. j. 707); Parker v. Gordon, 7 East, 386; 3 Smith, 358, 8 Esp. 41, (Chit. j. 727); Haynes v. Birks, 3
8 Esp. 41, (Chit. j. 727); Haynes v. Birks, 3
8 Esp. 59, (Chit. j. 690); Appleton v. Sweetapple, 1 Esp. Digest, 58, 69, 4th cdit. (Chit. j. 421); The King v. The Dean of St. Asuph, 3 T. R. 428, note (a): Maule v. Brown, 5 Scott, 694, 698; 4 Bing. N. C. 266, 8. C. In Fry v. Hill, 7 Taunt. 397, and Shute v. Rebins Mood. 8: M. 132 ante. 276, 277 v. Robins, Mood. & M. 133, ante, 276, 277,

notes (e) and (f), it was held, that what is reasonable time for presenting a bill, payable after sight, for acceptance, is always a question of fact to be determined by a jury.

(m) Scott r. Lifford, 9 East, 847; 1 Camp.

246, (Chit. j. 747).
(n) Russell r. Langstaffe, Dougl. 515, (Chit. j. 415); Muilman r. D'Eguino, 2 Hen. Bla. 568, 569, (Chit j. 549); ante, 275, note (a); Hankey r. Trotman, 1 Bla. Rep. 1; (Chit. j. 320); Kyd, 41; Poth. pl. 140.
(c) Darbishire v. Parker, 6 East, 10; 2

Smith, 195, (Chit. j. 707).

(2) A demand of payment within three or four weeks after the transfer of a note over-duo when transferred, and notice of non-payment within two or three months after such demand, it seems, is sufficient to charge the indorser, where, from the facts of the case, it is manifest that an immediate demand or notice were not contemplated. Van Hoosen v. Van Alstyne, 3 Wend.

Rep. 75.

The sufficiency of notice of non-payment to an indorser, when the facts are conceded, is a

The indorsee of a note not negotiable, must follow the rules of the law merchant, in making demand of payment, and giving notice of non-payment, in reasonable time. Aldis and Gad-comb v. Johnson, 1 Vermont R. 186.

⁽¹⁾ The defendant indersed a promissory note, payable on demand, with interest and without default, made to secure the payment of a sum of money loaned to one of the makers, by the plaintiff. The note was not made for commercial purposes, nor was it ever negotiated, and the bolder resided out of the state of New York. At the end of 19 months from its date, demand of payment was made, which being refused, notice was given to the indorser, who claimed to be discharged by the laches of the holder. Held, that the rule requiring promissory notes, payable on demand, to be presented within a "reasonable time" is applicable, chiefly to those which are made for commercial purposes. That the present was to be likened to a case of guaranty or suretyship, and that the defendant was liable on his indorsement. Vreeland v. Hyde, 2 Hall's

for Payment. 5thly, Time of Presentment.

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1. Of Pre- Thus, in some cases, it was considered by juries, that the keeping of a check. or bill, payable on demand, three, four, or five days, was not too long(p); in another case it was holden, that the presentment must be made within two days(q); and in subsequent cases, that it should be made on the very day the same was received, and that even an hour was an unreasonable time (r): and the opinion of juries of merchants has *been, that a check on a banker, or a cash note, payable on demand, ought, if given in the place where it is payable, to be presented for payment on the same day it is received, if the distance or other circumstances will possibly allow(s). But it may be considered as settled, that the time when the presentment for payment must be made is in general a question of law: we have, therefore, now to examine what is the rule of law upon the subject.

Notes, &c. payable on Demand. need not be presented on same Day when received.

Upon this question it has been observed, that there is no other settled general rule, than that the presentment must be made within a reasonable time, which must be accommodated to other business and affairs of life, and that a party is not bound in any case to present a bill or note, payable on demand, on the same day it is issued or received by him(t); for a man ought not to be required to neglect every other business for the purpose of making so prompt a presentment; and it would be very inconvenient to have an inquiry in each particular case, whether or not the holder could conveniently have presented the instrument on the same day(u). And, as observed by Lord Mansfield, it would be unreasonable to suppose that a tradesman should be compelled to run about the town with half a dozen drafts, from Charing Cross to Lombard Street, on the same day; and he directed the jury to consider that twenty-four hours was the usual time allowed for the presentment for payment (x). The notion, however, that twenty-four hours was the limit is not the present rule; and it suffices, in all cases, for a party to present a bill or note, payable on demand, at any time during the hours of business on the day after he received it(y). But although this rule universally prevails between the party delivering and the party receiving from him a bill or note so payable, yet it must not be understood that the ultimate presentment for payment can be delayed for any indefinite time, by successive

(p) Phillips v. Phillips, 2 Freem. 247, (Chit. j. 209); Crowley r. Crawther, Id. 257, (Ch. j. **2**24).

(q) Mainwaring v. Harrison, 1 Stra. 508, (Chit. j. 250).

(r) Per Lord Mansfield, in Tindal v. Brown, 1 T. R. 168, 169, (Chit. j. 431); Hankey v. Trotman, 1 Bls. R. 1, (Chit. j. 320); Beawes, 229; Kyd, 45; Appleton v. Sweetapple, 1 Esp. Digest, 59, 4th edit. (Chit. j 421); post, 882, note (e); Pocklington v. Silvester, post, **885**, note (b).

(s) Appleton v. Sweetapple, 1 Esp. Dig. 69, 4th edit.; post, 382 note (e); Russell v. Langstaffe, Dougl. 515, note (b), 110, (Chit. j. 415); Brown v. Collinson, Beawes, pl. 259; Kyd, 43, 45; Hankey v. Trotman, 1 Bla. Rep. 1, (Chit. j. 320).

(t) Darbishire v. Parker, 6 East, 4, 8, 9; 2

Smith, 195, (Chit. j. 707); Kyd, 129.

(u) Appleton v. Sweetapple, 3 Dougl. 137, M. T. 22 Geo. 3, S. C. cited in Bayley on Bills, 192; 1 Esp. Dig. 43, 4th edit. Where a bill, payable on demand, is taken in payment for goods, it is not necessary to present it the same day on which it is received. Semble, that reasonable time is a question of law. But as the jury had found otherwise twice, and the plaintiff had neglected to adopt the proper course for having the question put on the record, by demurrer to evidence or bill of exceptions, the court refused to interfere. See post, 182, note (e).

Medcalf v. Hall, 3 Dougl. 113, T. T. 22 Geo. 3. The not presenting a check upon a banker upon the same day on which it is recrived is not laches; and semble, that reasonable time is a question of law. The case of Hankey v. Trotman, t Bla. Rep 1, overruled. But the jury found two perverse verdicts, that the check ought to have been presented on the day it was received. See the reasoning, post, Ch. X. s. i. as to giving notice of non-payment on the day after a party receives notice of dishonour.

(x) Per Lord Mansfield, see Beawes, pl. 229; Kyd, 45, 127, 128; Ward v. Evans, 2 Lord Raym. 928; 2 Salk. 442, (Chit. j. 216); post, 381, note (c); Scott v. Lifford, 9 East,

347; 1 Campb. 246, (Chit. j. 747).

(y) Robson v. Bennett, 2 Taunt. 388, (Chit. j. 794); post, 385, note (c).

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transfers between numerous parties, and by each party on the day after he I. Of Prehas received the bill or note, transferring it to another; for if there should sentment by that means be an unreasonable number of days occupied, the party or ment. parties first transferring the instrument, and other of the earlier parties, would 5thly, probably be considered discharged from liability, in case the bankers or per- Time of son who issued the note so payable should in the mean time fail; and no pru- Presentdent party should permit any delay in presentment, especially if there be the ment. least reason to doubt the solvency of the party to pay. It is perfectly clear, that if a party who has received such a bill for note does not on the next day [*381] present it, or forward it for presentment, in due time on the next day, nor transfer it, but locks it up or keeps it, he thereby forfeits all claim upon the person from whom he received it(z).

It seems, that with respect to the length of time bills and notes, payable on demand, may be kept in circulation, a distinction may be taken between the notes of a private individual and country banker's notes, and also with reference to the persons by and between whom they have been circulated, and it has been considered, that upon a bill or note, payable on demand, and given for cash, by a person who makes the profit by the money on such bills or notes a source of his livelihood (as is the case of country bankers issuing their notes), it is difficult to say what length of time such person shall be entitled to consider unreasonable; but that upon such bills or notes given by way of payment, or paid into a banker's, any time beyond what the common course This position is explained by a of business warrants, is unreasonable (a). recent case, where the defendants themselves, country bankers, transferred another country banker's bill, some days after they had kept it, to the plaintiff's traveller, who did not remit it to the correspondents for some days; and, on its being presented, it was dishonoured; and it was held, that the defendants were not discharged from liability, because, as Lord Tenterden observed, the character of the bill and the course of dealing must be attended to. was a bill by a country banker upon his London banker, and it did not seem unreasonable to treat such bills as not requiring immediate presentment, but as being retainable by the holders for use within a moderate time, as part of the circulating medium of the country; and the defendants themselves, by the time they kept it, shewed they so considered this bill, but he left it to the jury to say whether they thought the delay unreasonable or not, and they found for the plaintiff (b).

Upon a bill or note of this kind (i. e. payable on demand,) given by way of payment, the course of business formerly was to allow the party to keep it, if it was payable in or near the place where it was given, until the morning of the next day of business after it was received(c); *and according to

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(z) Beeching v. -—, Holt, C. N. P. 313, (Chit. j. 966); Bayl. 5th edit. 212; and see observations in Camidge v. Allenby, 6 Bar. & Cres. 373; 9 Dow. & Ry. 391, (Chit. j. 1319); ante, 356, note (a).

(a) Bayl. 5th edit. 236, refers to Turner v.

Mead, 1 Stra. 416, (Chit. j. 248), infra, n. (c). (b) Shute v. Robins, Mood. & Mal. 133; 3 Car. & P. 80, (Chit. j. 1368); ante. 277, note (f); and see Boehm v. Stirling, 7 T. R. 425; 2 Esp. 575, (Chit. j. 593); anle, 217, note (m); as to a party himself circulating a check long after its date.

(c) Bayl. 5th edit. 286; Ward r. Evans, 2 Lord Raym. 928; 2 Salk. 442, (Chit. j. 216). A banker's note was paid to the plaintiff' servant at noon, and presented for payment the next morning, at which time the banker stopped payment. On a case reserved, the court held it was presented in time, and judgment was given for the plaintiff.

Moore r. Warren, 1 Stra. 415, (Chit. j. 249). The defendant gave the plaintiff a banker's note at two o'clock in the afternoon, and he tendered it for payment the next morning at nine; the banker stopped a quarter of an hour before; and Pratt, C. J. told the jury the loss should full on the defendant, there being no laches in the plaintiff, who had demanded the money as soon as was usual in the course of dealing, and that keeping the note till next morning could not be construed giving a new credit to the banker, and the jury found for the plaintiff. In Holmes r. Barry, Stra. 415, the circumstances

for Payment. 5thly, Time of Presentment.

I. Of Pre- more modern decisions, it is settled, that if such a bill or note be payable by or at a banker's it suffices to present it for payment at any time during banking hours on the day after it is received (d). Thus where a note of this kind, payable in London, was given there in the morning, a presentment the next morning was held by the court sufficiently early, though juries endeavoured to establish a contrary rule, and to find that the instrument must be presented on the very day it was received(e); and though it has been supposed that the presentment must be in the forenoon of the next day (f), yet, in other cases, it was considered that the party has twenty-four hours (g), or, according to a more recent decision, he has the whole of the banking hours, or hours of business of the next day, to make the presentment(h); and this last decision may now be relied upon as the fixed rule(i).

It has been held, that a bill or note of this kind given by way of payment to a banker, must be presented by him as soon as if it had been paid into

were the same, and King, C. J. of the Com- B. & C. 134; 7 Dow. & Ry. 528; (Chit. j. mon Pleas, gave similar directions, and the ju-

ry found accordingly.

Fletcher v. Sandys, 2 Stra. 1249, (Chit. j. 817). A banker's note was paid to the plaintiff after dinner, and he sent it for payment the next morning, but the banker had stopped payment; and Lee, C. J. ruled, that there were no laches in the plaintiff, and that in all these cases there must be a reasonable time allowed consistent with the nature of circulating paper credit.

Turner v. Mead, 1 Stra. 416, (Chit. j. 248). The defendants paid the Sword Blade Makers Company, the plaintiffs, two bankers notes at three o'clock in the afternoon, and the next morning their servant left them at the banker's, in order to call for the money in the evening, it then being the custom with the plaintiffs and the bank to send out their notes in the morning, and to call for the money in the afternoon. The plaintiff's servant called for the money between four and five in the afternoon, and the banker had just stopped payment, and because the plaintiffs had done nothing more than was usual in leaving the notes in the morning, without taking the money, Pratt, C. J. directed the jury to find for them, which they did.

Hoare v. Da Costa, 2 Stra. 910. fendant paid the plaintiff a banker's note at twelve; he put it into the bank at one, and at ten the next morning the runner from the bank carried it with other notes, and left them, as was then usual, to call again for the money: he called at eleven, and was told the banker's servant was gone to the bank; he called again at two, when the banker said he was going to stop, and refused payment, but he paid small notes till four o'clock. The defendant gave notice to the plaintiff the next morning. The question was, whether this note was payment to the plaintiff. It was insisted for the defendant, that if the note had been tendered by itself, it would have been paid; and for the plaintiff, that if there had been no demand, there would have been no laches, being within a day after the receipt. Raymond, C. J. said there was no standing rule, and left it to the jury, who found for the plaintiff.

But properly the notes ought not to have been

left; Hayward v. The Bank of England, 1 Stra. 550, (Chit. j. 252); Gillard v. Wise, 5

1276); ante, 308, note (p); Roscoe, 146.
(d) Robson v. Bennett, 2 Taunt. 388, (Chit. j. 794); post, 385, note (c); and Pocklington r. Silvester, post, 355, note (b).

(e) Beawes, pl. 229; Kyd, 45, 127. See Ward r. Evans, 2 Salk. 442, and other cases

in notes, supra.

Appleton v. Sweetapple, K. B. Mich. 28 Geo 3, 3 Doug 137; 1 Esp. Digest, 4th ed. 69; Bayl. 5th ed. 289, note 46, (Chit. j. 421), and see Robson r. Bennett, 2 Taunt. 394. The case was, that plaintiff received from the defendant a banker's note at one o'clock in the day, but did not call for payment till the morning of the next day, and in the previous evening the banker failed. A verdict was found for defendant, on the ground that it was the custom of the city that bills should be brought for payment the day they are received; but on a motion for a new trial, it appearing that there were many exceptions to this custom, as in the case of factors at Bear Quay, the salesmen at Smithfield, and others, the court held that it was not sufficiently proved; and even if the decision had been on that ground, it must appear that the custom was reasonable, or the court would controul it, and therefore granted a new trial. The jury found again for the defendant. but against the judge's direction. A second new trial was granted, and the jury again found for the defendant, and then the court refused to interfere in that particular case; but the three verdicts were clearly perverse, and no court would now allow such verdicts to stand. In Robson v. Bennett, 2 Taunt. 888, (Chit. j. 794), Mansfield, C. J. said, that Hankey v. Trotman, 1 Bla. Rep. 1, (Chit j. 820), was overruled by this case of Appleton v. Sweetapple.

(f) East India Company v. Chitty, 2 Stra. 1175, (Chit. j. 304); Mainwaring v. Harrison, 1 Stra. 508, (Chit. j. 250).

(g) Per Lord Mansfield, see Beawes, pl.

229; Kyd, 45, ante, 380, note (x).

(h) Pocklington v. Silvester, post, 385, n.

(i) Robson v. Bennett, 2 Taunt. 388, (Chit. j. 794); Gillard v. Wise, 5 Bar. & Cres. 184; 7 Dow. & Ry. 523, (Chit. j. 1276); Camidge v. Allenby, 6 Bar. & Cres. 880; ante, 356, note (a).

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his hands by a customer (k), and that if such a bill or note be paid into I. Of Prea banker's, and be payable at the place where the banker lives, it must be sentment for Paypresented the next time the banker's clerk goes his rounds; but that doctrine ment. has been over-ruled, and it should seem, that in all cases it suffices for a banker to present such bill or note the day after he receives it (l).

*If a bill or note, payable on demand, were payable elsewhere than in the But must place where it was received, it was formerly supposed that the party receiving be presented or cirit must forward it for payment by the next post after he received it, although culated on that post went out on the same day. But it is now established that it will Day after suffice if such bill or note be forwarded for payment by the regular post on they are received. the day after it is received (m); and that the person receiving it by the post [*383]in London is not bound to present it for payment till the next day(n). certain, however, that the holder's not forwarding such bill or note for payment by the post, or some conveyance of the day after it was received, and keeping it in his possession till on or after the third day for sending it, would be deemed laches (o); a bill or note must not be locked up or kept until a third day, and if it be, the party from whom the holder received it will be discharged from liability in case it be dishonoured(p). Where the defendant being indebted to the plaintiff, paid to him the debt in country bank notes (payable in the country and also in London) on a Friday, several hours before the post went out, and the plaintiff transmitted halves of the notes by a coach on Saturday, and the other halves by Sunday night's post, and all the halves arrived in London on Monday, but those by the coach two hours later than those by the post, and were presented for payment and dishonoured on the Tuesday, it was held that the plaintiff had not been guilty of laches, and that he might recover from the defendant his original debt(q).

(k) See Hankey v. Trotman, 1 Bla. Rep. 1, (Chit. j. 320). But see Robson r. Bennett, 2

Taunt. 398, (Chit j. 794); post, 385, n. (c).
(l) Id. ibid.; Rickford v. Ridge, 2 Campb. 537, (Chit. j. 819); post, 386, note (c); and Robson v. Bennett, 2 Taunt. 385, (Chit. j. **794)**; post, 385, note (c).

(m) Rickford v. Ridge, 2 Campb. 537, (Ch. . 819); post, 386, note (e); Darbishire v. Parker, 6 East, 3; 2 Smith, 195, (Chit. j. 707).

(n) Williams v. Smith, 2 Bar. & Ald. 496, (Chit. j. 1055); Bayl. 5th edit. 240.

(0) Beeching r. Gower, Holt, C. N. P. 315,

316, (Chit. j. 966); and Camidge r. Allenby, 6 Bar. & C. 373; ante, 356, note (s).

Beeching v. Gower. Action for money had and received. Defendant delivered to plaintiffs a check of 201. drawn on the Maidstone Bank, on 5th April. It was given to plaintiffs at the Tunbridge market some time before the post set out on the 5th, and they gave their own notes in exchange. Plaintiffs kept it until after the 6th, but sent it to Maidstone by the cartier on the morning of the 7th; the earrier reached Maidstone at nine o'clock on the 7th, but the Maidstone Bank did not open that morning. If it had been sent by the post of the 6th it would have reached Maidstone at an hour earlier, viz. at eight o'clock in the morning of the 7th. Best, Sert. for the defendant, contended, that the plaintiffs had been guilty of laches. Blossett, Serjt. for the plaintiffs, contra, relied on Rickford v. Ridge, 2 Campb. 587, (Chit. j. 819). Gibbs, C. J. "The plaintiffs cannot recover, they have been guilty of laches; I will not say that it was not their

duty to have sent the check off by the post of the 5th, but the extreme time up to which they were justified in keeping it was till the post of the 6th. They do not send it till the 7th. It does not matter when the carrier arrived, they must suffer for their negligence." Plaintiffs

(p) Camidge r. Allenby, 6 Bar. & C. 373; ante, 356, note (s); and see cases, ante, 220, 221, 222, As to time of transfer of notes payable on demand.

(q) Williams v. Smith, 2 Bar. & Ald. 496, (Chit. j. 1055); 7 Taunt. 397. And per Abbott, C. J. "It appears that if these notes had been transmitted direct to Newbury by the post they would not have been paid; for they discontinued payment there on Monday morning, and though the circumstance of one set of halves being sent by the coach caused their arrival in London two hours later, still, that being a reasonable precaution, the plaintiff had a right to send them by that conveyance. There is a difference between this case and that of a bill payable to order, for such bill may be specially indorsed, and no risk incurred by sending it by the post. But here it would not have been so safe to have transmitted notes, payable to bearer on demand, by that conveyance. in addition to this, it appears that the defendant has not been in the least degree prejudiced by this mode of conveyance having been adopted." See also Camidge v. Allenby, 6 Bar. & C. 878; ante, 856, n. (s), and James v. Houlditch, 8 Dow. & R. 40, (Chit. j. 1290), next

sentment for Payment. 5thly, Time of Presentment [*384]

I. Of Pre- where a servant, on behalf of his master, at one o'clock on a Friday afternoon, received of the defendant, at Devonport, country bank notes payable there, in payment for cattle sold there, and in consequence of his master being absent from home all Saturday morning, did not deliver them to him until after banking hours on Saturday evening, and they were not presented for payment until Monday morning, and between three and four in the afternoon of Saturday the bank stopped payment: it was held, *that the master was not guilty of laches, in not presenting the notes before the bank stopped on Saturday(r).

Country Bankers' Notes to be presented. &c notwithstanding stoppage of Bank.

In general, in the case of country bankers' notes, payable on demand, although the bank has stopped payment and been shut up, and has declared that they will not pay any notes, yet a due and regular presentment of such notes, with respect to time, must be formally made at the banker's, or to one or more of the makers, unless dispensed with by the parties to be resorted to by the holder(s); and due and immediate notice of the dishonour must be given to all the parties who are known to have transferred the same, or they will be discharged from all liability, as well to pay the note as the debt, in respect of which it was transferred(t). Hence it is expedient for every holder of a note payable on demand, to present it for payment as soon as possible, and immediately on being apprised of the insolvency of the banker or other party who ought primarily to pay the same, formerly to tender the same and demand payment at the banking-house, and also of the partners of the firm if practicable; and as soon as possible afterwards to give notice of the non-payment to all the parties on whom he can possibly have any claim (u).

Nor is there any distinction in this respect, whether the note payable on demand has been circulated by a party after the maker has stopped payment or was insolvent, unless the former knew that fact at the time (v). If he did not, then he may insist on a due presentment of the note, or at least on having due notice of the dishonour within the time usually applicable to such Therefore, where it appeared that a note of a country bank was given in payment while the bank continued open, but before the time allowed by the law-merchant for presentment had expired, the bank failed; yet it was held, that the holder was bound to present the note for payment in due time, and that he, by neglecting to do so, made it his own(x). So where, on the 10th of December, at three o'clock in the afternoon, the defendant at York, forty miles from Huddersfield, delivered to the plaintiff four 51. notes, payable to bearer on demand, of the bank of Debson and Co. at Huddersfield, in

(r) James v. Houlditch, S Dow. & R. 40, (Chit. j. 1290). Assumpsit for goods sold. On trial before Burroughs, J. it appeared in evidence that plaintiff, a farmer, living at Tavistock, sent his hind on Friday, the 30th of September, to sell some steers at Devonport, and he accordingly sold them there to the defendant, who paid him seven 51. promissory notes, payable to bearer, at the house of Messrs. Shields and Johns, at Devonport. The distance be-tween Devonport and Tavistock is fourteen miles. The hind received the notes from the defendant about one o'clock on the Friday afternoon, and on settling his accounts paid them to his master on Saturday evening, his muster being from home the whole of Friday. The hind lived in the plaintiff's house. On the Monday following the notes were presented at the banking-house, when it was discovered that the bankers had stopped payment on the previous Saturday, between three and four o'clock of the afternoon; and it was decided that the plaintiff had not been guilty of Jaches, but was entitled to recover the price of the beasts.

(s) Bowes r. Howe, in error, 5 Taunt. 30; 16 East, 112, (Chit. j. 892); 1 Maule & S. 555; Camidge v. Allenby, 6 Bar. & Cres. 373; ante, 356, note (s); and Henderson v. Appleton, ante, 356, note (t).
(t) 1d. ibid.

(u) Id. ibid.

(r) Camidge r. Allenby, 6 B. & C. 373; ante, 356, note (s); Beeching r. Gower, Holt,

C. N. P. 313; ante, 383, note (o). (x) Beeching v. Gower, Holt, C. N. P. 313; ante, 383, note (o), cited in Camidge v. Allenby, 6 Bar. & C. 381; and per Bayley, J. id. 388; antc, 356, note (s).

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payment for goods sold, and at eleven o'clock on that day those bankers had I. Of Prestopped payment, but neither the plaintiffs nor the defendant knew of it; and sentment the plaintiff did not circulate or transfer the notes, nor present them for payment, and on the 17th of December required the defendant to take them back, and he refusing, the plaintiff sued him for the price of the goods, the Time of court held that the defendant *was discharged from liability, and that the Presentplaintiff should either have negotiated the notes, or forwarded them for pay-ment. ment on the day after he received them, and to have given due notice of non- [*385] payment (y).

But where a country banker's note, payable on demand, had been transferred by A. to B. and the bankers stopped payment before B. could, in the ordinary course of business, present the same for payment, and thereupon, before the expiration of such time B. offered to return the note to A., but he refused to take it: it was held, that B. was not bound to present the same formerly to the banker's for payment, nor to give any further notice to A. of the non-payment (z).

With respect to a check on a banker, it is now settled, that it suffices to Checks on present it for payment to the banker at any time during banking hours (in be present-London, five o'clock) on the day after it is received, and that no laches can ed for paybe imputed to the holder in not presenting it for payment early in the morn-ment during of the second day, although the bankers paid drafts on them until four ing the hours of o'clock in the afternoon, and then stopped payment(b). And where a per- business on son in London received a check upon a London banker, between one and the day aftwo o'clock, and lodged it soon after four with his banker, and the latter presented it between five and six, and got it marked as a good check, and the received next day at noon presented it for payment at the clearing-house, the court (a). held that there had been no unreasonable delay either by the holder in not presenting it for payment on the first day, which he might have done, or by his banker in presenting it at the clearing-house only on the following day at noon; it being proved to be the usage among such bankers not to pay checks presented by one banker to another after four o'clock, but only to mark them, if good, and to pay them the next day at the clearing-house (c). *And al- [*386]

(y) Camidge v. Allenby, 6 B. & C. 373; see the facts and judgment, ante, 356, note (s).

(2) Henderson v. Appleton, ante, 356, note

(t).(a) See further as to checks, post, C. XI. (b) Pocklington r. Silvester, Sittings at Guild-hall, after Trinity Term, 57 Geo. 3. This was an action brought by the plaintiffs, for the amount of a check given by the defendants to the plaintiffs. The defendants drew the check on their bankers, Messra. Mainwaring and Co., which was paid to the plaintills at eleven o'clock in the morning on the 16th of November, 1817, which was not presented till near five o'clock on the 17th. The bankers stopped payment at four o'clock on the 17th of November, and the defendants had notice thereof that evening. At the trial before Gibbs, C. J., at Guildhall, he directed a verdict for the plaintiff, on the ground that the plaintiff had the whole of the banking hours of the next day to present the check for payment. The jury, however, contrary to the direction of the judge, found for defendants. In the ensuing term, the plaintiff obtained a rule for a new trial, and upon the second trial, before Burrough, J., at Guildhall, 10th of Decem-

ber, 1817, he directed a verdict for the plaintiff. saying, that whatever doubts had been formerly entertained, it was now established as a rule of law, that the party receiving a check on a banker has the whole of the banking hours of the next day to present it for payment. The jury found accordingly. See Robson and another v. Bennett and another, 2 Taunt 388, next note; and Rickford v. Ridge, 2 Campb. 537, (Chit. j. 819); post, 386, note (e); see also ante, 383. note (m).

(c) Robson v. Bennett, 2 Taunt, 388, (Chit. j. 794).

Per Mansfield, C. J. "The whole question amounts merely to this; a man who has bought goods, and given a draft on a banker, contends, that he has paid for those goods, though the plaintiff has never received the money. A draft on Bloxam and Co. was drawn on the 11th of September; on that day it was carried to the house of the drawee, and in the language of those persons was marked; the effect of that marking is similar to the accepting of a bill; for he admits thereby assets, and makes himself liable to pay. It is the practice of the bankers not to pay bills of this description, which are

sentment for Payın ent.

5thly, Time of Presentment.

Checks on Bankers.

1. Of Pre- though as between a London banker and his customer the former may, according to the usage there, be bound to present a crossed check, paid in by the latter, to the drawee at the clearing-house on the same day, provided it be paid in in sufficient time to enable the banker to do so, yet, as between the payee and drawer of a crossed check, there is no obligation on the part of the payee, who receives and sends such check to his banker's in time for presentment, to see that it is cleared on the same day, and the drawer will continue liable, in case of dishonour, though it be not presented till the fol-

If a check on a banker be delivered to a person at a place distant from the place where it is payable, it will suffice to forward it by post or otherwise to some person residing at the latter, on the day after it is received, and it will suffice for him to present it on the third day. And it has been holden that a London banker who receives a check by the general post, is not bound to present it for payment until the following day(e). But where a check

presented after four o'clock, but to mark them; and it is usual that bills marked on one day are carried to the clearing-house where their clerks meet, and paid there on the next day. Therefore it is the same thing as if a banker had written on a check, 'We pay this to-morrow at the clearing-house.' On the next day, after marking the check, the banker stops payment; the holder's clerk goes to the clearing house, where no clerk attends from Messrs. Bloxam's, and the bill is not paid, and the first question is, whether there is any laches as to the time of presentment? As to that, the case of Appleton v. Sweetapple decides, that a check need not be presented on the day on which it was drawn: now this bill was in fact presented and accepted on the very day on which it was drawn. reason of that haste probably was, in order to fix the banker, lest the drawer should be insolvent before the next day, bankers being usually persons of great substance, whereas the drawer may be of less credit; the mark on the check is an engagement to pay at a particular place: is not then the presenting it at that place equivalent to presenting at the banking-house? It seems that it is; and that it therefore is no laches; consequently the surplus of the money for the coals remains due, and judgment must be entered for the plaintiff." See also Reynolds n. Chettle, 2 Campb. 596, (Chit. j. 823); Selw. Ni. Pri. 9th edit. 354.

(d) Bodington v. Schlencker, 4 B. & Ad. 752; 1 N. & M. 540; more fully post, C. XI.

(e) Rickford v. Ridge, 2 Campb. 537, (Chit. j. 819). The plaintiffs, bankers at Aylesbury, gave the defendant cash for a check upon Smith and Co bankers, in London; and in an action to recover this money, it appeared that they took the check on the 13th June; but instead of sending it to London by the post of that day, which they might have done, they sent it by a morning coach on the 14th, and their bankers, to whom it was directed, received it between three and four o'clock on the same day, and presented it at Smith's house at noon on the 15th, when payment was refused. It was proved that bankers to the west of St. Paul's, where the plaintiff's bankers resided, sent out checks and bills for payment only once in the day, and that generally before the arrival of the post; and there-

fore such as arrived by the post on one day generally remained with them until the following morning; so that had this check arrived by the post on the 14th, it would not have been presented until the 15th. The question therefore was, whether such practice were reasonable? It was admitted that a different practice prevailed to the east of St. Paul's. Lord Ellenborough said, "the holder of a check is not bound to give notice of its dishonour to the drawer for the purpose of charging the person from whom he received it. He does enough if he presents it with due diligence to the bankers on whom it is drawn, and gives due notice of its dishonour to those only against whom he seeks his remedy. The question here is, whether, if the check had arrived by post on the 14th, the bankers were bound to present it for payment the same day? This must be decided by the law-merchant. I cannot hear of any arbitrary distinction between one part of the city and another. It is not competent to bankers to lay down one rule for the eastward of St. Paul's, and another for the westward. They may as well fix upon St. Peter's at Rome. It is always to be considered whether, under the circumstances of the case, the check has been presented with reasonable diligence. This is what the law-merchant requires. The rule, that the moment a check is received by the post, it should invariably be sent out for payment, would be most inconvonient and unreasonable. In Liverpool and other great towns different posts arrive at different hours; but it would be impossible to have clerks constantly ready to carry out all the bills and checks that may arrive in the course of the day; nor if it were possible, is it requisite, that all other business being laid aside, parties should devote themselves to the presentment of checks. The rule to be adopted must be a rule of convenience; and it seems to me to be convenient and reasonable, that checks received in the course of one day should be presented the next. Is this practice consistent with the law-merchant? It cannot alter it. Bankers would be kept in a continual fever if they were obliged to send out a check the moment it is paid in. The arrangement mentioned by the plaintiff's witnesses appears subservient to general convenience, and not contrary to the law-merchant, which merePART I

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drawn by one F. upon a banker at Bath was, on Tuesday the 28th March, I. Of Prereceived from the defendant at one of the branches of the North Wilts bank sentment for Payat Malmesbury, and was on the same day remitted to the chief office at Melk-ment. sham, twelve miles from Bath, and thence to Bath on the 30th, and presented for *payment on Friday the 31st and dishonoured, it was held, that 5thly, the presentment was not made in due course, so as to entitle the holders to Time of resort to the defendant (f).

Present-[*387]

It will be observed that this rule allowing the party receiving a bill, note, Conseor check, payable on demand, until the next day to present it for payment, quences of will not enable a succession of persons to keep such instrument long in circu-several lation, so as to retain the liability of all the parties, in case the same should lay in Preultimately be dishonoured by the maker of the note or drawee of the $\operatorname{check}(g)$. sentment, And though each party may be allowed a day, as between him and the par- occasioned by a sucty from whom he received a check, it would be otherwise as to the drawer, cession of if the banker should, during a succession of several days, fail, and would Holders. have paid if the check had been presented on the day after it was drawn; a check being an instrument not in general intended by the drawer to be long in circulation, and in that respect differing from a country banker's note, which is known to all parties to have been intended to be in circulation, and not so promptly presented for payment as a check.

A presentment for payment of a bill, payable on a day certain, should in Hour of all cases be made within a reasonable time before the expiration of the day when the when it is due; and if by the known custom of any particular place bills are Presentonly payable within limited hours, a presentment there, out of those hours, ment should be would be improper(h); and this rule extends also to a presentment out of the made. hours of business to a person of a particular description, where, by the known custom of the place, all such persons begin and leave off business at stated hours(i). And therefore when a bill is accepted payable at a banker's, it must be presented there before five o'clock, or the usual hour of shutting up their shop, and presentment afterwards will not entitle the notary to protest i(k)(1). And no inference is to be drawn from the circumstance

ly requires checks to be presented with reasonable diligence." See also Williams v. Smith, 2 Bar. & Ald. 496, (Chit. j. 1055); ante, 383, note (q); and Boyd r. Emmerson, 4 N. & M. 99; 2 Ad. & El. 184, S. C.; post, 39!, note (j); and more fully, post, Ch. XI.

(f) Moule v. Brown, 5 Scott, 694; 4 Bing. N. C. 266, S. C.

(g) Admitted in Boehm v. Stirling, 7 T. R.

425; anle, 217, note (m), Time of Transfer.
(h) Per Lord Ellenborough, in Parker r. Gordon, 6 Esp. Rep. 42; 7 East, 385; 3 Smith R. 358, (Chit. j. 727); and see, in particular, observations of Lawrence, J., id.; and Elford v. Teed, 1 Maule & S. 28, (Chit. j. 879); Marias, 2d edit. 187.

(i) Bayl. 5th ed. 224; Leftley v. Mills, 4 T. R. 170, (Chit. j. 478); Marius, 2d edit. 187. (k) Parker v. Gordon, 7 East, 385; 3 Smith, 858; 6 Esp. R. 41, (Chit. j. 727); Elford r. Teed, I Maule & S. 28, (Chit. j. 879); Jameson v. Swinton, 2 Taunt. 224; 2 Campb. 374, (Chit j. 782); Selw. N. P. 9th edit. 354; Wilkins r. Jadis, 2 B. & Adol. 188; 1 M. & Rob. 41, (Chit. j. 1537).

Parker v. Gordon. The drawee accepted the bill, payable at Davison and Co. his bankers; at the part of the town where Davison and Co. lived, bankers shut up at six o'clock. 'The bill was not presented for payment until after six, when the shop was shut up, and the clerks one. In an action against the drawer, Lord Ellenborough held, that this was not a good presentment, and nonsuited the plaintiff; and on a motion for a new trial, the court held. that if a party took an acceptance, payable at a banker's he bound himself to present the bill during the banking hours; and therefore rule

(1) \{ A presentment of a draft payable at a particular bank, to the cashier for payment at the bank, on the day it fell due, but after business hours, who refused payment because the acceptors had no funds, was held sufficient, in Flint r. Rogers, 15 Maine Rep. 67.

If a note is payable "at bank," no particular one being named, the hour will be determined by the usual banking hours at the bank or several banks in the place where the note is payable. Church v. Clark, 21 Pick. 310. }

sentment for Payment.

5thly, Time of Presentment. r *388 l

I. Of Pro- of the bill being presented by a notary in the evening that it had before been duly presented within the banking-hours (1). However, a presentment of a bill at a banker's, where it is payable, is sufficient, although it be made after banking-hours, provided a person be stationed there by the banker, to return And when the *party to pay answers, and he refuses to pay the bill(m). the bill or note is not a banker, a presentment at any time, not during the hours of rest, however late in the evening, will in general suffice (n). And it has been decided, that a presentment between eight and nine o'clock in the evening, at the house of a trader or merchant, is quite sufficient(o); and this, although the house be shut up and no person there to give an answer(p).

> refused. Lawrence and Le Blanc, Js. said, the holder was not bound to take such an acceptance.

(1) Elford v. Teed, I Maule & S. 28, (Chit.

j. 879). (m) Garnett v. Woodcock, 1 Stark. R. 475; 6 Maule & S. 44, (Chit. j. 879, 881). Indorsee against acceptor. The bill was drawn by Hudson in Lancashire, upon defendants in London. for 6701., payable to drawer's order, and indorsed by them to plaintiff. Defendants had accepted the bill payable at Denison's and Co. bankers, London. The bill had been presented at Denison's and Co. between seven and eight in the evening on the day it became due, and a boy returned for answer, no orders. Campbell, for defendants, contended, that since the bill was drawn payable in London, and had been accepted payable at Denison's and Co. a presentment there was necessary; and that this was not a sufficient presentment, and cited Parker v. Gordon, 7 East, 385; Elford v. Teed, 1 Maule & S. 28, where the court held, that sentment at a banker's after banking hours, was a nullity, although the presentment in that case had been made by a notary. He admitted, that when the bill had been made payable at a merchant's, a presentment after banking bours, where a negative answer had been returned on presentment of the bill, had been deemed to be sufficient; but this was the case of a presentment at a banker's. Lord Ellenborough, "Bankers do not usually pay at so late an hour; but if a person be left there who gives a negative answer, there is no difference between that case and that of a presentment at a merchant's. I think it is perfectly clear, that if a banker appoint a person to attend, in order to give an answer, a presentment would be sufficient if it were made before twelve at night." Verdict for the plaintiff. In the easning term, Campbell moved for a new trial; and cited Parker v. Gordon, 7 East, 385, where Lawrence, J. says, "the party might have re-fused to take this special acceptance; but if he chose to take the acceptance payable in that manner, payable at the banker's, does he not agree to take it payable at the usual banking hours?" Lord Ellenborough, "In that case no answer was given upon the presentment of the bill. Upon the trial, I laid down nothing but, that if a servant was stationed for the purpose of giving an answer, it was sufficient. general, there are two presentments, one in the morning, and the other in the evening; but if there be a presentment in the evening, and the party is ready to give an answer, he does all The banker returned an that is necessary.

answer by the mouth of his servant, and non constat, but that he was stationed there for the express purpose." Rule refused. See post, 821 (43).

(n) Barclay v. Bailey, 2 Campb. 527, (Chit. j. 818). Action against drawer of a bill, accepted by Hardy. At eight in the evening of the day the bill became due, it was presented at the house mentioned on the face of it, as the drawee's place of residence, when the answer given by a person who came to the door, was, that "Mr. Hardy had become bankrupt, and removed into another quarter of the town."
On the part of the defendant it was proved, that he had a person stationed at this house for the purpose of taking up the bill, from nine in the morning till four in the afternoon, but that no one presented it during that time; and it was insisted, that a presentment so late as eight in the evening was insufficient to charge the drawer. Lord Ellenborough, "I think this presentment sufficient; a common trader is different from bankers, and has not any peculiar hours for paying or receiving money; if the presentment had been during the hours of rest, it would have been altogether unavailing; but eight in the evening cannot be considered an unseasonable hour for demanding payment at the house of a private merchant, who has accepted a bill." The plaintiff had a verdict. S. P. Jameson v. Swinton, 2 Taunt. 224; 2 Campb. 374, (Chit. j. 782); Bancroft v. Hall, Holt, 476, (Chit. j. 968); Wilkins v. Jadis, 2 B. & Ad. 188.

Morgan v. Davison, 1 Stark. Rep. 114. Assumpeit by indorsee of a bill against drawer. The bill was accepted payable at Herring and Dishardsun's Control court London. The Richardson's, Copthal-court, London. The plaintiff proved presentment at Herring and Richardson's, who were not bankers, in Copthal-court, on the day when the bill became due, between six and seven in the evening, when no one was there but a girl left to take care of the counting-house. Lord Ellenborough held, that this was a sufficient presentment; the hour was not an improper one, and the holder might reasonably expect to find the party in his counting-house at that time. See further, Friggs v. Newman, 10 Moore, 249; 1 Car. &

(e) Triggs v. Newman, 10 Moore, 249; 1 Car. & P. 631, S. C.

(p) Wilkins v. Jadis, 2 B. & Adol. 188; 1 Moo. & Rob. 41, (Chit. j. 1857). A present-ment at twelve o'clock at night, when a person has retired to rest, would be unreasonable. Per Lord Tenterden, C. J. ib.

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By the 4 & 5 W. 4, c. 15, s. 1, government bills, check, drafts, and or- I. Of Preders, are not to be payable at the bank of England after three o'clock(q).

for Pay-

Provided the party entitled to a bill or note produce it as soon as the im-Thus it has been Present-And it would

pediment has been removed, and in the mean time take every step in his what expower to obtain payment at the appointed time, a delay in presenting the in- lay in a strument itself at maturity may be excused, on account of any accident or punctual circumstance not attributable to the party's own fault(r). considered, that the detention of the bill by contrary winds, or the holder's having been robbed of the bill, or the like would *afford an adequate excuse, [*389] provided he present as soon afterwards as he is able(s). So the occupation of the country by an enemy will constitute an adequate excuse for de-But a notice of the reason why the bill itself cannot be produced should be given; and a demand of payment should, if possible, be made on the very day the instrument falls due; and if it be a foreign bill, it should be duly protested, in case the drawee should refuse payment (u). be advisable also to tender an adequate indemnity to the acceptor or maker of a note, and to request him to pay, without his insisting on production of the instrument; after which he should keep the money ready to pay when the bill is produced, and this at his own risk, in case his agent, holding the money, And notice of all the circumstances and of the non-payment should be given to all the other parties; and if the bill has been stolen or lost. public notice should be given as advised in a preceding page (w).

But the circumstance of the holder having received a bill very near the time of its becoming due, constitutes no excuse for a neglect to present it for payment at maturity, for he might renounce it if he did not choose to undertake that duty, and send the bill back to the party from whom he received it; but if he keep it, he is bound to use reasonable and due diligence in presenting it: and, therefore, where the plaintiff, in Yorkshire, on the 26th of December, received a bill of exchange, payable in London, which became due on the 28th, and kept it in his own hands until the 29th, when he sent it by post to his banker's in Lincoln, who duly forwarded it to London for presentment, and the bill was dishonoured, it was held that the plaintiff had by his laches lost his remedy against the drawer and indorsers (x). But it has been considered in France, that if an indorser himself transfer a bill so late to the holder as to render it impracticable to present it precisely at maturity, he cannot take advantage of a delay in presentment so occasion-

ed by himself, though the prior indorsers and the drawer may (y).

In considering the necessity of a due presentment for acceptance(z) and 6thly, for payment(a), and the time when the same should be made, we have an- Conseticipated this inquiry; and it may suffice to observe, that on principle, per-quences of Laches, haps, more exactness and punctuality in a presentment for payment may rea- and how sonably be required than even in a notice of nonpayment, because a prompt waived. and regular demand of payment may frequently obtain payment from an acceptor of a bill and maker of a note, who is in a state of progressive insol-

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(q) See the act, Chit. & II. Stat. 397, 400.
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⁽¹⁾ See ante, 358, et seq. (s) In America. Young v. Forbes, Morri- j. 872).

son, 1580; Thornpson, 483. (t) Patience v. Townley, 2 Smith. R. 224, (Chit. j. 714).

⁽u) Molloy, pl. 27; Pothier, pl. 144. (v) Dent r. Dunn, 3 Campb. 296, (Chit. j.

^{877.)}

⁽w) Ante, 253, 254.

⁽x) Anderton r. Beck, 16 East, 248, (Chit.

⁽y) Pardess. 451; and see Boehm v. Stirling, 7 T. R. 425; 2 Esp. 575, (Chit. j. 598); ante, 217, note (m).

⁽z) Ante, 272 to 290.

⁽a) Ante, 353. et. seg.

for Payment. 6thly, Consequences of Laches, and how waired.

1. Of Pre- vency, when a subsequent application of the same nature would become unavailing; whereas the loss of a day or more in giving notice of non-payment rarely makes any actual difference. The rules applicable to delay in notice of non-payment will in general apply, and with more force, to delay in due demand of payment. And even if an hour be lost, the laches will in some cases deprive the holder of all remedy against any party not primarily liable. But we have seen, that even in the case of a special acceptance payable at a particular place, and made according to the recent act, although a pre-[*390] sentment at that place is essential to be made *before the acceptor can be sued, still a delay in making presentment there on the very day when the bill'fell due, will not discharge the acceptor, unless he prove that he has really sustained damages by the delay, as by a banker in the mean time failing (b).

The delay in making due presentment for payment may be excused or waived by a subsequent promise, or by other circumstances which we shall find will preclude a party from taking advantage of the neglect to give notice of non-payment(c). And it has recently been determined, that the new rules as to pleading make no difference as to the effect of a subsequent promise, and that although a precise issue be joined on the fact of presentment, a promise made by the defendant to pay the bill or note after it became due is primâ facie evidence to prove the issue(d). So the want of effects in the hands of the acceptor, excuses the indorsee of an accommodation bill from presenting it for payment, as well as from giving notice of dishonour to the drawer(e).

Circumstances arising be-Payment.

If at any instant before the actual payment of a bill or check, given upon a condition, the drawer discover that the condition has not been performed, he may stop the payment thereof to the party who has thus eluded the consentment dition (f); and a banker who, upon presentment of a bill or check for payand actual ment, cancels the acceptance or drawer's name by mistake, may yet, upon discovering his error before actual payment, effectually resist such payment as if he had not so cancelled the draft(g). And where the drawee of a bill, on presentment for payment, said, "This bill will be paid, but we cannot allow you for a duplicate protest," and the holder refuses to receive payment without the charges of such protest, it was held, that the drawee So where the bankers, at whose house was not bound to pay the bill(h). by the terms of the acceptance the bill was payable, had received money for the express purpose of taking up the bill two days after it became due, and upon tendering it to the holders and demanding the bill, found that it had been sent back protested for non-payment to the persons who indorsed it to the holders, it was decided, that such bankers, having received fresh orders not to pay the bill, were not liable to an action by the holders for money had and received, when, upon the bill's being got back and tendered to them,

(b) Rhodes v. Gent, 5 Bar. & Ald. 244, (Chit. j. 1124); Bayl. 5th edit. 244.

(c) Post, Chap. X. s. i.; and see aute, 358, et seq. 388, 389.

(d) Croxon v. Worthen, 5 Mee. & Wels. 5; citing Lundie v. Robertson, 7 Fast, 232; post, Ch. X. s. i.

(e) Terry v. Parker, 1 Nev. & Perry, 752; 6 Ad. & El. 502, S. C. And see De Berdt v. Atkinson, 2 H. Bla. 336; ante, 273, note (u), 358, note (c); and post, Ch. X. s. i.; but observe, in that case the defendant was not the party accommodated, but had lent his name as payee and indorser to accommodate the maker

of the note: as an authority that in such case a presentment is unnecessary it clearly cannot be supported. See the judgment in Terry v.

(f) Wienholt v. Spitta, 3 Campb. 376, (Chit. j. 890).

(g) Raper v. Birkbeck, 15 East, 17, (Chit. . 851); Fernandey v. Glynn, I Campb. 426; Novelli v. Rossi, 2 B. & Ad. 757; ante, 309; and see Wilkinson v. Johnson, 3 Bar. & Cres. 492, (Chit. j. 1231); 5 Dowl. & Ry. 403, S. C.; post, s. ii. as to payments by mistake.

(h) Anderson r. Heath, 4 Maule & S. 303,

(Chit. j. 936); ante, 809, note (r).

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they refused to pay the money(i). And when a customer pays into his I. Of Prebanker's, in the ordinary way, a check drawn upon them by another of their for Payment, the bankers are entitled to the same time for ascertaining whether the check will be paid, and giving notice of dishonour (in case it be resolved by them not to pay the check), as in the case where the check is drawn upon other bankers; and, therefore, in such a case no promise to pay the check quences of will be *implied from the absence of notice until the following day: in order laches, and how to make the bankers liable, at all events, the customer should demand paywaired.

ment, or request that the amount may be placed to his credit; and an assent [*391] on the part of the bankers to such demand or request would raise an implied promise to pay, or give credit for the amount(j). But we have seen, that if one banker presents for payment to another banker a check on him in the usual course, and the latter marks it as approved, importing that it shall be paid the next day at the clearing-house, this is binding on the latter, and is equivalent to an acceptance, and he must, at all events, pays it(k).

If the maker of a promissory note pay money into the hands of an agent to retire it, and the agent tenders the money to the holder, on condition of having it delivered up, and the note being mislaid, this condition is not complied with, and the agent afterwards becomes bankrupt, with the money in his hands, it has been decided that the maker is still responsible on the

note(l).

II. OF PAYMENT.

II. Of Payment.

Before the drawee of a bill or maker of a note pays, he should be first lat, Prewell satisfied that his supposed signature, and that of the first indorser of liminary each, are genuine, and the latter made by the proper person(m), and that the sum to be paid was inserted by the drawer, and not subsequently altered(n), and that the person who presents for payment is entitled to receive it, especially after notice of loss(o), or of the holder's bankruptcy(p), or of the drawer's death, when a bill has not been previously accepted(q), and no adequate indemnity be tendered; nor after countermand of a general indorsement, or mere authority to receive payment(r).

So an indorser or party who transferred a bill or note returned to him, and called upon to take it up, should also perfectly assure himself, not only that the party applying for payment is the lawful holder of the bill, but also that there have not been any laches either by such holder or any other party; for if there have been laches, and prior parties have been thereby dis-

(i) Stewart v. Fry, 1 Moore, 74; Holt, C. N. P. 372, (Chit. j. 984); ante, 322, n. (p). When money is to be considered as particularly appropriated to payment of a bill, or not, see the cases, ante, 321 to 323. And see generally as to the appropriation of payments, post, s. ii.

(j) Boyd r. Emmerson, 4 Nev. & M. 99; 2 Adol. & Ell. 184, S. C.; more fully, post, Ch.

(k) Robson r. Bennett, 2 Taunt. 388, (Ch. j. 794), ante, 385, et seq.

(1) Dent v. Dunn, 3 Campb. 296, (Chit. j. 877).

(m) East India Company v. Tritton, 3 Bar. & C. 280; 5 Dowl. & Ry. 214, (Chit. j. 1216); Mead v. Young. 4 T. R. 28, (Chit. j. 467):

ante, 28, note (m); Price v. Neale, Burr. 1354; 1 Bla. R. 390, (Chit. j. 364); Smith v. Mercer, 6 Taunt. 76; 1 Marsh. 453, (Chit. j. 923); Cocks v. Masterman, post, 426, note (o); Bayl. 5th edit. 320.

(n) Bulkeley v. Butler, 2 Bar. & C. 434; 3 Dow. & Ry. 625, (Chit. j. 1294); ante, 159, 160, note (p), 281, 282, note (m); Bayl. 5th edit. 322.

(o) Ante, 259 to 261; Lovell r. Martin, 4 Taunt. 799, (Chit. j. 889); 1 Pardess. 427, 444.

(p) 1 Pardess. 427.

(q) Ante, 282, note (y); Hammonds r. Barclay, 2 East, 227, (Chit. j. 646).

(r) I Pardess. 427, 428.

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charged, an indorser, by unnecessarily paying the bill, will not revive the lia-II. Of Payment bility of the prior parties, or be enabled to recover from them; as where a bill has been refused acceptance, and due notice thereof not given(s), or where one of several parties has lost a day in giving notice of non-pay-[*392] ment(t). So a banker who pays a *forged check of his customer must bear the loss (u); though a refusal to pay a genuine check, having sufficient funds

in hand, will subject him to an action at the suit of the customer(v).

2dly, By whom **Payment** to be made.

Payment of a bill or note may not only be made by the drawee of the former or maker of the latter, but also by any other party to it; and in the case of a bill, even by a total stranger, as where a payment is made supra protest(x), which will be spoken of hereafter (y); and that of payment by the bail of one of the parties (z). If a party be sued on a bill of exchange, and it appear that the plaintiff has agreed with a third person that if he will advance part of the sum for the defendant, the plaintiff will take that in discharge of the whole debt, and such third person so advances it, this is a good defence to the action(a).

Of Payments by a Bankrupt (b).

So also all payments bona fide made by a bankrupt, or any person on his behalf, to a person not having notice of any act of bankruptcy, and not being a fraudulent preference, are protected by the statutes 6 Geo. 4, c. 16, s. 82, and 2 & 3 Vict. c. 29(c). We have already considered some of the decisions affecting the construction of the former acts(d), and what are considered fraudulent preferences(e). We have also seen that the 6 Geo. 4, c. 16, s. 82, is not, like the 19 Geo. 2, c. 32, confined to payments

(s) Roscoe v. Hardy, 12 East, 434; 2 Campb. 458, (Chit. j. 801); ante, 215, n. (x). In this case, as in Turner v. Leach, 4 B. & A. 454, next note, the action was against a prior party to the bill. When want of notice to plaintiff no answer to an action founded on an implied indemnity, Huntley v. Sanderson, 1 C. & M. 467; 3 Tyrw. 469, S. C.; ante, 331, note (z), 343, note (e).
(t) Turner v. Leach, 4 B. & Ald. 454, (Ch.

j. 1108)

(u) Hall v. Fuller, 5 B. & C. 750; 8 D. & R. 464, S. C.; ante, 261, note (u); and post, As to Payments by mistake.
(v) Marzetti v. Williams, 1 B. Ad. 415;

ante, 281, note (k); and post, Ch. XI.

(x) Poth. pl. 170.

(y) Ch. X. s. ii.

(z) Hull v. Pitfield, 1 Wils. 46, (Chit. j. 306). Payment of a note by the bail of the maker, is a discharge to the indorser. Id. ibid.
(a) Welby v. Drake, 1 Car. & P. 557.

(b) See ante, 202 to 212, as to transfers by bankrupt.

(c) See these enactments, ante, 206. In Terrington v. Hargreaves, 5 Bing. 489, the 6 G. 4, c. 16, s. 82, was held retrospective.

(d) Ante, 206 to 208. (e) Ante, 208 to 210; Vacher v. Cocks, 1 Bar. & Adol. 145. An army agent was in the habit of advancing money to his customers on their pay and pensions, by checks on his bankers. Having overdrawn his banking account, he received a new credit from the bankers, and engaged, in return, to pay over to them, on receipt, the sums which usually came to his hands

half-yearly from government, for the discharge of pensions. The agreement was not known to the persons who issued these funds. He committed an act of bankruptcy unknown to the bankers, and having subsequently received some government remittances, paid them over according to the above arrangement, being indebted to the bankers in more than the amount. It was made a question whether such payments were justifiable, or a fraudulent preference? But it was admitted, that if the sums were put into the bank merely to enable the bankrupt to go on in business for a time, these were not payments in fraud of creditors.

Churchill v. Crease, 5 Bing. 197. 1st, A payment made in June, 1825, by a debtor bonk fide without intention of fraudulent preference, eight days before a commission of bankrupt was issued against him, was held to be protected under the 82d sect. of 6 Geo. 4, c. 16. 2nd, The debtor, a prisoner, went eight days before a commission of bankrupt was sued out against him, to a fire office, to receive money payable to him in respect of a loss by fire; a creditor, for labour done, who knew the time when the money was to be paid, without any intimation from the debtor, met him at the office, and obtained out of the sum so received payment of his own debt, not knowing that his debtor was a prisoner or insolvent; and a jury having negatived fraud, it was held that this was not a fraudulent preference by the debtor. And see Jones v. Fort, 9 B. & C. 764; Abbott v. Pomfret, 1 Bing. N. C. 462; antc, 210, notes (c), (d).

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made in the course of trade, and for goods sold, or on a bill or note, but ex- 11. Of tends to all bona fide payments; and further, that the recent act 2 & 3 Vict. Payment. c. 29, protects all bona fide contracts, dealings, and transactions by and with any bankrupt before the date and issuing of the fiat, and without notice of the act of bankruptcy; and, therefore, it is unnecessary to notice the decisions upon this question under the prior statutes (f)(1).

*By the general Insolvent Act, 7 Geo. 4, c. 57, s. 32, (re-enacted 1 & By an In-2 Vict. c. 110, s. 59), a voluntary payment by an insolvent, within three solvent. months before his imprisonment, is void(g). And it will be equally void [*393] though made more than three months before the imprisonment, if made with

the intention of petitioning (h).

Payment should always be made to the real proprietor of the bill(i) or to 3dly, To one of several partners (k), or to some person authorized by him to receive $\frac{\text{whom}}{\text{Payment}}$ it, as a factor, &c. (l)(2); and payment to the payee will, consequently, be should be

made.

(f) See anie, 205 to 207. Upon the old acts it was held, that payment of a bill to a creditor by a bankrupt under an arrest, after a secret act of bankruptcy, was a payment in the course of trade; Cox v. Morgan, 2 B. & P. 398; Ex parte Farr, 8 Ves. 515; sed vide Southey v. Butler, 8 B. & P. 237; Blogg v. Phillips, 2 Campb. 129; Cullen, 238, 239; Bayly v. Schofield, 1 Maule & S. 338. But if the payment were intended as a fraudulent preference, it would not be valid. Singleton v. Butler, 2 B. & Pul. 283; Southey r. Butler, 8 B. & Pul. 237. If the holder of a bill gave time to the acceptor upon condition that he should allow interest, and he afterwards paid the bill, having previously committed a secret act of bankruptcy, this was held not a payment in the usual course of trade within the meaning of the statute. Vernon v. Hall, 2 T. R. 648, (Chit. j. 446); and see 1 Montagu, 311 to 313; 2 Ves. 550; Cullen, 234. So where A. having recovered a verdict against B. who afterwards committed an act of bankruptcy, and A not having had notice thereof, took a bill drawn by B. on C. for the amount of the sum recovered, payable at a distant period, which bill was afterwards paid: it was determined that this payment was not protected by the statute, and consequently that A. was liable to refund the money received by him to the assignees of B., Pinkerton v. Marshall, 2 Hen. Bla. 334. And where bankers having accepted bills for the accommodation of a trader, he, after committing an act of bankruptcy, but before a commission was sued out, lodged money with them to take up the bills, which did not become due till after a commission was sued out, and were then regularly paid by the acceptors, it was held, that they were bound to refund this money to the assignees, and that they neither had a right of set-off under 5 Geo. 2, c. 30, nor could protect themselves under 19 G. 2, c. 32, as having received the money in payment of bills of exchange in the ordinary course of trade. Tamplin and others, assignees of Visich, a bankrapt, v. Diggins and others, 2 Campb. 312,

(Chit. j 780). And where bankers, after a secret act of bankruptcy of the acceptor, paid a bill for him, accepted payable at their house, and he afterwards remitted the money to them, it was decided that they were liable to refund; because the bankrupt was not liable to them on the bill, and his repayment to them was only in satisfaction of a loan, which was not a payment protected by the statute. Holroyd v. White-head, 3 Campb. 530, 533; 2 Rose, 145; 5 Taunt. 444; 1 Marsh. 128, (Chit. j. 905). So if bankers paid a check drawn upon them by a trader after a secret act of bankruptcy, it was held they could not retain money received to cover such check, id. ibid. So it was decided, that the assignees of a bankrupt were entitled to recover back money paid by the bankrupt to the defendant after a secret act of bankruptcy (though before the date of the commission), which the defendant had before recovered by judgment against the bankrupt in an action on a promissory note reserving interest half-yearly, given for the balance of an account amongst other things consisting of money lent, such note not being given in the usual and ordinary course of dealing, so as to be protected by 19 G. 2, c. 32. And us to a set-off mot being provided for till the 6 G. 4, c. 16, s. 50, see Kinder v. Butterworth, 6 Bar. & C. 42; 9 Dow. & Ry. 47, S. C.; and ante, 318, note (o); and post, Part II. Ch. VIII. Bankruptcy.

(g) Herbert v. Wilcox, 6 Bing. 208; ante,

212, note (r).

(h) Beck v. Smith, 2 M. & W. 191; ante, 212, where see as to what amounts to a roluntary payment.

(i) Poth. pl. 142, 143, 164.

(k) Duff v. East India Company, 15 Ves.

(1) Favenc v. Bennett, 11 East, 40. Payment to the plaintiff's attorney suffices. Coore v. Callaway, 1 Esp. Rep. 115, 116; 1 Bla. Rep. 85; 1 Campb. 478. Aliler to the agent or clerk to plaintiff 's attorney; Yates v. Frecklington, Dougl. 622; post, 394, note (v).

^{(1) {} Payment by last endorser will not destroy the negotiability of an indersement; or by a prior endorser, if the subsequent indorsements are struck out before it is again negotiated. Wallace v. Branch Bank, 1 Ala. Rep. N. S. 565.

⁽²⁾ On presenting a note or bill for payment, the holder must have the bill with him, otherwise the demand will not be deemed effectual so as to charge the other parties. Freeman v.

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inoperative, if he have ceased to be the proprietor of it by having indorsed it to another person, and the drawee has notice of the fact(m); nor ought payment to be made to the wrongful holder and detainer of a bill(u). bill be payable to A. B. only, and not negotiable, it is said that A. B. in person must appear and demand payment (o). If the holder of a bill die, payment should not be made to his personal representative, unless he has a power of administering his effects(p). Payment, however, to a person having obtained probate of a forged will of a deceased party, will be valid; although if the supposed testator were living it would be otherwise (q). On a [*394] bill payable to A. *or order, to the use of B., payment should be made to A. or his indorsee, and not to $B_{\cdot}(r)$. If a bill be beneficial to a minor, payment to him would be valid, though it is said that it ought to be made to his guardian(s)(1); and a payment to a married woman, after knowledge of that fact, without the concurrence of her husband, would not discharge the person making it(t). When a bill is indersed to a person merely for the purpose of receiving payment for the indorser, and the authority given to the indorsee is afterwards revoked, either by the party himself or by operation of law, as by his death, payment to the indorsee will not discharge the person making it, if he had notice of the revocation (u); this doctrine, however, is objected to by Beawes, in his Lex Mercatoria(x); and it must certainly be confined to the single case of an indorsement to an agent, for the purpose of his receiving payment for his principal. Payment of debts should not, in

general, be made to a mere sub-agent (y); though payment to a person found

(m) Poth. pl. 164. (n) 1 Pardess. 444.

(o) Marius, 4th edit. 34; Sigourney v. Lloyd, 8 Bar. & C. 629; 3 Man. & Ry. 58, (Chit. j. 1412); 5 Bing. 525; 3 Moore & P. 229; 3 Younge & J. 220, S. C. in error; ante, 232, 233, notes (n), (p), as to restrictive indorsements.

(p) Poth. pl. 166.

(q) Allen v. Dundas, 3 T. R. 125. As to forgery of power of attorney to obtain stock, see Rex v. Fauntleroy, 2 Bing 413; 1 C. & P. 421, S. C.

(r) Cramlington r. Evans, 2 Vent. 310;

Carth. 5, (Chit. j. 174); Marchington v. Vernon, 1 B. & P. 101, note (c); Smith v. Kendall, 6 T. R. 123, 124; 1 Esp. 231, (Chit. j. 533); ante, 202, note (u).

(s) Poth. pl. 166.

(1) Barlow r. Bishop, 1 East, 167; 3 East, 226, (Chit. j. 637); ante, 201, note (e).
(u) Poth. 168; 1 Pardess. 437, 438; et Mar. 72, 73; sed quære Tate r. Hilbert, 2 Ves. jun. 114, 115, 118, 121, (Chit. j. 510); 16 Ves. 450; ante, 282, note (y), 287, note (n). (x) Pl. 219.

(y) Yates v. Frecklington, Dougl. 622.

Boynton, 7 Mass. Rep. 483. { Farmer's Bank v. Duvall, 7 Gill & John. 78. But see Gallagher v. Roberts, 2 Fairf. 489. } And as the whole of a set of exchange constitute but one bill, payment to the holder is good, which so ever of the set he may happen to have in his possession. Durkin v. Cranston, 7 John. Rep. 422. Payment to the general indorsee of a bill is good, and cannot be affected by any transactions between him and the person by whom it was remitted; and if the bill has been protested for non-payment, he may waive the default and accept payment. Durkin v. Cranston. But where a note was indorsed by the defendant for the accommodation of the makers, who were then in good credit, and before negotiating they became insolvent, and the defendant then directed them not to part with the note, which they promised, but afterwards passed it to the plaintiffs with full notice of all the circumstances, in satisfaction of a debt, held that the plaintiffs could not support an action on the note. Skelding et al. r. Warren, 15 Johns. Rep. 270.

Payment to the holder of a note, may protect the indorser and maker from the claim of the former; though it may extinguish his right against them, it does not extinguish that of the indorser, who pays against the previous indorser and maker. Louisiana Bank r. Roberts, 4 Miller's

Louis. Rep. 530. The plaintiffs in an action on the second set of a foreign bill of Exchange, protested for nonacceptance, with the protests thereto attached, can recover without producing the first of the same set, or accounting for its non-production. Downes r. Church, 13 Pet. 205.

If the payee of a note pay a holder whom he knows had no right to recover, it will not be an extinguishment of the debt. Netherville r. Stevens, 2 How. 642.

(1) {So payment to a person non compos mentis, under guardianship, the payor having knowledge of the guardianship, is not valid. Leonard v. Leonard, 14 Pick. 280. }

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in a merchant's counting-house, and appearing to be entrusted with the conduct of the business there, is a good payment to the merchant, notwithstand- Payment. ing it turns out that such person was never employed by him(z). However, adly, To in ordinary cases, the mere production of a bill of exchange or note indersed whom to in blank by the proper person, or mere production of a check, is sufficient to be made. warrant the payment to the person who produces it, for the possession of an instrument so indorsed, affords presumptive evidence of the holder's ownership or agency to receive payment(a), and this without reference to the circumstance of his being the habitual agent of the same party (b)(1). banker or agent has become a bankrupt, we have seen that his assignees may receive payment without being liable to an action of trover, upon the supposition that such receipt is a conversion of the bill, and will be merely liable to pay over the proceeds to the rightful owner(c). It is neither necessary (d)nor prudent to pay a bill or note to a party who is not the holder, nor without his first producing and delivering up the instrument, for otherwise the party paying may be liable to pay over again to another party who may really be the holder, or entitled to receive payment, unless the latter has afterwards received payment from another party (e); and if for want of distinct evidence of a payment, it should be in doubt whether it was made, the mere circumstance of the instrument not having been given up will afford a presumption against the party who alleges he has paid it (f). But we have seen (g) that if there be clear proof of the destruction of the bill or note, or it be not negotiable, or has not been *indorsed or only specially indorsed, its non-production [*395] furnishes no excuse for non-payment. And, accordingly, in a very recent case(h) it was held to be no answer to an action on a promissory note, not made payable to bearer or order, that when the note became due the defendant was ready to pay on the note being produced and delivered up to him, and always had been and still was ready to pay on the production of

In general when the holder of a bill or note indorsed in blank, or payable to bearer, loses or is robbed of it, and the person finding or stealing it presents it to the drawee at the time it is due, and he pays it bona fide in the course of business, without knowing of the loss or robbery such payment will discharge him(i); and although he had notice of such fact, yet if the person

(z) Barrett v. Deere, Mood. & M. 200; see Corfield v. Parsons, 1 C. & M. 730, 733.

(a) Owen v. Barrow, 1 New Rep. 103, (Chit j. 703); Anon. 12 Mod. 564, (Chit. j. 218); Pal. P. & A. 181.

(b) Anon. 12 Mod. 554; 2 Ld. Raym. 930; Pal. P. & A. 181.

(c) Ante, 359; Tennant v. Strachan, Moo. & M. 377; 4 Car. & P. 31, (Chit. j. 1450). Bills of exchange were deposited with bankers before their bankruptcy, and, handed over by them on the day of their bankruptcy to A. B. who received the proceeds of some of them, and handed over those monies and the remaining bills to the assignees, as soon as they were appointed; and it was held that the assignees

were not liable in trover for the bills of which A. B. received the proceeds.

(d) Hansard v. Robinson, 7 B. & C. 90; 9 Dow. & Ry. 860, (Chit. j 1349); ante, 266, note (a).

(c) Fielder v. Carr, 5 Bing. 13; 2 Moore & P. 46, (Chit. j. 1405).

(f) Buzzard r. Flecknoe, 1 Stark. R. 823, (Chit. j. 966); Brombridge v. Osborne, 1 Stark. R. 374.

(g) Aute, 268.

(h) Wain r. Bayley, 2 Perry & Dav. 507.

(i) Ante, 254 to 256; Smith v. Shepperd, Hil. Term, 16 Geo. 3; ante, 261, note

Had there been an existing demand due from the factor to the purchaser at the time of the transfer of the note, quere if such demand might have been set off in an action by the principal.

Ibid.

⁽¹⁾ Where a factor sells the goods of his principal without disclosing his agency, and takes the note of the purchaser, payable to himself or hearer at a future day, and before maturity transfers the note to his principal, payment by the purchaser to the factor, after such transfer and before the note falls due, is no bar to a recovery in an action by the principal as indorsee against the purchaser as maker of the note. Mitchell v. Bristoll, 10 Wend. Rep. 492.

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presenting the bill to him was a bona fide holder, such notice would not invalidate the payment (k)(1). (But after notice of a loss, payment should not be made to the finder or any other person without his establishing a clear title or giving an adequate indemnity (l); and in general, if an acceptor or a banker at whose house a bill is made payable, has notice of the loss, and afterwards incautiously pay it, or having afterwards discounted it, debits his customer with the amount, he will have to pay the bill over again to the rightful owner(m). Nor will a payment before a bill or check is due discharge the drawee, unless made to the real proprietor of it; and therefore, where a banker paid a check the day before it bore date, which had been lost by the payee, it was adjudged that he was liable to repay the amount to the person losing it(n); and it is perhaps advisable, that an acceptor should in no case, without adequate indemnity, pay a bill before it is due(o), or after notice from the drawer or indorser not to pay it(p). And if banker pay a check under such circumstances as are sufficient to convince a jury that the payment was not made bon? fide, they cannot take credit for the amount in their account with their customer (q); and where a person pays a sum of money into a banker's for a special purpose, viz. to pay a particular bill, and the banker's clerk by mistake pays the money to the holder of another bill, he may sue the bankers for the amount, but not the party to whom the payment was made(r). Where a bill, transferable only by indorsement, and not indorsed by the proper party, is lost by the person entitled to indorse, no other person can transfer the interest in the bill, and consequently a payment by the drawee even to a bonû fide holder will not in such case be protected(s). It has been held, that in an action by bankers to recover the amount of a bill made payable at their banking-house and paid by them, it is necessary for them not only to prove the hand-writing of the defendant (the acceptor) but also that of the payee, being the first indorser, for the acceptor, by accepting payable at a banker's, only requests the latter to pay it to the payee or his order, and not to any person who presents it; and that if the banker pays it with-[*396] out *ascertaining the indorsement to be genuine, it is at his own risk(t). consequence of a payment in case of forgery will be considered hereafter(u).

Payment to a person or his order, after the knowledge of his having committed an act of bankruptcy, would be ineffectual(x). Thus it has been holden, that if a banker pay the draft of a trader keeping cash with him, after notice of an act of bankruptcy committed by the latter, the assignees may recover the money paid, either from the banker(y) or from the payee of the

(k) Pierson v. Hutchinson, 2 Campb. 211; 6 Esp. 126, (Chit. j. 776); ante, 265, note (z); and Bevan v. Hill, 2 Campb. 381, (Chit. j. 788); ante, 267, note (c).

(1) 1 Pardess. 427.

(m) Lovell v. Martin, 4 Taunt. 799, (Chit.

j. 889); ante, 259, note (d).

(n) Da Silva v. Fuller, ante, 260, note (l);

and see post, Time of Payment.
(o) Com. Dig. tit. Merchant, F. 7; Mar. 129, 130.

v(p) Bacon v. Searles, 1 H. Bla. 89, (Chit. j. 446); Mar. 129; Com. Dig. tit. Merchant, F. 7.
(q) See ante, 257; Scholey v. Ramsbottom,

2 Campb. 485, (Chit. j. 807); post Payment by Mistake; Lovell v. Martin, 4 Taunt. 799; supra, note (m).

(r) Rogers v. Kelly, 2 Campb. 123.

(s) Mead v. Young, 4 T. R. 32, (Chit. j. 467); ante, 198, note (e), 261, note (z); Long v. Buillie, 2 Campb. 214, (Chit. j. 777); ante, 268, note (i).

(t) Per Lord Ellenhorough, in Forster v. Clements, 2 Campb. 17, (Chit. j. 765); post, Evidence-Indorsement. And see Johnson r. Windle, 3 Bing. N. C. 225; 3 Scott, 603, S. C.; ante, 261, note (s); Hall v. Fuller, 5 B. & C. 750; post, Payment by Mistake.

(u) Post, 426, 427.

(x) Kitchen v. Bartsch, 7 East, 53; 1 B. & P. 378; Cooke's Bankrupt Laws, 584, 585; Eden's Bankrupt Laws, 252.
(y) Id. ibid., Vernon v. Hankey, 2 T. R.

113, (Chit. j. 433); 3 Bro. 313; Pryn v. Beal,

⁽¹⁾ But if he have notice before payment that the bill has been lost, he pays it at his own peril, and if it turn out that the party had no title, he will be liable to the real owner. Lovell v. Martin, 4 Taunt. Rep. 749. See Gorgerat v. M'Carty, 1 Yeates' Rep. 94.

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check, if such payee also had notice of the bankruptcy(z), unless the payment were compulsion of law(a), but still, until a commission has issued Payment. against the holder, there is no defence to an action at his suit(b); and after saly, T_0 action bona fide brought by such party, it should seem that the defendant whom to might safely pay the money into Court, in order to prevent further costs(c).

So a payment made to a bankrupt or his order, and before the date of the Of Paycommission, and without notice of act of bankruptcy, will in all cases discharge the person making it, it being protected by the statutes, 6 Gco. 4, c. 16, s. 82, and 2 & 3 Vict. c. 29(d); and it has been holden, that if a debtor, not having notice of the act of bankruptcy of his creditor, give him his acceptance in discharge of the debt, he may afterwards pay such acceptance to the holder of the bill, although between the time when he accepted, and the time when the bill became due, he heard of the bankruptcy; the giving, indorsing, or accepting a hill of exchange, being considered as equivalent to an immediate payment within the meaning of the 6 Geo. 4, which protects bona fide payments made to a bankrupt(e). And under the 1 Jac. 1, c. 15, s. 14, it was held, in a court of error, that a payment made to a bankrupt, or the acceptance of a bill on his account, even after a commission issued, was protected, the same as a payment before a commission issued, if the party paying or accepting had not notice in fact of such commission (f).

*We have already seen that a bill or check should not be prematurely 4thly, id(x): Marius gives particular directions on this point(h). The holder Within paid(g); Marius gives particular directions on this point(h). cannot be compelled to receive payment before, or to give time afterwards (i). what Time Payment The general rule with respect to the time allowed for the payment of money, must be when a day certain is appointed, is, that the party bound has till the last made. moment of the day to pay it(k); but it is otherwise with respect to foreign [*397]

gan, 2 B. & P. 898.

(z) Vernon v. Hanson, 2 T. R. 257.

(a) 14 Ves. 557; 1 Mont. 316; but see

Blogg v. Phillips, 2 Campb. 129
(b) Prichell v. Down, 3 Campb. 131. Held, that where two partners have stopped payment, and before a commission of bankrupt is taken out against one, a debtor to the firm, who knows of the stoppage, cannot refuse to pay money due to them, on the ground that the other may have committed an act of bankruptcy, although, if that had been the case, his assignees might call upon the debtor to pay a moiety of the money a second time. Per Lord Ellenborough, C. J. "The defendants are not under the protection of the act, 46 Geo. 8, c. 185, s. 1, but before it was passed they could not have justified refusing to pay the balance in their hands under similar circumstances, to whatever subsequent inconvenience the pay-ment might have exposed them. Till the ment might have exposed them. party has actually become a bankrupt, and a commission has been taken out against him, he may sue his debtors. There may be peril in paying a man who is known to have stopped payment, but that affords no defence to an ac-

tion for a debt justly due to him." Verdict for the plaintiffs. (c) Foster v. Allanson, 2 T. R. 479; 14

East, 588; 2 Ves. jun. 104 to 106.

(d) Sec ante, 206; Coles v. Robins. 3 Campb. 183; Cash r. Young, 2 B & C. 413;

3 Keb. 231; Freem. 349, S. C.; Cox v. Mor- 3 D. & R. 652, S. C. Under the 1 Jac. 1, c. 15, s. 14, a payment to a bankrupt was not protected unless the party making it was strictly a debtor to the bankrupt. Bishop v. Crawshay, 3 B. & C. 415; 5 D. & R. 279, S. C.

(c) Wilkins v. Casey, 7 T. R. 711; ante, 207, note (h); Bayl. 5th edit. 316; and see Foxcrast v. Devonshire, I Bla Rep. 193, (Chit.

j. 353); 3 Campb. 185.

(f) Sowerby r. Brooks, on error, in K. B. from C. P., 4 Bar. & Ald. 523, upon 1 Jac. 1, c. 15, s. 14. On 7th October, a commission issued against Carbutt, but it was not in the Gazette till 5th November. On 30th October. Sowerby accepted a bill drawn on him by Carbutt for 95/. 4s. a sum he owed Carbutt. Sowerby did not know of the commission, or that Carbutt was a bankrupt or insolvent at the time he so accepted. Carbutt's assignce sued Sowerby for the old debt, and he relied on his acceptance, which he paid when due, as a discharge. In C. P. (3 Moore, 157) it was held no discharge, on the ground that issuing a commission was notice to all the world of the bankruptcy, but upon a writ of error the Court of K. B. reversed the judgment. See now as to what shall be deemed constructive notice of an act of bankruptcy, 6 Geo. 4, c 16, s. 83, ante, 208.

(g) Ante, 395, 396; see 1 Pardess 432; Burbridge v. Manners, 3 Campb. 194, (Ch. j 855.)

(h) Marius, 1th edit. 31.

(i) 1 Pardess. 423.

(k) Hudson v. Barton, I Rol. Rep. 189; 1

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bills, for as the protest of non-payment of them should be made on the last day of grace(l), and so as to be sent, if possible, by the post on that day, it follows that the holder may insist on payment on demand, or at least before the hours of business are expired (m).

With respect to inland bills it has been much discussed whether the acceptor has not the whole day for payment. On the one hand a bill of exchange has been assimilated to other contracts, in which the party has till the last instant of the day to pay the same: but on the other hand it has been urged, that the contract of an acceptor of a bill or maker of a note, is to pay on demand on the appointed day, and that if payment be not made on such demand, the contract is broken: and the holder may treat the bill or note as dishonoured(n). The latter doctrine appears now to be established; and, therefore, where the acceptor having said, at eleven o'clock in the day, that he would not pay the bill, it was decided that the holder might immediately resort to the drawer, so that notice of the dishonour might be given on the same day(o). And if the house at which the bill is made payable be shut [*398] up, *and no one there, this will be deemed equivalent to a refusal to pay, and notice of dishonour may immediately be given (p). However, it is not usual or necessary to give notice of non-payment before the following morning, and therefore there can be no objection to the allowance of the whole day on which the bill becomes due, to pay it in(q). If the holder make a second presentment of an inland bill on the last day of grace, the acceptor may insist on paying it when such presentment is made, without paying the fees of noting or protesting, notwithstanding such presentment be made after banking-hours, and expressly for the purpose of noting and protesting, because the statute does not authorize a protest until after the last day of

Saund. 288, note 17; Leftley v. Mills, 4 T. R.

173, (Chit. j. 473).
(1) Lassel v. Lewis, t Lord Raym. 743, (Chit. j. 192); et post, Ch. X. s. i.; sed quære, see report of the same case, 1 Salk. 132, nom. Hill v. Lewis; Vin. Ab. tit. Time, A. 2, pl. 3; Anon. Lutw. 1593.

(m) Colkett v. Freeman, 2 T. R. 61, (Chit.

(m) Correct v. Freeman, 2 I. R. 01, (Chit. j. 441); Parker v. Gordon, 7 East, 385; 3 Smith's Rep. 358, (Chit. j. 727).

(n) Leftley v. Mills, 4 T. R. 170, (Chit. j. 473); arguments of Kenyon, C. J. and Buller, J. disputed by Lord Alvanley, C. J. in Haynes v. Birks, 3 Bos. & Pul. 602, (Chit. j. 630).

(o) Ex parte Moline, 1 Rose, 303; 19 Ves. 216, (Chit. j. 871); Burbridge c. Manners, 3 Campb. 193, (Chit. j. 855); Hume v. Peploe, 8 East, 169, (Chit. j. 732). Ex parte Moline, 1 Rose, 203. In this case

the point was, the acceptor having said, at eleven o'clock in the day, that he would not pay the bill, whether the holder could immediately resort to the drawer? The Lord Chancellor was of opinion that he could. Sir Samuel Romilly mentioned Burbridge v. Manners, 8 Campb. 194, S. P. Quære, whether notice on such day, where there was no unqualified refusal, would do; see Hartley r. Case, 4 B. & C. 339; 6 D. & R. 595; 1 Car. & P. 555, 556, 677, (Chit. j. 1263). See rost, Ch. X. s. i. as to the time of giving notice.

Burbridge v. Manners, 3 Campb. 193, (Chit.

defendant, indorsed by him to one Tinson, and by Tinson to the plaintiff. The note was regalarly presented for payment in the forenoon of the day it became due, when payment was refused, and in the afternoon of the same day the plaintiff caused notice of its dishonour to be sent to the defendant. Park, for the defendant, objected that this was not sufficient notice of the dishonour Finney, the maker of the note, had the whole of the day it became due to pay it, and till the last minute of that day it could not be considered as dishonoured. The notice therefore stated what was untrue, and was evidently premature. Per Lord Ellenborough, "I think the note was dishonoured as soon as the maker had refused payment on the day when it became due, and the notice sent to the defendant must have answered all the purposes for which notice in such case is required. holder of a bill or note gives notice of its dishonour in reasonable time the day after it is due, but he may gire such notice as soon as it has been dishonoured, the day it becomes due; and the other party cannot complain of the extraordinary dilligence used to give him information." Verdict for the plaintiff. And see observations as to giving notice on the same day, in Cocks v. Masterman, post, 426, n. (0); Bayl. 5th edit. 320.

(p) Hine v. Allely, 4 B. & Ad. 624; 1 N.

i M. 433, S. C.

(q) Leftley v. Mills, 4 T. R. 170, (Chit. j. 473); Vin Ab. tit. Time, A. 2, pl. 3; Haynes j. 855). This was an action on a promissory around for 101l. 15s. 5d. dated 11th October, v. Birks, 3 Bos. & Pul. 599, (Chit. j. 690); 1810, drawn by J. Linney, payable three and see per Bayley, J. in Hartley v. Case, 1 nonths after date at Frisci and Co.'s to the C. & P. 677. ARL

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grace(r). But it has been decided, that in an action against the acceptor a plea of a tender made after the day of payment of a bill of exchange and be- Payment. fore action brought, is insufficient; although the plea aver that the defendant 4thly, was always ready to pay from the time of the tender, and that the sum ten- Time of dered was the whole money then due, owing, or payable to the plaintiff in Payment. respect of the bill, with interest from the time of the default, for the damages sustained by the plaintiff by reason of the non-performance of the promise, because the neglect to pay on the day when the bill was due established that the defendant was not always ready from the time when the bill was due, which is always essential to the validity of a tender(s)(1). And such plea will be equally bad though it allege that the defendant was always ready to pay from the time when the bill became due, instead of from the time of the tender(t). And though in Walker v. Barnes(u) it was held, that a drawer or indorser might tender within a reasonable time after notice, as it was not to be expected that he should be ready at the very instant he received notice to pay the amount, yet, in a more recent case(x), it was held to be no defence to an action against an indorser, that it was commenced before a reasonable time had elapsed after notice of the dishonour; and that the only remedy the defendant has is to apply to the court to stay proceedings on payment of costs.

*Independently of the Statute of Limitations, if a promissory note of twen- Presumpty years date be unaccounted for, it affords a presumption of payment(y); tion of but it is not conclusive evidence thereof, and especially in a case where, al- Payment, though the promissory note made abroad was over due more than twenty Time. years, yet the plaintiff resided abroad for a considerable time as an alien en- [*399]

emy(z).

The payment of a bill or note must always be made in money, and an 5thly,

(r) Leftley v. Mills, 4 T. R. 170, (Chit. j. 473); Poth. pl. 140, 174; see post, Ch. X. s. i. Protest for Non-payment—When necessa-

(s) Hume v. Peploe, 8 East, 168, (Chit. j.

722.) (t) Poole v. Tumbridge, 2 Mee. & Wels. 223; 5 Dowl. 468; 1 Murr. & H. 32, S. C. Indorsee v. Acceptor. Plea, that after the bill became due and before the commencement of this suit, defendant tendered to the plaintiff the amount of the bill, with the interest from the day it became due, and that he hath always, from the time when the bill became due, been ready to pay the plaintiff the amount with in-terest aforesaid: held bad on special demurrer. Per Lord Abinger, C. B. "I am of opinion that this plea is bad. If the question be merely whether the acceptor can plead a tender after the day of payment, it is bad on the authority of Hume v. Peploe, (8 East, 168). I will not say that if this case arose—that the acceptor went on the day that the bill became due to the house of the holder, for the purpose of paying it, and could not find him, but on a subsequent day when be found him, tendered him the money-I am not prepared to say that in such a

case the rules of law ought to be pressed so far how made, as to render the party liable to an action the and what next day after the bill becomes due, and not to amounts to allow him to plead that tender, by which means it. the proceedings of a court of law are made nothing else but machinery to increase costs. But it is consistent with the present plea, that the defendant knew where the holder lived, but did not take the pains to tender him the money on the day it became payable. If he knows where the holder is to be found, he clearly ought to go and pay the debt. Even, therefore, if Hume v. Peploe did not apply, the plea does not disclose a sufficient defence.

(u) 1 Marsh. 36; 5 Taunt. 240, (Chit. j. 989); ante, 341, note (p).

(x) Siggers v. Lewis, 2 Dowl. P. C. 181; 1 Crom. M. & Ros. 370; 4 Tyrw. 847, S. C.; semble, overruling Walker v. Barnes, 1 Marsh.

(y) Duffield v. Creed, 5 Esp. R. 52, (Chit. . 684). And see the 3 & 4 W. 4, c. 42, s. 3, limiting the time for the recovery of specialty debts to twenty years.

(z) Du Belloix v. Lord Waterpark, 1 D. & R. 16, (Chit. j. 1128).

⁽¹⁾ Caldwell v. Cassidy, S Cowen's Rep. 271. Curley v. Vance, 17 Mass. Rep. 389. By the common law and practice of Connecticut such tender would be good. Tracy r. Strong, 2 Conn. Rep. 659

II. Of Payment. 5thly,

agent authorised to receive payment generally cannot take goods in pay-When a bill is drawn here, and payable in a foreign country in ment(a)(1). foreign coin, the value of which is reduced by the government of that coun-How made try, it is said that the bill shall be payable according to the value of the moand what amounts to ney at the time it was drawn(b). But though a war between this and a foreign country may in some cases excuse the obligation on a British subject to pay a bill in such foreign country(c); yet where a note was made payable in Paris, or at the choice of the bearer in England, according to the course of exchange upon Paris, it was holden, that as the direct course of exchange between London and Paris had ceased, the holder was entitled to recover upon the note, according to the circuitous course of exchange by Hamburgh at the time the note was presented (d). The effect of payment by a remittance of bills by post, which are lost, has also already been stated(e); and we have seen, that bank-notes and country bankers' notes should be remitted in halves and by different conveyances (f). Payment is frequently made by a draft on a banker, in which case, if the person receiving the draft, do not use due diligence to get it paid, the person from whom he received it, and every other party to the bill, will be discharged, but nototherwise, unless the holder expressly agreed to run all risks(g); for a banker's check is not money (h)(2); and it has been holden, that the act of writing a receipt in full will not be evidence of such agreement (i) (3). The delivery of an over-due bill of the vendor in payment for goods sold by him, has, in one instance, been considered as a complete payment; as where the defendant, who had ordered goods for ready money, paid for them by returning to the vendor's agent a bill accepted by the vendor, which had been due and dishonoured before the goods were ordered; the agent, at first, re-

> (a) Howard v. Chapman, 4 Car. & P. 508. (b) Da Costa v. Cole, Skin. 272, (Chit. j.

179). (c) Pollard v. Herries, 3 Bos & Pul. 340,

(Chit. j. 672).
(d) Pollard v. Herries, 3 Bos. & Pul. 335.

(e) Ante, 236.

(f) Ante, 237, and ante, 383, Time of Presentment, where we have seen that a few hours delay, occasioned by that mode of remittance, would not be deemed laches

(g) Vernon v. Boverie, 2 Show. 296, (Chit. j. 166); Ward v. Evans, 2 Ld. Raym. 930, (Chit j. 216); Anon. 12 Mod. 521, S. C.; Vin. Ab. tit. Payment, A.; Dent v. Duna, 3 Campb. 296, (Chit. j. 877); ante, 178.

(h) See Moore v. Bartrup, 2 D. & R. 25; 1

B. & C. 5, (Chit. j. 1153).

(i) Ante, 172 to 181.

(1) So it has been held in New York, that a receipt for a note as cash, is not evidence that it is received as an absolute payment. Tobey v. Barber, 5 John. Rep. 68. Putnam v. Lewis, 8 John. Rep. 389.

In an action against the maker by the holder of a promissory note, indorsed after it was dishonoured, the defendant proved, that there being an unsettled account between himself and the payee, the payee agreed to take up the note from a creditor, to whom he had indorsed it, and upon a settlement of the account, to deliver it to the defendant; that the payee did take it up for that purpose, and that there was a balance due from him to the defendant, exceeding the amount of the note; held, that this agreement operated as a payment of the note. Peabody v. Peters, 5 Pick. 1.

(2) A check upon a bank, given in the ordinary course of business, is not presumed to be received as an absolute payment, even if the drawer have funds in the bank, but as the means whereby the holder may procure the money. Cromwell v. Wing & Lovett, I Hall's Rep. 56.

The holder of a check in such a case, becomes the agent of the drawer to collect the money;

and if guilty of no negligence, whereby an actual injury is sustained by the drawer, he will not be answerable, if from any peculiar circumstances attending the bank, the check is not paid.

In a suit against the drawer for the consideration of such a check, the holder may treat it as a nullity and resort to his original cause of action. Ibid.

(3) A negotiable note given for a subsisting debt will not be regarded as payment when it is otherwise understood or agreed by the parties, at the time. Gilmore v. Bussey, 3 Fairf. 418.

Where an acceptance has been received to be collected and applied in payment of a precedent debt, the creditor is bound to use due diligence in its collection, or it will be holden as a satisfaction of his own deht, by reason of his laches. Cochran v. Wheeler, 7 N. Hamp. 202. }

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fused to take the bill, but ultimately carried it to the vendor, who kept it, II. Of and the vendor having become bankrupt, the court in an action brought by Payment. his assignees to recover the value of the goods, held this transaction equiva-5thly, lent to payment(k). But a bill or note cannot be set off unless it be due(l). How made

When payment is made by the drawee giving a draft on a banker, Marius and what amounts to advises the holder not to give up the bill until the drast be *paid(m). For-[*400] merly the usage in London was otherwise when the drawee was a respectable person in trade; and in one case it was decided, that a banker having a bill remitted to him to present for payment, was not guilty of negligence in giving it up upon receiving from the acceptor a check upon another banker for the amount payable the same day, although such check be afterwards dishonoured(n); but in a subsequent case it was considered, that the drawer and indorsers of a bill would be discharged by the holder's taking a check from and delivering up the bill to the acceptor, in case the check were not paid; because the drawer and indorsers have a right to insist on the production of the bill, and to have it delivered up on payment by them (o). holder of a draft on a banker receive payment thereof in the banker's notes instead of cash, and the banker fail, the drawer of the check will be discharged (p). But if a creditor, on any other account than a bill of exchange, is offered cash in payment of his debt, or a check upon a banker, from an agent of his debtor, and prefer the latter, this does not discharge the debtor, if the check is dishonoured, although the agent fails, with a balance of his principal in his hands to a much greater amount (q). When twenty years have elapsed since the date of a note, &c. payment may be presumed unless the contrary appear (r). And when bills are taken in payment of a debt, and the party sues upon the original consideration, payment of the bills will be presumed till the contrary appear(s). So the acceptance by a creditor of a check in his favour, drawn by his debtor, operates as payment unless dishonoured(t)(1). And it has been holden, that the production of a check drawn by the defendant, payable to the plaintiff and indorsed by him, is evi-

dence of the payment(u), but the mere insertion of the party's name in the

draft would not have that effect(x); and it has been held, that proof of the

(k) Mayer v. Nias, 1 Bing. 311; 8 Moore, 275, (Chit. ij. 1189). See Elaud v. Karr, 1 East, 375; Fair v. M'Iver, 16 East, 130, (Ch. j. 865). But see Lackington v. Combes, 6 Bing. N. C. 71; post, Part II. Ch. VIII. s. v. as to question of set-off under bankrupt act.

(1) In re Goodchild, 2 Law J. 137. (m) Mar. 21; Ward v. Evans, 12 Mod. 521, (Chit. j. 216); Vernon v. Boverie, 2 Show. 395, (Chit. j. 166); ante, 368, 369, Mode of Presentment.

(n) Ante, 368; Russell v. Hankey, 6 T. R. 12, (Chit. j. 530); Paley Prin. & Ag. 8, 87, 144, 186, 187; and see Turner v. Mead, 1 Stra. 416, (Chit. j. 248); Hayward v. The Bank of England, 1 Stra. 550, (Chit. j. 252); Kyd, 43; Mar. 121; See Haynes v. Birks, 8 B. & P. 601, (Chit. j. 690), as to sanctioning usage.

(o) Powell v. Roche, Sittings at Guildhall, before Lord Ellenborough, A. D. 1807, MS.; 6 Esp. 76, (Chit. j. 731); and see Mar. 22;

et ante, 353, note (b), as to recovering at law without producing a bill, &c.; and post, Ch. X. s. i. as to sending a protested bill.

(p) Vernon v. Boverie, 2 Show. 296, (Chit.

J. 166).
(q) Everett v. Collins, 2 Campb. 515, (Ch. j. 818); and see Dent v. Dunn, 3 Campb. 296, (Chit. j. 877); Marsh v. Peddar, Holt, C. N. P. 72, 278, (Chit. j. 945); Tapley v. Masters, 8 T. R. 451, (Chit. j. 625); Wyatt v. Marquess of Hertford, 3 East, 147, (Chit. j. 664).
(r) Duffield r. Creed, 5 Esp. Rep. 52, (Ch.

j. 684); ante, 399, note (y).
(s) Hebden v. Hartsink, 4 Esp. Rep. 46.

(s) Hebden v. Hartsink, 4 Esp. Rep. 46, (Chit. j. 640).
(t) Pearce v. Davis, 1 Mood. & Rob. 365.

(t) Pearce v. Davis, I Mood. & Rob. 365.
 (u) Egg v. Barnet, 3 Esp. 196, (Chit. j. 626).

(x) Egg v. Barnet, 3 Esp. Rep. 196; Pearce v. Davis, 1 Mood. & Rob. 365; Pfiel v. Van Batenberg, 2 Campb. 439, (Chit. j. 797).

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^{(1) {} Where bank bills are received in payment of a debt, which bank had failed prior to their acceptance by the creditor, but such failure was unknown to either party at the time; Held that the creditor must suffer the loss. Scruggs v. Gase, S Yerg. 175. But see Lightbody v. Ontario Bank, 11 Wend. 9, and Harley v. Thornton, 2 Hill, 509, where it was held that in such a case the loss falls on the party paying, and not on the party receiving. }

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delivery and payment of a check to the plaintiff is not sufficient evidence of a debt, in order to support a set-off, unless it be shewn upon what consideration and under what circumstances the check was given (y); and it has even How made been held, that the mere circumstance of a check being made payable to A., amounts to. and of A.'s having received payment of it, is not evidence that the maker gave it to him(z).

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*We have already seen, that a deed reciting the actual payment of money is conclusive at law against the recovery of such money; but not so where from the whole tenor of the deed it shews no such payment was made(a). A judgment without satisfaction is no payment(b).

As bills of exchange differ from other debts in respect of their assignable quality, it has been decided, that a negotiable bill of exchange is not to be considered as paid or satisfied by the drawer's bequeathing a larger legacy to the party in whose favour it was drawn, although such party continued to be holder at the time of the testator's death(c). But in another case it was held, that a debt on a note was discharged by an entry in the testator's hand, that the debtor should pay no interest, nor should he, the testator, take the principal, unless greatly distressed, it being proved that the testator died in affluent circumstances (d).

Credit given to the holder of a bill, by the party ultimately liable, is tantamount to payment; but it is otherwise as to credit given by a party not ultimately liable, as where the credit is given by the banker of the holder, such banker not being a party to the bill(e). Upon this principle it has been held, that if bankers' notes be paid into another banking-house, having transactions with the former, who by the course of dealing and with the consent of the latter, give credit for, instead of giving cash for the amount of the notes, and fail, the latter must bear the loss(f).

(y) Aubert v. Walsh, 4 Taunt. 293, (Chit. j. 860); see also Cary v. Gerrish, 4 Esp. Rep. 9, (Chit. j. 635).

(z) Lloyd v. Sandilands, Gow, C. N. P. 15. A receipt on the back of a bill is evidence of payment. Scholey v. Walsby, Peake R. 25. But the production of a bill of exchange from the custody of the acceptor is not prim's facie evidence of his having paid it, without proof that it was once in circulation after it had been accepted. Pfiel v. Van Batenberg, 2 Campb. 439. And in such case payment is not to be presumed from a receipt indorsed on the bill, unless this receipt is known to be in the handwriting of the person entitled to demand payment, id. See post, Sthly, as to the Receipt for Payment.

(a) Ante, 314.

(b) Tarleton v. Allhusen, 2 Ad. & Ellis, 32. A purchaser of goods accepted a bill for the price, which the vendor indorsed over; the indorsee recovered judgment on the bill against the purchaser, but did not take out execution; afterwards the vendor took up the bill and received a mortgage from the purchaser, from which, however, there were no proceeds: held, that the vendor was not, in point of law, paid

for the goods.
(c) Carr v. Eastabrook, 3 Ves. 561, (Chit. j. 572); 2 Roper, 20.

(d) Aston, executor, v. Pye, C. P. Easter Term, 28 Geo. 3, cited in Eldon v. Smyth, 5 Ves. 350. Judgment for defendant; action for

£300, upon a note of hand given by defendant to his uncle, payable twelve months after date. The cause was tried at the Sittings after Trinity Term. Verdict for the plaintiff, subject to the opinion of the court. The case was this: Thomas Pye, the uncle, made his will the 17th August, 1785, and after his death the executors found the following entry: " Henry James Pye pays no interest, nor shall I ever take the principal unless greatly distressed;" which entry bears date subsequent to the will. Upon the case coming on to be argued, the court advised a reference to the Ecclesiastical Court, who refused to prove the same as a testamentary paper, whereupon the court considered the same as a discharge, and that the paper would operate as a bar against the executors. As to how far the gift of a legacy by the holder of a bill, whose claim is barred by the Statute of Limitations, may be enforced, see 4 Bro. C. C. 227.

(e) Per Patteson, J. in Atkins v. Owen, 4 Nev. & Man. 123, 125; 2 Ad. & El. 35, S. C.; and see the same case 6 N. & M. 309; 4 Ad. & El. 819.

(f) Gillard v. Wise and others, 5 B. & C. 134; 7 Dow. & Ry. 523, (Chit. j. 1276). A. on the 18th March, 1824, paid into the Totness country bank a quantity of notes of a bank at Dartmouth to bear interest from that day. Totness bankers sent the notes early on the following morning to the Dartmouth bank; upon the receipt of them there the latter, according to the usual course of dealing with the Totness

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If money be paid into a banking-house, to be placed to the credit of II. Of another, upon a condition, the money in the mean time to stand in the bank- Payment. ers' books in the name of the party paying it in, it is at his risk; and the 5thly, loss is his, if the bankers fail before the condition is complied with, though How made the other party had written to desire it to be paid in *generally(g). where A. in October authorised his debtor B. to discharge the amount by [*402] paying it to A.'s bankers at Maidstone, and owing to a mistake B. did not then pay it, but B. who kept an account with the same bankers, transferred the same to A.'s credit on Friday, the 9th December, and A. being at a distance did not receive notice of this transfer till the Sunday following, and on that day the bankers failed, it was holden that this was a sufficient payment by B.(h).

But and what amounts to.

With respect to the application of payments in general, where a party 6thly, of owes two or more distinct debts, and pays money generally to the creditor, the Appliwithout directing or shewing his intention that it shall be applied in satisfac- Payments. tion of one of the debts in particular, the creditor may apply it in discharge Separate of any one of the debts he may think fit; and this even to the prejudice of a Accounts. party who was surety for one of the debts(i); and although one of the debts

bankers, gave them credit in account for the amount of the notes. The course of business between the two banks was, that if the Totness bank received notes of the Dartmouth bank in the course of the day, they sent the notes on the following morning to the Dartmouth bank. If the Dartmouth bank received notes of the Totness bank, they, at the close of the business of the day, sent them to the Totness bank. If the balance of the day was in favour of either bank, the account was paid by a bill upon their respective agents in London. The Dartmouth bank continued to pay their notes until the evening of the 19th. Held, as between A. and the Totness bankers, the taking of credit in account for the amount of the Dartmouth notes was equivalent to payment to the Totness bankers, and therefore that A. was entitled to recover the amount from them. Ante, 368, note (p).

(g) Culley v. Short, 1 Cooper Eq. Ca. 148; see ante, 36, as to the liability of an agent paying his principal's money into his bankers' hands.

(h) Eyles v. Ellis, 4 Bing. 112. A mere prospective engagement to give credit does not. however, amount to payment; Peddar c. Watt, Peake Add. 41; ante, 180, note (a).

(i) Goddard r. Cox, 2 Stra. 1194; Bosanquet v. Wray, 6 Taunt. 597; 2 Marsh. 319, S. C.; Kirby v Duke of Marlborough, 2 Maule & S. 18; Plomer v. Long, 1 Stark. R. 153; Cro. Eliz 68; Campbell v. Hodgson, Gow. N. P. C. 74; Hall v. Wood, 14 East, 243, note, and cases in the following notes.

Neale r. Bird, 1 B. & C. 657; 3 D. & R. 158, S. C. A sold goods to B., at whose risk they were shipped for Lisbon, to be paid for by bills drawn upon R. & Co. C. went as supercargo and trustee for A. and B., and was to retain possession of the goods, until the amount of the bills drawn upon R. & Co. was remitted, and then the bill of lading was to be given up to B. B. directed R. & Co. to effect an insurance, which was done at his expense,

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and not in pursuance of any agreement between him and A. The ship, with the goods on board, was captured, and the underwriters paid a total loss to R. & Co., who gave B. credit for the money, part of which they paid over to him, and part to his assignces after he had become bankrupt. R. & Co paid part of the bills drawn upon them, and rejected others; in an action brought against them by A. for money had and received to his use; held, that they were not bound to apply the money paid on the policy to the discharge of the bills drawn by B. for the goods. The defendants, in answer to an application by plaintiff, stated that they could say nothing about some of the bills in question not then accepted, and that their fate must depend upon the state of Williams's account when they become due : Held, that this was not a conditional acceptance, and did not bind R. & Co. to apply to the payment of the bills any money that they might receive on account of Williams.

Where A. gave an accommodation acceptance to B., which B gave to C. as a security for some acceptances of his, and these acceptances, when they became due, were paid by B. out of the produce of other acceptances given by C.; but A.'s acceptance was not given up, though C. was desired not to present it, and A. was informed that it would not be presented. it was held that the original transaction was continued; and A. not calling for the delivery of the bill must be presumed to have allowed it to remain as a security in the hands of C., for such of his acceptances as were subsequent to those for which it was at first given. Wood-roffe r. Hayne, 1 Car. & P. 600, (Chit. j. 1241); and see Attwood v. Crowdie, I Stark, R 483, (Chit. j. 979); ante, 218, note (r), 305, note (y).

The doctrine applies to cases where one of the debts is due on specialty, id.; Western v. Westerne, 2 Vern 606; Peters v. Anderson, 5 Taunt. 597; or where one is a judgment, and

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II. Of Payment plication of Payments. [*403 |

be secured only by an unstamped bill, the holder may apply the payment in discharge of that in preference to another duly stamped bill(k). So although 6thly, Ap- one of two *debts be barred by the Statute of Limitations, the creditor is at liberty to appropriate a general payment in discharge of the debt so bar-And where in an action for the balance of a banking account, the question between the parties was whether a disputed sum, above six years old, had been paid by the plaintiffs with the defendant's authority or not; it was held, that the jury having found that the payment was authorised by the defendant, the plaintiffs were entitled to apply subsequent unappropriated payments of the defendant in discharge of the sum in question, so as to prevent the operation of the Statute of Limitations (m).

> Where A. has a legal claim against B. as the acceptor of a bill of exchange, and has also possession of a mortgage deed, executed by B. to a third person, of which he might compel an assignment in equity, and B. pays money to A. on account, without prejudice to his claim on any securities, the law applies such payment to the bill of exchange(n). And where a promissory note had been given by a surety, for goods to be supplied to his principal, and not in respect of a previously existing debt, and goods were subsequently supplied, and payments were from time to time made by the principal, in respect of some of which discount was allowed for prompt payment, it was inferred in favour of the surety that all these payments were intended in liquidation of the latter account(o).

> If a debtor owe a debt contracted whilst he was a trader within the bankrupt laws, and another debt contracted afterwards, and make a general payment, if nothing be said respecting the application, the law applies the payment to the first demand; and, therefore, the creditor could not take out a commission of bankruptcy in respect of it(p). And if a person have two demand upon another, one arising out of a lawful contract, the other out of a contract forbidden by law, and the debtor make a payment, which is not specifically appropriated by either party at the time of the receipt, the law will appropriate it to the well-founded and legal demand (q). And where both demands are legal, if the payment be wholly unappropriated by either

the other a simple contract debt, Brazier v. Bryant, 2 Dowl. 477; Chitty v. Naish, id. 511; or where the prior debt is merely equitable, Bo-sanquet v. Wray, 6 Taunt. 597; 2 Marsh. 319, S. C.; but a general payment unappropriated by the creditor must be applied to a prior legal, and not to a subsequent equitable demand, Goddard v. Hodges, 1 C. & M. 33; 3 Tyrw. 259, S. C.; and post, 403; see Chit. j. on Contracts, 279; 3 Chit. Com. Law, 133, 134. It is not necessary that the party should expressly declare how the money is to be appropriated; it will suffice if such direction or appropriation can from circumstances be implied. Shaw v. Picton, 4 B. & C. 713; 7 D. & R. 201, S. C.; Chitty v. Naish, 2 Dowl. 511; Marryatt v. White, 2 Stark. R. 101; Peters v. Anderson, 5 Taunt. 597.

(k) Biggs v. Dwight, 1 Man. & Ry. 808, (Chit. j. 1360). A. the acceptor of two bills for 25l. and 50l., both over-due, paid 22l. 10s. to B. the holder, "on account;" B. said, "he wished to have the full amount of the 25l. bill;" A. replied, "he had no more mones then, but would pay some more soon." B. then indorsed on the 25l. bill, "Received 22l. 10s. in part of two bills." Held, that B. might

appropriate the payment to the 251. bill, though void for want of a stamp.

(1) Mills v. Fowkes, 5 Bing. N. C. 455; 7 Scott, 444, S. C. The rule of civil law, that a general payment is to be applied to the more burthensome debt, is unknown to our law. Per Tindal, C. J. ib. As to the time of application, see infra.

(m) Williams r. Griffith, 5 Mee. & W. 800.
(n) Birch v. Tebbutt, 2 Stark. R. 7.

(o) Marryatts v. White, 2 Stark. R. 101. (p) Meggot v. Mills, 1 Ld. Raym. 296; Dawe r. Holdsworth, Peake, 645; but note, these cases were decided upon the supposed

criminality of an act of bankruptcy. See observations in Peters v. Anderson, 5 Taunt. 596,

(q) Wright v. Laing, 3 B. & C. 165; 4 D. & Ry. 783, (Chit. j. 1213); Ribbans v. Crickett, 1 Bos. & P. 264; Ex parte Randleson, 2 Den. & Chit. 534; but see Biggs v. Dwight, 1 Man. & Ry. 308; ante, 402, note (k); Philpot v. Jones, 2 Ad. & El. 41; Cruikshanks v. Rose, 1 Mood. & Rob. 100; that the creditor may apply such payment in discharge of the contract forbidden by law. 7417.1

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party, the law will apply it to the earlier debt(r). In neither case, howev- II. Of er, is the creditor bound to make the appropriation at the time of payment, Payment. but may make his election at any time before action(s); nor is he bound to 6thly, Apnetify the appropriation by any specific act, and, it should seem, that his plication of election is sufficiently manifested by bringing the action (t). And the right of election or appropriation by the creditor is not exercised by him merely Applicaby entries made in his own private books, and is not complete or lost to him tion. *until such election or appropriation has been communicated to the opposite [*404] party(u).

But this doctrine does not apply where there are no distinct accounts, or Joint Acwhere separate accounts are treated as one entire account by all parties, as counts. in an account with bankers, when the payments, advances, and receipts on each side are to be considered as applicable in reduction of the earliest part of the account (v).

Where bankers discounted for the drawer a bill accepted for his accommodation, and after it was dishonoured were informed of the fact, and requested by the drawer not to apply to the acceptor, and afterwards the drawee's account with them was in his favour, it was decided that the balance being once turned in his favour, the bill was to be considered as satisfied, although afterwards the drawer became insolvent, and was much indebted to them in consequence of subsequent advances(x). And where a per-

(r) Per Tindal, C. J. in Mills v. Fowkes, 5 Bing. N. C. 461.

(s) Simson v. Ingham, 2 B. & C. 65; 3 D. & R. 249, S. C.; post, 408, n. (1); Mills v. Fowkes, 5 Bing N. C. 455; 7 Scott, 444, S. C.; Philpot v. Jones, 2 Ad. & El. 41. In the last case it was said by Taunton, J. that the appropriation might be made at any time before the case came under the consideration of a jury. It should seem, therefore, that the application by law can rarely be of any service to the debtor.

(t) Id. ib.; Peters v. Anderson, 5 Taunt. 596.

(u) Simson v. Ingham, 2 B. & Cress. 65; 8 D. & R. 249, S. C.; post, 408, n. (l) Where the consignor of goods appropriates the proceeds thereof in discharge of a particular antecedent debt, he may alter the application of those proceeds at any time before the goods come to the possession of the party whose debt they were to discharge, unless notice has been given to him of the prior appropriation; Hankey v. Hunter, Peake's Add. Ca. 107, per Lord

(v) Clayton's case, cited 1 Meriv. 585, 608; per Bayley, J. in Bodenham v. Purchas, 2 B. & Al. 39, 45; and see other cases, 2 Bridgm. lodex, 586, 587, 2d edit. tit. Trade; Harrison's Index, vols. 2 and 3, p. 893 to 897, 2442, 3d edit. tit. Debtor and Creditor.

As to the obligation of bankers to apply a general payment in discharge of a particular demand, see Kilsby v. Williams, 5 B. & Ald. 816; ante, 821, note (m).

As to the lien of bankers upon securities in their hands for the balance of their general account, see Jourdaine v. Lefevre, 1 Esp. R. 66; Davis v. Bowsher, 5 T. R. 488; Giles v. Perkins, 9 East, 14; Scott v. Franklin, 15 East, 428; Bolland v. Bygrave, Ry. & Moo. 271;

Wilson v. Balfour, 2 Campb. 579; Lucas v. Dorrien, 7 Taunt. 278; 1 Moore, 29, S. C. When a banker's acceptances exceed the cash balance in his hands, he holds collateral securities for value; Bosanquet v. Dudman, 1 Stark. R. 1; ante, 74, note (*); and see further, post, Part II. Ch. VIII. s vi. Bankruptcy.

(x) Marsh and another v. Houlditch, Sittings Westminster, after Easter Term, 1818, before Mr. Justice Abbott. Assumpsit on a bill for 500L, dated 28th June, 1811, payable three months after date, drawn by Joel George Young upon and accepted by the defendant for the accommodation of the drawer, and in-dorsed by him to the plaintiffs. The drawer, on being released, swore as follows:-In June 1811, I re-opened my account with the plaintiff, when the bill for 500/. was discounted. I had other bills with them, they were discounted together, I had credit for that sum in my account; no other bills were discounted for me during this account. Defendant had no consideration whatever for this bill; I was aware of the time of its becoming due. that day I called at defendant's house, he was not at home, I think I found a banker's ticket there. That day or the next, I saw Mr. Fauntleroy, (one of the plaintiffs,) I told him the bill was an accommodation from defendant to me; that I should take it up and requested him not to apply to defendant. He said, very well, and requested me to take it up as soon as I could; he did not like defendant's bills, and had had trouble enough with him. I said he might depend upon me; he said he should look to me and not mind him. The bill was due the 1st of October; I paid in 1041, at the time of the conversation; shortly afterwards the balance was in my farour. In the course of the month I paid in 10001., and did not draw out above 200/. Some months afterwards, for the first

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son who kept cash with a banker, *deposited with him the note of a third person for a sum of money, telling him, at the same time, that it was a note 6thly, Ap-made for his accommodation, and afterwards paid a sum of money into the plication of bank without making any specific appropriation of it; it was held, that this money must be placed, as far as it would go, towards the discharge of the then existing debt, and the banker could not hold the maker of the note responsible for more than the balance remaining due at the time of such payment, although he afterwards trusted his debtor with a further sum of mo-So where the defendant accepted a bill of exchange drawn by C. who indorsed it to his bankers, and they entered it on the credit side of C.'s account, but the bill having been dishonoured, entered it afterwards on the debit side, and a few days after the dishonour, the defendant paid the amount of the bill to C., but omitted to take it out of the banker's hands; and C. subsequently paid into the bank on his general account more than enough to cover all the items of the account preceding the bill item, and that item also; and the bankers, for a space of three years, treated the bill as paid, and they then sued defendant on his acceptance; it was holden, that he was not liable; and that the circumstance of the banker's proving the balance under a commission against their customer, without excepting the bills, afforded evidence that they no longer consider them as subsisting securities (z).

But if a bill or note be intended as a continuing security, then the circumstance of the party depositing it with his bankers, having afterwards at one time had a balance in his favour, will not be deemed a satisfaction of the instrument, but the same may afterwards be enforced against all the parties

for the balance subsequently becoming due(a).

time, I heard again of this bill; I failed in October 1812, heard of application to defendant from him, and went to plaintiffs upon it. In May the bill was at rest completely; 20th and 23d of May I paid monies, but cannot recollect on what particular account. I went to plaintiffs on my general accounts, after defendant had had a letter from the plaintiffs; I had an interview with them, and they agreed I should clear up my account as soon as I could; they wanted security or would make me no more advances; they had a security from me in January, but could make no use of it. Abbott. J. to plaintiffs' counsel, "Unless you can alter the fact of the conversation, it is an answer to the action. The banking account of the drawer with the plaintiffs having, at one time after the bill was due, been in his favour to a larger amount than the bill, the plaintiffs were bound to apply the balance in discharge of that bill, and could not keep it as a security for a fluctuating balance, which might ultimately be-come due to them." Plaintiffs nonsuited. See Bloxsome v. Neale, ante, 219, note (t); Hammersley v. Knowlys, 2 Esp. R. 665; post, 405, note (y); 1 Meriv. 589; Dawe r. Holdsworth, Peake P. 64, 65, S. P.; but see Tinson r. Francis, 1 Campb. 19; Attwood r. Crowdie, 1 Stark. R. 483, and Bosanquet r. Dudman, id. 1; ante, 217, note (m), 218, note (r), 305. note (y), semb. contra.

(y) Hammersley v. Knowlys, 2 Esp. R. 665;

(Chit. j. 611).

(z) Field and others v. Carr, 5 Bing. 13; 2 Moore & P. 46, (Chit. j. 1405); and see Bayl. 5th edit. 317, 318.

(a) Pesse v. Hirst, 10 Bar. & C. 122; 5

Man. & Ry. 88, (Chit. j. 1456); and see Williams r. Rawlinson, 3 Bing. 71; 10 Moore, 362; Ry. & M. 233; Field v. Carr. 5 Bing.

Pease r. Hirst, 10 Bar. & C. 122; 5 Man. & Ry. SS, (Chit. j. 1456). The analysis of that case is thus: A. wishing to obtain credit with his bankers. with his bankers, in 1817 prevailed upon three persons to join him in a promissory note, whereby they jointly and severally promised to pay the bankers or order 3001. The bankers gave A. credit in his pass-book for 300l. on account of the note, and charged him with interest for the same yearly. Upon two of the partners retiring from the banking-house, a balance was struck between the old and new firm, and a promissory note was delivered to the new firm, but not indorsed to them. A. at one time had in the hands of his bankers a balance exceeding the amount of the note. He paid interest to the banking-house annually, and it was held, first, that the note being payable to the firm of the banking-house or order, and being evidently intended to be a continuing security, the makers were liable upon it, notwithstanding a change in the members of the banking-house; and secondly, that an action on the note (the same not having been indorsed) was properly brought in the name of the payee of the note; and thirdly, that the note was not discharged by reason of A. at one time having in the hands of the banker a balance exceeding in amount the sum secured by the note; and fourthly, that the payment of interest within six years by A. on the note was evidence of an acknowledgment by all the joint makers of the note, so as to take the case out of the Statute of Limitations.

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And where A., a solicitor in the country, received from a client a sum II. Of of money, which was to be paid by him into the Court of Chancery on the Payment. client's account, and A. obtained a bill for the sum from a country banker, 6thly, and remitted it to his bankers in London, without stating, the reason for Applicawhich the amount had been paid to him; and at the same time A. was in-tion of debted to his bankers in 450l. for which they held securities, and as to which they kept an account separate from his general account; and A. died; and a few days afterwards the bill became due and was paid, and the bankers carried the amount to A.'s general account; and the bankers, for sometime after they had received notice from the client of the circumstances under which the amount of the bill had been paid to A., continued to keep the accounts separate, *but ultimately deducted the 450l. from the proceeds of the [*406] bill, and paid the balance to his executrix; it was held, that as there was no agreement binding the bankers to keep separate accounts as to the 450l. and the amount of the bill, and as they had no notice till after the amount was received of the purpose for which it was intended to be applied, the client was not entitled to recover from them any part of the proceeds of the bill(b).

If after a partnership is dissolved or new partners are admitted, a party Dissolution who had previous dealings with the old firm deals with the new firm, and still ship. continues the same accounts, he does not thereby discharge the old firm(c); but if payments are made by such party and the account is continued, with an alteration of the partner's name, it seems that such payments are to be carried to the old account(d).

Where the plaintiff carried on dealings in one general and unbroken account with A. one of the defendants, as his banker and army-agent, from a period before 1807 up to 1819, when A. became bankrupt, and a balance was struck, none having been before struck since 1816; and in 1807, the defendant B. became a partner with A., and continued so till 1817, but the partnership was secret and unknown to the plaintiff till A.'s bankruptcy, defendant B. never interfering (to the knowledge of the plaintiff) in the business carried on by A.; and at the expiration of the partnership in 1817, a balance was due from the defendants to the plaintiff; and between the expiration of the partnership and A.'s bankruptcy, A. paid to plaintiff, and also received from plaintiff, several sums; in an action against the defendants for the balance due from them at the expiration of the partnership, (A. having pleaded his bankruptcy and certificate), it was held that B. might consider the sums paid by A. to the plaintiff, after the expiration of the partnership, as paid in reduction of the balance due at the expiration of the partnership, and might take the credit for them, without giving credit for any sums received after the expiration of the partnership by A. on account of the plain-And where A. and B., partners, were indebted to the plaintiff, and after the dissolution of the partnership, B. also became indebted on his separate account to the plaintiff, it was held, that in the absence of any specific appropriation by either party, payments made by B., after the dissolution, must go in reduction of the entire account, and consequently must discharge the earlier items (f). But where a partner in trade was separately liable for a debt contracted by him before the partnership, and was also liable for a copartnership debt, and paid to the creditor money generally on account, it

⁽b) Grigg v. Cocks, 4 Sim. 439. (c) Gough r. Davies, 4 Price, 200.

⁽d) Strange v. Lee, 3 East, 488; Bodenham, v. Purchas, 2 Bar. & Ald. 39. See Newmarch. v. Clay. 14 East, 239; ante, 51, n. (m).

⁽e) Brooke v. Enderby, 2 Brod. & B. 70; 4 Moore, 501, S. C.

⁽f) Smith v. Wigley, 3 Moore & S. 174. (g) Thompson v. Brown and another, Mood & M. 40.

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has held, that the creditor could not apply the money in discharge of the separate debt, it appearing that the money so paid was partnership property (g).

If one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debts, because it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of [*407] the partners has produced *no alteration(h). And where a bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor, and one of the partners died, and a new partner was taken into the firm, and at that time a considerable balance was due from the obligor to the firm; and advances were afterwards made by the bankers, and payments made to them on account of the obligor; and the latter was credited by the new firm with the several payments, and charged with the original debt and subsequent advances, as constituting items in one entire account, and the balance due at the time of the partner's death was considerably reduced, and that reduced balance, by order of the obligor, was transferred by the bankers to the account of another customer, who with his assent, was charged with the then debt of the obligor; and the person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond; it was held, that as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period; and that having received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, the bond was to be considered as paid(i). the same principle, if A., the widow and administratrix of B., continue B.'s trade after his decease, and B. at his death is indebted to C. on a balance of an account, and A. continue to receive goods from and to make payments to C., as B. had done, and she be charged in account by C. with the debt, and the payments made by her to C. exceed the debt, but a balance is ultimately due to C.; B.'s debt is discharged by A.'s payments(k). But where A., B. and Co., country bankers, had a cash account with C. & Co., London bankers, who were in the habit of transmitting to the former monthly statements of mutual debits and credits; and A. died, leaving a large balance due from himself and B. & Co, to C. & Co., who for two months afterwards made no alteration in their own books as to the mode of keeping the account, but continued it as before; and in the interval, money was transmitted to C. & Co. from the country bank sufficient to pay off the balance due from the firm at the time of A.'s death; and during the two months no accounts were transmitted to the country bank; but at the end of that time two separate accounts were sent, one called the old account, made up to the death of A., without giving credit for the money received since his death, in liquidation of the balance at that time due from the firm; and the other called the new account, comprising the two months, giving credit for the sums received during that period; in an action by C. & Co. on a joint and several indemnity bond given by A. and B. against the heirs of A. for the balance due at his death, it

⁽h) Per Bayley, J. in Simson v. Ingham, 2 B. & C. 72; 3 D. & R. 252, S. C.; post, 408, note (1). As to the equitable claim on the estate of a deceased partner in a banking-house,

see Devaynes v. Noble, 1 Meriv. 568.

⁽i) Bodenham v. Purchas, 2 B. & Al. 89.

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was held, that C. & Co. by continuing their own private accounts against A. II. of and B. for two months after the death of A., as theretofore, were not estop- Payment. ped from suing his heirs, as entries in their books did not amount to a complete appropriation by them of the several payments to the old account, such appropriation not being complete until it was communicated to the party to be affected by it; and, therefore, that notwithstanding those entries they were *en- [*408] titled to apply the payments received subsequently to the death of A. to the debt of the new firm (l).

If after a bill or note has become due, the holder for adequate considera-7thly. tion agrees with the drawee of the bill, or maker of the note, to give him time quences of for payment, without the concurrence of the other parties entitled to sue such giving drawee or maker on the bill or note, they will thereby in general be discharged Time to or from all liabilty, although the holder may have given due notice of the non-Acceptor, And if without such *a consideration he take fresh security, as &c.

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(1) Simson v. Ingham, 3 Dow. & Ry. 549; 2 Bar. & C. 65, S. C. Where an account is delivered by an agent, in which he charges himself with a balance, and he continues to receive monies for his principal, his subsequent payments are not necessarily to be first applied to the extinction of the previous balance, when the subsequent receipts are equal to the subsequent payments; Lysaght v. Walker, 5 Bligh, N. S. 1; and see Taylor v. Kymer, 3 Bar. & Adol. **320**.

(m) See 1 Pardess. 423, 424; and reasons in Philpot v. Bryant, 4 Bing. 719; and 1 Moore

& P. 754, (Chit. j. 1887) Anderson v. George, London Sittings after Trin. Term, 1757, cor. Lord Mansfield, Selw. N. P. 9th edit. 390, (Chit. j 346). Indorsee against indorser of a promissory note, presented for payment when due. The maker desired two or three days time to pay it in, and so from time to time, which was given to him by the then holders. Lord Mansfield said, " here is an actual credit given for eight days, and the loss

must fall on the plaintiff; and therefore there was a verdict for the defendant.'

In Tindal v. Brown, 1 T. R. 169, (Chit. j. 431), per Buller, J. "As to giving time, the holder does it at his peril; and that circumstance alone would be sufficient to decide this case. For in no case has it been determined, that the indorser is liable after the holder of the note has

given time to the maker. English v. Darley, 2 Bos. & Pul. 61; 3 Esp. 49, (Chit. j. 620). The holder of a bill sued the indorser and acceptor, and took out execution against the acceptor, and received 1001. from him, and took his bond and warrant of attorney, for payment of the remainder by instalments, with interest and costs, excepting only a nominal sum, to enable him to support actions against the other parties. He then brought on to trial this action against the indorser. Lord Eldon thought that the bargain to give indulgence to the acceptor was a bar, and nonsuited the plaintiff; and on motion for a new trial, the court was clear that the nonsuit was right; because giving time to the acceptor was a pledge that he should have time from all the other parties, and the holder had no right to give such pledge, and yet hold the other parties liable. Per Lord Eldon, C. J. "It is very clear that the holder of a bill may, at his election, sue any or all of the parties to it;

and that if they all become bankrupt, he may prove against the estates of all, unless he receive part of the debt from any one; and although the debt be reduced from time to time by dividends. no part of the proof shall be expunged under any of the commissions, till 20s. in the pound have been received. As long as the holder is passive, all his remedies remain; and if any of the parties be discharged by the act of law, as by an insolvent debtor's act, that operation of law shall not prejudice the holder. spect to Hayling v. Mullhall, (post, 418, n. (k), it may be observed, that the marginal abstract of that case is incorrect; for it appears from the report, that the person first sued was a subsequent indorser: had the plaintiff first sued the prior indorser, and discharged him from execution, it would have afforded sufficient objection to an action against a subsequent indorser. If holder a enter into an agreement with a prior indorser in the morning not to sue him for a certain period of time, and then oblige a subseauent indorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued. the case Ex parte Smith, Lord Thurlow, after consulting with all the judges, was of opinion that the holder of a bill, by entering into a composition with the acceptor, discharged the indorser; and accordingly ordered the proof against the estate of the latter to be expunged, proceeding on the ground of the acceptor's lia-bility being varied by the act of the holder. We all remember the case where Mr. Richard Burke being co-surety for an annuity, the grantee gave time to the principal, and yet argued that Mr. Burke was not relieved thereby, though the principal was: but it was answered that the grantee could make no demand on the the co-surety, because he must, by so doing, enforce a payment from the principal, contrary to the agreement. Here the plaintiff, having taken a new security from the acceptor, has discharged the defendant."

Clark v. Devlin, 8 Bos. & Pul. 363, (Chit. Per Lord Alvanley, C. J. " If the holder of a bill, without the knowledge of the other parties, give time to the acceptor, he cannot afterwards call on the other parties without an injury to the person to whom he has given time. In such case, therefore, those parties

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a renewed bill or a cognovit, or warrant of attorney, and also agree to give time, he thereby discharges the drawer and indorsers (n). It is said however, that the merely taking fresh security payable at a future day, but without a bar-Consequences of gain to give time, will not discharge the drawer, it appearing that the second security was taken only as a collateral security (o). But it is submitted, Time to or that the mere receiving further security payable at a future day, would in general imply an engagement to wait till it becomes due. And in a late case(p) it was held, that if A., the drawer of a bill, indorse it to B., and B. afterwards indorses it back to A., who indorses it to C.; the taking of a cognorit by C. from A. discharges B., provided the identity of A. as the first and last indorser of the bill be established, and C.'s knowledge of such identity be shown.

There is no obligation of active diligence on the part of the holder to sue · the acceptor or any other party, and he may be passive and forbear to sue as long as he chooses; but he must not so agree to give time to the accep-

will be discharged. But a man is not bound to seek his remedy against the acceptor if he sign judgment against him, he will not be bound to prosecute that judgment." Per Chambre, J. "The acceptor of a bill is to be considered as the principal debtor, and the other parties as sureties only; the holder, therefore, who is the creditor, ought not so to negotiate with the acceptor as to prejudice the remaining parties to the bill. On this ground English v. Darley proceeded. If a creditor give time to the principal debtor, the collateral sureties are discharged, both at law and in equity. But in this case defendant having assented to the payment by instalments, cannot now complain of being prejudiced by the conduct of the holder. Rule discharged. See post, 415.

Gould v. Robson, 8 East, 576, (Chit. j. 735). The holder of a bill, upon its becoming due, received part payment of the acceptor, and took a bill from him at a future short date for the remainder, and agreed to keep the original bill in his hands in the interion as a security. He now sued the defendant as indorser, and this was relied upon as a defence. Lord Ellenborough thought at the trial, that it did not amount to giving time to the acceptor and the plaintiff had a verdict; but upon motion for a new trial, he and the court were satisfied that it did, and a nonsuit was entered. Lord Ellenborough said, "How can a man be said not to be injured, if his means of suing be abridged by the nct of another? If the plaintiffs, holders of the bill, had called immediately upon the defendant for payment, as soon as the bill was dishonoured they might immediately have sued the acceptor and the other parties on the bill. I had some doubts on the trial, but am inclined to think now that time was given. The holder has the dominion of the bill at the time: he may make what arrangements he pleases with the acceptor, but he does that at his peril; and if he thereby alter the situation of any other person on the bill, to the prejudice of that person, he cannot afterwards proceed against him. As to the taking part-payment, no person can ob-ject to it, because it is in aid of all the others who are liable upon the bill; but here the holder did something more, he took a new bill from the acceptor, and was to keep the original

bill till the other was paid. This is an agreement that in the mean time the original bill should not be enforced; such is at least the effect of the agreement, and therefore I think time was given."

Smith v. Beckett, 13 East, 187, (Chit. j. 816). Where the defendant lent his indorse ment on a promissory note to the drawer, which note was payable on demand, for the purpose of enabling him to raise the money on that security from the plaintiffs, his bankers, who agreed to make advances thereon for six months, held, that the bankers, who had renewed their advances at the end of the six months, without the knowledge or consent of the defendant, could not recover upon the note thus indorsed by him, without proof of demand on the drawer, and a regular notice of the dishonour to the defendant.

(n) See last note. (a) Pring v. Clarkson, 1 Bar. & C. 14; 2 Dowl. & Ry. 78, (Chit. j. 1153); but see observations, Bayl. 5th edit. 345; Bedford v. Deakin, and Bickley v. Hickman, 2 Stark. R.

178, (Chit. j. 1040). (p) Hall v. Cole, 4 Ad & Ellis, 577; 6 Nev. & M. 124; 1 Har. & W. 722, S. C. There the declaration stated that A. drew a bill payable to his own order on W.; that "the said A." indorsed to defendant, who indorsed to "the said A." who indorsed to plaintiff, and that W. did not pay, of which defendant had notice. Defendant plended that after the dis-honour the plaintiff, without defendant's authority, took from "the said A." a cognovit in an action commenced by the plaintiff against A. for the recovery of the sum specified in the bill, and by the cognovit agreed to give, and did, without defendant's authority, actually give, to A. longer time for payment than the time in which plaintiff might have obtained judgment against A.; and it was held that, upon this declaration, it must be intended that the person to whom defendant indorsed was, and was known by plaintiff to be, the person who indorsed to defendant; and that the plea therefore was sufficient, though it did not state in what character A. had been sued by the plaintiff, the action against defendant being in any case in fraud of the cognovit.

tor as to preclude himself from suing him, and suspend his remedy against him in prejudice of the drawer and indorsers (q)(1). This rule is founded Payment. on the principle that the holder, by entering into a binding engagement to 7thly, give time to the acceptor, renders him less *active in endeavoring to satisfy Consethe bill than he probably would otherwise be, if he continued liable to an quences of immediate action at the suit of the holder; besides, if a holder agree to give Time to or indulgence for a certain period of time to any one of the parties to a bill, this Releasing takes away his right to call upon that party for payment before the period &c. expires; and not only to call upon him, but on all the intermediate parties; [*410] for otherwise, if he were to oblige them to pay the bill, they could immediately resort against the very person whom the holder has indulged, which would be inconsistent with his agreement, and a fraud upon him(r). unless the agreement to give time be made with some party to the bill it will not operate as a discharge of any of the parties thereto(s). In courts of equity the now settled doctrine is, that giving time to a principal without the concurrence of a surety, discharges the latter (t)(2), and if the obligee of a bond with a surety, without communication with the surety, take notes from

(9) Per Lord Eldon, in Wright v. Simpson, 6 Ves. 734; see also Trent Navigation Company e. Harley, 10 East, 40; Clark e. Wilson, 3 M. & W. 208; post, 416, note (r). The same rule applies to the case of a guarantee, Combe r. Wolfe, S Bing. 156; 1 Moore & S. 241, S. C.; but see Carr r. Brown, 7 bing. 508; 5 Law J. 12, S C.

(r) Per Bayley, J. in Claridge v. Dalton, 4 Maule & Sel. 232, (Chit. j. 924); and see Hall v. Cole, 4 Ad. & El. 577; ante, 409,

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(s) Lyon v. Holt, 5 Mee. & W. 250. To a declaration by the indorsee of a bill of exchange alleged to have been indorsed by the drawer to the defendant, by the defendant to W. and by W. to the plaintiff, the defendant pleaded, that the bill was indersed by the defendant to II. for his accommodation and without consideration; that II. indorsed it to W.; that the alleged indorsement by the defendant to W., in the declaration mentioned, was the said indorsement by the defendant to II., and by him to W.; and that after the bill became due and was dishonoured, the plaintiff and II. stated an

account respecting this and other dishonoured bills, on which H, was liable to the plaintiff. and agreed to take from B. renewed bills in lieu of them, and not to press any parties for payment of the original bills during the currency of the latter, and averred that the substituted bills were originally drawn and accepted and delivered to the plaintiff, without the defendant's knowledge or consent, and that the plaintill gave time thereby to the parties in the original bills. At the trial the agreement alleged in the plea was proved in substance, but it appeared that II. did not indorse the bill to W. It was held, that this indersement was a material part of the defence, since, unless H. was a party liable on the bill, the agreement between the plaintiff and II. was not such a giving of time as to discharge the defendant; and therefore that the plea was not proved, and the plaintill was entitled to a verdict.

(1) The Covernor and Company of the Bank of Ireland v. Beresford, 6 Dow, 333, (Chit. j. 1952); and Arther v. Hale, 4 Bing. 464; 1 Moore & P. 2-5, S. C.; and see Tidd, 9th

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An agreement by which the holder of a promissory note gives time to the maker, will discharge the indorser, if it be to the prejudice of the latter. Wood c. Jetierson County Bank, 9 Cowen, 194. { Hill r. Bostick, 10 Yerg 410. And if no express agreement by the holder, to give time to the principal debtor is proved, yet if he take a collateral security payable at a future time, in the absence of proof to the contrary, an engagement to wait until the security becomes

due will be presumed. Ibid. }

An agreement between the creditor and principal debtor for delay, or otherwise changing the nature of the contract to the prejudice of the surety, in order to discharge the latter, must be made on sufficient consideration, and binding in law upon the parties: a mere agreement by the holder of a bill with the drawer, for delay, without consideration, though without any communication with, or assent of the inderser, will not discharge the latter, after his responsibility has been fixed by due notice of dishonour. M'Lemore v. Powell, 12 Wheat 554.

(2) Inderser of a promissory note, the surety of the maker, is respectible only on condition of

⁽¹⁾ To the same effect are several cases decided in the United States. The people r. Janson, 7 John. Rep. 332. Hunt r. The United States, 1 Gal is. Rep. 32. See Doming r. Norton, Kirby's Rep. 397. Ludlow r. Limond, 1 Caines' Ca. t. Walsh r. Baillie, 10 John. Rep. 180. Rathbone r. Warren, 10 John. Rep. 587. Comm. of Berlis Co. r. Ross, 3 Binn. 523. King v. Baldwin, 2 John. Cha. Rep. 554 Burn v. Poaug's Adm., 3 Dessaus, Cha. Rep. 604. Butler v. Hamilton, 2 Dessaus, Cha. Rep. 230. Rutledge v. Greenwood, 2 Dessaus, Cha. Rep. 589. { Huie r. Bailey, 16 Louis. Rep. 213. }

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the principal, and give further time, the surety would in some cases be discharged(u); though he would not be so at law(x), (except in the case of bail(y),) for a specialty is not discharged by a mere simple contract(z).

*The acceptor of a bill is primarily liable; and the drawer and indorsers may be considered in the nature of sureties for the performance of his act(a). Therefore the taking of a bond or a negotiable security, payable at a future distant day, from the acceptor of a bill or maker of a note, without the assent of the other parties thereto, would discharge them from liability (b). And where the indorsce of a bill having sued the acceptor to judgment, and taken out execution, received of him a sum of money in part-payment, and took his security for the residue, with the exception of only a nominal sum, it was holden, that he was thereby precluded from afterwards suing the indorser(c); and the letting such acceptor out of custody on a ca. sa. would have the same effect(d); and if the holder of a bill of exchange, when due, after taking part-payment from the acceptor, agree to take a new acceptance from him for the remainder, payable at a future day, and that in the mean time the holder should keep the original bill in his hands as a security; such agreement amounts to giving time and new credit to the acceptor, and discharges the indorser, who was no party to such agreement, though

(u) Rees v. Berrington, 2 Ves. jun. 540, (Chit. j. 544); 6 Ves. 805; Skip v. Huey, 3 Atk. 91; 9 Mod. 439, (Chit. j. 308, 309); Bac. Ab. tit. Obligation; and id. vol. vii. tit. Obligation, 506; English v. Darley, 2 Bos. & P. 62; 2 Esp. 49, (Chit. j. 620); ante, 408, nute (m).

Rees v. Berrington, 2 Ves. jun. 540, (Chit. j. 544). Rees became surety in a joint and several bond, conditioned for the payment to the obligee of a certain sum, with interest, by two instalments; the first on the 31st December, 1789, and the second on the 31st December, 1790. In September 1790, the whole sum being unpaid, the obligee took promissory notes from the principal obligor for payment of the debt by instalments at extended periods, which notes were afterwards exchanged for others, payable at more distant days. This arrangement was without the knowledge of Rees. The principal obligor afterwards became bankrupt, and the executor of the obligee sued Rees, the surety; and on a bill filed for an injunction, the Chancellor held that the surety was discharged by this indulgence having been given without his consent to the principal. Vide English r. Darley, 2 Bos. Pul. 61; ante, 408, note (m).

As to when a surety by bond or by simple contract is discharged by giving time in general, see Tidd, 9th edit. 1260.

(x) Davy v. Prendergrass, 5 B. & Al. 187; 2 Chit. 336, S. C.; Drake v. Mitchell, 3 East,

251, (Chit. j. 665).
(y) Willison v. Whitaker, 2 Marsh. 383; 7
Taunt. 53, S. C; Brickwood v. Anniss, 5

Taunt. 614; 1 Marsh. 250, S. C. The plaintiff, after final judgment, having taken bills payable at a future day, in satisfaction of the debt, the Court directed an exoneretur to be entered on the bail-piece: because the principle is, that where the plaintiff has disarmed himself from proceeding against the principal, the bail are discharged; but where he has not, by taking a security payable at a future day, precluded himself from proceeding, he may, although he has agreed without consideration to give time to the principal, proceed against the bail. See also Thomas v. Young, 15 East, 617; and Willison v. Whitaker, 7 Taunt. 54, 55; 2 Marsh. 383, S. C; 8 Taunt. 28; 4 B. & Ald. 91; 7 Price, 223; Tidd, 9th edit. 1260. But a surety is not discharged by neglect to give him notice of the extent of the defalcation of the prin-

cipal, Goring v. Edmunds, 6 Bing. 94.
(z) See per Tindal, C. J. in Combe v. Wolfe, 8 Bing. 156, 161; 1 Moore & S. 241, S. C.
(a) Clark v. Devlin, 3 Bos. & Pul. 363,

866, (Chit. j. 674); ante, 408, note (m).
(b) Claxton v. Smith, 3 Mod. 87, (Chit. j. 167, 168, 171); but see ante, 409, note (o). (c) English r. Darley, 2 Bos. & Pul. 61; 3 Esp. Rep. 49, (Chit. j. 620); infra; Clark r. Devlin, 3 Bos. & Pul. 363, (Chit. j. 674); ante, 408, note (m); Walwyn r. St. Quintin, 1 Bos. & Pul. 652; 2 Esp. 514, (Chit. j. 578); Exparte Wilson, 11 Ves. 411, (Chit. j. 720).

(d) Id. ibid.; 2 Swanst. 190, for principle,

sed vide Pole v. Ford, 2 Chit. Rep. 125, (Chit. j. 958), where it was held, that giving time to the acceptor after judgment against him, did not discharge the drawer.

the prosecution of the maker with due diligence, to insolvency. Morrison's Exrs. v Taylor, 6 Monroe's Rep. 89.

An admission that an obligor was insolvent at the time of making the obligation, held not to be an admission of his insolvency when it fell due. Hume v. Long, Id. 119.

The same diligence against the principal is required in chancery, to charge the assignor as at law. Ib.

the drawer might have had no effects in the hands of the acceptor (e). Similar indulgence to a drawer or a prior indorser would also discharge all subsequent parties (f)(1). And where the defendant lent his indorsement on a 7thly, promissory note to the drawer, which note was payable on demand, to enable greenest of

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(e) Gould v. Robson, 8 East, 576, (Chit. j. to recover against a subsequent one."
735); ante, 409.
So also in English v. Darley, 2 B.

f) Id. ibid.

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Per Bayley, J in Cluridge v. Dalton, 4 Maule

& S. 232, 233, (Chit. j. 934).

Smith v. Knox, 8 Esp. Rep. 46, (Chit. j. 617). Per Lord Eldon, "It is said that the holder may discharge any of the indorsers after taking them in execution, and yet have recourse to the others. I doubt the law as stated so generally. I am disposed to be of opinion, that if the holder discharge a prior indorser, he will find it difficult

to recover against a subsequent one."

So also in English v. Darley, 2 B. & P. 61, (Chit. j. 620), ante, 408, note (m), Lord Eldon, Acceptor, after adverting to the inaccuracy of the marginal abstract of the case of Hayling v. Mullhall, said, "Had the plaintiff first sued a prior indorser, and discharged him from execution, it would have afforded a sufficient objection to an action against a subsequent indorser." See Hayling v. Mullhall, 2 Bla. Rep. 1235, (Ch. j. 400); post, 418, note (k).

(1) In various cases decided in the United States, the same principles have been recognized. Scarborough v. Harris, 1 Bay's Rep. 177. Robertson v. Vogle, 1 Dall. Rep. 252. James v. Badger, 1 John. Cas. 131. Kenworthy v. Hopkins, 1 John. Cas. 107. If the holder receive part payment from the maker when a note becomes due, and before giving notice to the indorser, allows further credit to him, the indorser is discharged. Cain v. Colwell, 3 John. Rep. 384. See Lynch v. Reynolds, 16 John. Rep. 42. But if the holder receive part payment and give due notice to the indorser, the latter will be holden for the payment of the residue. James v. Badger, 1 John. Cas. 131. Kennedy v. Motte, 3 M'Cord, 13. And it has been declared that any credit given by the holder of a bill to the drawer, acceptor, indorser, or promissor, is a consent to hold the demand upon their responsibility, and that the holder has no remedy afterwards but against them, where the circumstances of the transaction have rendered them liable absolutely, and at all events. Shaw v. Griffith, 7 Mass. Rep. 494. But it is admitted that this rule does not hold where the acceptor is discharged by the holder, and the drawer is sued, having in his hands funds of the acceptor, which have been retained for the express purpose of paying the bill. Sargeant v. Appleton, 6 Mass. Rep. 55. And there seem to be other cases in which the rule has received qualifications. See Hubby v. Prown, 16 John. Rep. 70.

The holder having protested a bill for non-acceptance, and given due notice to the other parties to the bill, took collateral security from the drawer, and afterwards upon learning that it was probable that the drawee would pay the bill at maturity, relinquished the security. The greater part of the bill was paid at maturity, and it was regularly protested for non-payment of the residue. It was held, that as the holder had not given time to the drawer, but had merely taken security without giving new credit, the indorser was not discharged. It was in effect no more than if the holder of a bill or note had taken part payment from one of the parties. Hurd v. Little,

12 Mass. Rep. 502.

If the holder of a note release one of the joint makers, excepting from such liability as he may be under to the indersers, the latter cannot in an action by the holder against them, set up such release as a discharge. Stewart v. Eden, 2 Caines' Rep. 121.

A part payment by one joint promissor is no discharge of the others from payment of the residue, nor can it be averred as a sufficient consideration for such discharge. Ruggles v. Patten, 8 Mass. Rep. 480.

A several suit and judgment against one joint promissor of a note, is no bar to a joint action against both, upon the same note. Sheehy r. Mandeville, 6 Cranch, 253. But see contra Black r. Smith, 9 Serg. & Rawle, 142. Robertson c. Smith, 18 Johns. Rep. 459. Ward r. Johnson, 13 Mass. Rep. 148.

The holder of a negotiable note, who gives further time to, or enters into a new contract with

the drawer, does not thereby discharge the indorser. Bennet c. Maule, Gilmer, 205.

It seems, that if the holder of a note who has sucd the maker, obtain a judgment, and agree in consideration thereof, not to issue execution before a certain day, before which day he could not, by the practice of the court, have otherwise obtained a judgment; this is not such an indulgence to the maker as will discharge the indorser. Hallett r. Holmes, 18 Johns. 28.

Where the indorser was also a party to the instrument by which the maker was released, and joined in the release as a creditor of the maker, it was held under the circumstances, that the indorser was not discharged by the release of the maker. Bruen c. Marquand, 17 Johns. 58.

To discharge a surely on the ground of the omission of the creditor to proceed against the principal debtor when requested so to do, it must appear that the principal was solvent at the time of the request, within the jurisdiction of the state in which the suit against the surely is instituted, and that the creditor, without any reasonable excuse, neglected or refused to proceed, until the principal debtor became insolvent and unable to pay. Warner v. Beardsley, 8 Wend. Rep. 194.

Surety is not released by the long delay of the obliged to sue the principal, who in the time becomes insolvent and removes out of the state. Stout v. Ashten, 5 Monroe's Rep. 252.

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him to raise money on that security from the plaintiff, his banker, who agreed to make advances thereon for six months, it was held, that the bankers, who had renewed their advances at the end of the six months without the knowledge of the defendant, could not recover upon the note thus indorsed by him, without proof of the demand on the drawer, and a regular notice of the disgiving Time to or honour to the defendant; and the taking a cognovit, payable by instalments at Releasing a distant time, might discharge the drawer(g). And as it is a rule of law that a debt once released or suspended by the act of the party is always so(h); the releasing an acceptor or other prior party to a bill or note, would discharge a subsequent party; and where in an action on a promissory note against a party who has indorsed it for the accommodation of the maker, it appeared that the plaintiff, the indorsee, had signed an agreement to accept from the maker of the note five shillings in the pound, in full of his demand, on having a collateral security for that sum from a third person, it was held, that this dis-[*412] charged the defendant(i). *On the other hand, where the creditors of an insolvent agreed, by an instrument not under seal, that they would accept, in full satisfaction of their debts, twelve shillings in the pound, payable by instalments, and would release him from all demands; and one of the creditors,

who signed for the whole amount of his debt, held, at the time, as a security for part, a bill of exchange drawn by the debtor, and accepted by a third person; it was held, the money due on this bill having been afterwards paid by the acceptor, that the creditor might retain it, the agreement of composition not containing any stipulation for the giving up of securities, and the effect of it not being to extinguish the original debt(k).

But the mere change or addition of securities, without expressly relinquishing the original debts, nor suspending for a time the creditor's right of action, will not, either at law or in equity, discharge a surety or party to a And accepting a mere collateral security from the acceptor, will not discharge the other parties to a bill; and where a bill of exchange having been dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first, and the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards for a valuable consideration indorsed it to the plaintiff; it was held, that the second bill was merely a collateral security, and the receipt of it by the payee did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer (m).

Where B. being indebted to A. procured C. to join with him in giving a joint and several promissory note for the amount, and afterwards, having become further indebted, and being pressed by A. for further security, by deed (reciting the debt, and that for a part, a note had been given by him (B.) and C., and that A. having demanded payment of the debt, B. had requested him to accept a further security), assigned to A. all his household goods, &c. as a further security, with a proviso, that he should not be deprived of the possession of the property assigned until after three days notice; it was held that this deed did not extinguish or suspend the remedy on the note, but that

(Chit. j. 998); see Nicholls v. Norris, 3 B. &

Ad. 41, post, 420, note (u).
(1) Boultbee v. Stubbs, 18 Ves. 20; 5 Dow, 234; 3 East, 251; Pring v. Clarkson, 1 B. & C. 14; 2 Dow. & Ry. 78, (Chit. j. 1153);

ante, 403, note (a).
(m) Pring v. Clarkson, 1 Bar. & C. 14; 2
Dow. & Rv. 78, (Chit. j. 1153); ante, 403.

note (o).

⁽g) Smith v. Becket, 13 East, 187, (Chit. j. 816); The King v. Sheriff of Surrey, I Taunt. 161; Smith v. Knox, 3 Esp. R. 46, (Chit. j. 617); and Willison v. Whitaker, 2 Marsh. R. 883; 7 Taunt. 53, S. C.; ante, 410, note (y).

⁽i) Lewis v. Jones, 4 B. & C. 506; 6 Dow. & Ry. 576, (Chit. j. 1265). See a learned note, 4 B. & C. 515, 516, collecting all the cases. (k) Thomas v. Courtnay, 1 B. & Ald. 1,

A. might, notwithstanding the deed, suc C. at any time(n). And a compo- 11. Of sition with the acceptor or other party to a bill, reserving the remedy for the Payment. remainder against the other parties, and made with their consent, would not, 7thly, either at law or in equity, discharge such other parties(o).

As already observed (p), there is no obligation on the part of the holder to quences of use active diligence, and after regular notice of the non-payment of a bill, the Time to or holder may tacitly forbear to sue the acceptor, provided he do not absolutely Releasing agree for sufficient consideration to give a precise time (q); and may receive $\overset{\text{Acceptor}}{\&c}$. **proposals** for a security without prejudicing the claims on the other parties (r), and it has even been holden, *that agreeing (after a bill has become due and [*413] been regularly protested for non-payment, and notice thereof given) not to press the acceptor, will not discharge the drawer(s); and it is clear that such an agreement entered into with a third person not a party to the bill, will not have the effect of discharging any of the parties to the bill(t). the holders of a bill of exchange which had been refused payment by the acceptor, gave notice thereof to the drawers, but informed them that they had reason to believe it would be taken up in a few days, and offered to retain the bill till the end of the week, unless they received their instructions to the contrary, it was held, that such conduct did not discharge the drawer, although no further notice of non-payment was given (u).

It seems that in the older cases, any absolute and distinct agreement to give the acceptor time, was considered as discharging the drawer and indorsers, without any distinction whether or not such agreement was founded on a sufficient consideration to bind the party making it, because, at least,

(n) Twopenny v. Young, 3 Bar. & C. 268; 5 Dow. & Ry. 259, (Chit. j. 1215); and see Dean v. Newhall, 8 T. R. 168.

(0) But it would be otherwise if without their assent, see Boultbee v. Stubbs, 18 Ves. 20; and sec Lewis r. Jones, 4 B. & C. 507; 6 Dow. & Ry. 576, (Chit. j. 1265).

(p); Ante, 409.

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(q) Second resolution in Walwyn v. St. Quintin, 1 Bos & P. 652; 2 Esp. 514, (Chit j. 578); Selw. N. P. 9th edit. 363; Wright v. Simpson, 6 Ves. 734.

(r) Hewet v. Goodrich, 2 Car. & P. 468, (Chit. j. 1315); Walwyn r. St. Quintin, 1 Bos. & Pul 652; 2 Esp. R. 514, (Chit. j. 578). In an action by indorsees against the drawer of a bill, it appeared that after the bill had become due and been protested for non-payment, though no notice thereof had been given to the defendant, he having no effects in the hands of the acceptor, the plaintiffs received part of the money on account of the indorser, and that to an application from the acceptor, stating that it was probable he should be able to pay at a future period, they returned for answer that they would not press him. It was urged, that either of these facts discharged the drawer; but the court, after argument and time taken to consider, held that they did not, and awarded the postca to the plaintifis. Eyre, C. J. said, "That had this forbearance to sue the acceptor taken place before noting and protesting for non-payment, so that the bill had not been demanded when it was due, it is clear that the drawer would have been discharged; it would have been giving a new credit to the acceptor. But that after protest for non-payment, and notice to the drawer, or an equivalent to a notice, a right to sue the

drawer had attached; another holder was not bound to sue the acceptor; he might therefore forbear to sue him." Manning's Index, 72.

(s) Walwyn v. St. Quintin, 1 Bos. & P. 652, supra; 2 Esp. 515, (Chit. j. 578).

(t) Lyon v. Holt, 5 M. & W. 250; ante,

410, note (s).

(u) Forster v. Jurdison, 16 East, 105, (Chit. 862). The plaintiffs were indorsees of a bill of exchange drawn by the defendants on J. L. and accepted by him. The bill was duly presented for payment and dishonoured. but the acceptor requested the plaintfls to keep the bill a week, and he should be able to pay it. The plaintiffs gave the defendants notice of the dishonour, and of the acceptor's request, and added, they would keep the bill till the end of the week, unless they heard from them to the contrary. It was contended for the defendants, that the plaintiffs should have given them notice, at the end of the week, of the bill not having been paid, and by which laches they were discharged. Wood, B. before whom the cause was tried, was of that opinion, and a verdict was found for the defendants. A rule for a new trial was afterwards obtained, and on cause shewn, the court were of opinion that the plaintiffs had done every thing which was incumbent upon them to give themselves a title under the bill, and that by their letters, they at most took upon themselves an agency on the part of the defendants to get payment of the bill, and in that character they continued to hold for the defendants, and that after the notice received by the defendants, the latter were bound to look after the acceptor, and the rule was made absolute.

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the acceptor relying on the honour of the party making it, and that he would abide by it, would naturally relax in his endeavours to pay the bill before the enlarged time, and in the mean time might pay less accommodating hold $e_{is}(x)$. But of late a distinction has been taken, and a new doctrine has sprung up and been acted upon, namely, that even an express agreement not giring sprung up and been acted upon, namely, that even an express agreement not Time to or to sue, made after giving notice of non-payment, but without sufficient con-Releasing sideration, and without taking any security, being nudum pactum, will not discharge the other parties (y). If the holder has not entered into such an 1 *414] agreement *as to disable himself from suing the acceptor, he has not discharged the other parties (z). And, therefore, where the executor of the acceptor of a bill verbally promised to pay the holder out of her own estate, provided he would forbear to sue, and the holder forbore to sue in consequence, it was held, that as the promise was void by the statute against frauds, the drawer of the bill was not discharged by the holder's having promised to give time, and having delayed to sue under such circumstances(a). And it has been decided, that where all parties have had due notice of the dishonour of a bill, a subsequent indorser is not discharged by a treaty between the attorney of the holder and the drawer and acceptor, that the holder should wait a given time for the payment of the balance, in consideration of receiving from the acceptor and prior indorser, by a certain time, a stipulated proportion of the amount, a part only of which proportion was afterwards paid, although the subsequent indorser had no notice of such treaty or the result, nor was informed of the payment of any part of the money due on the bill, or of the ultimate non-payment of the balance till some months after the original dishonour of the bill(b).

And though we have just seen, that taking a cognorit pavable at a very distant time, might discharge the drawer and indorsers(c); it would be otherwise if a cognovit or warrant of attorney be taken without giving time (d). And it should seem that the taking from an acceptor, after action brought against him, a warrant of attorney payable by instalments, the last of which would fall due before the time when, in the ordinary course of proceedings, the plaintiff could have obtained judgment against the acceptor, will not discharge the other parties to the bill; especially if it be taken after action com-

(x) See cases, ante, 408, note (m).
(y) Semble Walwyn v. St. Quintin, 1 Bos. & P. 655; 2 Esp. 515, (Chit. j. 578); Dean v. Newhall, 8 T. R. 168; Fitch v. Sutton, 5 East, 230; 1 Smith, 415, S. C.; Carstairs v. Rolleston, 5 Taunt. 551; 1 Marsh. 207, (Chit. 100). j. 909); Bayl. 5th edit. 342; Clarke v. Wilson,

3 M. & W. 208, post, 416, note (r) Arundel Bank v. Goble, K. B. 1817. Action by indorsee against drawer of a bill. The plaintiffs were the holders when the bill became due, and duly presented the same to the ac-ceptor for payment, and wrote a letter to the defendant in due time, informing him of the dishonour, but that from the promise of the acceptor they expected the same would be shortly paid. Afterwards the acceptor applied to them for indulgence for some months. They in reply wrote to the acceptor, that they would give him the time, but that they should expect in-The cause was tried on the Home Circuit, before Burroughs, J. when it was contended by Nolan and Comyn for the defendant, that this indulgence to the acceptor dishcharged the drawer; but the jury found a verdict for the plaintiff. On motion to the Court of K. B. for

a new trial, the court held, that as no fresh security was taken from the acceptor, the agreement of the plaintiffs, to wait without consideration, did not discharge the drawer, because the acceptor might, notwithstanding such agreement, be sued at the next instant, and that the understanding that interest should be paid by the acceptor made no difference. Rule refused. The accuracy of this report of the case was recognised in Philpot v. Briant, 4 Bing. 721; 1 Moore & P. 754, (Chit. j 1337); see also Willison v. Whitaker, 2 Marsh. 383; 7 Taunt. 53, S. C; and Brickwood v. Anniss, 5 Taunt. 614; 1 Marsh. 250, S. C.; ante, 410, note (y); and Bayley, 5th edit. 341, S. P.

(z) Hewet and another r. Goodrich, 2 Car.

(2) Hewer and anomaly to the September of the September o

(b) Badnall r. Samuel, 3 Price, 521, (Chit. j. 985).

(c) Aute, 409.

(d) Ayrey v. Davenport, 2 New Rep. 474. (Chit. j. 736); Price c. Edmunds, 10 B. & C 578, (Chit. j. 1488).

menced against such acceptor, and also against such other parties(e). In II. Of another case it was held, that taking a cognovit of the acceptor after action Payment. brought against him, and by that giving him three weeks time before enter-7thly, ing up judgment, is not such a giving time as will discharge the other parties Conseto the bill (f). And it has been held, that after action brought against a principal debtor on a note, the taking a *cognorit* from him for the debt, payable Time to or by instalments, with a stipulation that execution might issue for the whole on Releasing one default, will not discharge a co-maker of the note, who was a surety, as some of the instalments were payable before the *plaintiff, by adverse pro-[*415] ceedings, could have obtained execution(g); and in another case it appears to have been considered, that giving time to an acceptor, after action brought against him, would not discharge the drawer or indorsers (h).

A party sued as surety on a bill is not entitled to the inspection of a deed in the plaintiff's possession, by which it is suggested time has been given to

the principal debtor, but to which deed the surety is no party (i).

If there be any evidence of the assent of the drawer or indorser to the se- Consecurity being taken from and time given to the acceptor (k), or if after notice quences of of the time having been given, the drawer or indorser promise to pay (1), he prior Inis precluded from taking advantage of the indulgence to the acceptor. So dulgence, where the holder of a bill of exchange, of which payment had been refused, &c. informed the drawer of his intention to take security from the acceptor, and the drawer answered, "you may do as you like, for I am discharged for want of notice," and it appeared that due notice had been given, it was held that this amounted to an assent on the part of the drawer, and that the holder might still sue him after taking security from the acceptor(m). So where, in an action by indorsee against the drawer of a bill of exchange, the defence was, that time had been given to the acceptor, and to meet such defence a copy of a paper, which the defendant had promised to sign, was offered in evidence, and by which the defendant consented to the plaintiff's "using any means to obtain payment from the acceptor, without prejudice of his right to recover from the drawer;" it was held, that that amounted to an assent to

(e) Lec r. Levi, 4 B. & C. 390; 6 Dow. & Ry. 475, (Ch. j. 1264); 1 Car. & P. 553, S. C. But note, this case (before the new rules) was decided on the ground of such facts not being receivable in evidence under the general issue. See English v Darley, 3 Bos. & Pul. 61; Hall v. Cole, 4 Ad. & El. 577; ante, 408, 409; in the latter case, however, the plea expressly averred that more time was given than would have been necessary to have obtained judgment.

As to giving time to a principal after taking assignment of bail bond, not discharging the bail to sheriff, see Woosman v. Price, 1 Cromp.

(f) Jay v. Warren, 1 Car. & P. 532, (Chit. j. 1241).

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(g) Price v. Edmunds, 10 B. & C. 579, (Chit. j. 1483).

(h) Pike v. Sweet, 1 Dans. & Lloyd, 159;

Moody & M. 226, (Chit. j. 1410).
(i) Smith v. Winter, 3 Mee. & Wels. 309;

1 Horn & Hurl. 45, S. C.

(k) Clark v. Devlin, 3 Bos. & Pul. 863, (Chit. j. 674). Atkinson, the acceptor of a bill, having been arrested by the holder, offered him a warrant of attorney for the amount of the

bill, payable by instalments. This offer the holder mentioned to the defendant, the drawer, proposing to accept it, who said, " you may do as you like, for I have had no notice of the non-payment." In fact he had had notice. The court held, that this amounted to an assent on the part of the defendant to the security being taken; and therefore that the defendant was not discharged by this indulgence to the acceptor. See ante, 408, 409, note (m), Selw. 9th edit. 364.

(i) Stevens r. Lynch, 12 East, 38; 2 Campb. 832, (Chit. j. 782). The indorsee against the drawer of a bill. Defence, that the plaintiff had given time to the acceptor, in answer to which it was proved, that the defendant knew of such time having been given; but that, con-ceiving himself to be still liable, three months after the bill became due, he said to the plaintiff, "I know I am liable, and if Jones (the acceptor) does not pay it, I will." Upon this Lord Ellenborough directed a verdict to be found for the plaintiff; and, upon motion for a new trial, the court held the direction right, and refused a rule; and see 2 Swanst. 186, 192.

(m) Id. ibid.

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the holder's giving time, if he should think it advisable; and also that this Payment. paper did not require any stamp(n). But in another case(0), where the holder of a bill of exchange, on its becoming due, allowed the acceptor to renew it, without consulting the indorser, but the indorser afterwards said to the acceptor, "it was the best thing that could be done;" it was held, that giving the acceptor, which was the nest thing that could be done; it was neid, that Time to or the indorser was nevertheless discharged, because this was not a recognition Releasing of the terms granted by the holder to the acceptor, but such approbation must be considered as referring to the acceptor of the bill, to whom the arrangement was obviously advantageous.

Where A. indorsed to S. and Co., as a security for advances made to him by them, certain promissory notes made by B.; and while the notes were running, A. stopped payment, and a deed was executed by him and [*416] several of his creditors, and amongst them by S. and Co., *whereby his affairs were placed in the hands of inspectors, and the creditors, parties to the deed, agreed on certain terms not to call for or compel payment of the debts due from him for the period of three years; and after the execution of this deed by A. and S. and Co. and before the notes became due, B. signed a written consent to the creditors signing the deed, and giving time to A., without prejudice to their claims on her, B.; it was held, that her liability on the notes to S. and Co. was thereby revived (p).

The giving time to, or taking security from, one of several joint acceptors Effect of of a bill, or makers of a note, will not discharge the other acceptors or makers from liability (q): and it has been doubted, whether one of several makseveral Ac- ers of a joint and several note is at liberty to shew that he in fact was mereceptors or ly a surety, and as such discharged by indulgence to the other (r). But a Makers of formal release under seal of such one would discharge the rest(s), unless ina Note.

> (n) Hill v. Johnson, 3 Car. & P. 456, (Ch. j. 1417)

> (o) Withall v. Masterman, 2 Campb. 179,

(Chit. j. 773); Selw. 9th edit. 365. (p) Smith r. Winter, 4 Mees. & W. 454. Quære, as to the power of one partner to bind the others by the execution of such deed, ib.

(q) Bedford v. Deakin, 2 B. & Ald. 210; 2 Stark. 178, (Chit. j. 1040); and see David v. Ellice, 5 B. & C. 196; 7 D. & R. 690; 1 C. & P. 368, (Chit. j. 1278); Lodgo v. Dicas, 3 B. & Ald. 611. In Bedford v. Deakin, where one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills; and it was held, that the separate notes having proved unproductive, he might still resort to his remedy against the other partners; and that the taking, under these circumstances, the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint And see Dunn r. Slee, Holt, C. N. P. 339.

In Perfect v. Musgrave, 6 Price, 111, (Chit. 1044), it was held, that one of two drawers of a joint promissory note, payable twelve months after date, who is surety to the other for the amount, is not discharged by the drawer

not having demanded payment from the surety when due, nor till after having entered into a deed of composition with the principal and his other creditors, and received the composition money.

(r) Price v. Edmunds, 10 B. & C. 578, (Chit. j. 1483); ante, 414, 415, note (g).

In Clarke v. Wilson, 3 M. & W. 208, which was an action by the payee against the maker of a promissory note, and in which this question was intended to be raised, the defendant pleaded that it was a joint and several note made by the defendant and T. S., and that the defendant entered into it at the request of T. S., and for his accommodation, and in order that he might get it discounted by the plaintiffs; that the defendant had no other value or consideration for making it, and that he made it as a mere surety for T. S., of which plaintiffs had notice; and that although the note was due in the hands of the plaintiff for six months, yet the defendant had no notice, till the commencement of this suit, of its non-payment by T. S.; and that the plaintiff gave time for payment to T. S., to the prejudice and without the knowledge or consent of the defendant: and it was held, that such plea was bad on general demurrer as shewing only a giving of time without setting out any contract that was binding on the plaintiff: the general question, therefore, whether one of two makers of a joint and several promissory note can shew by purol that he is liable as surety only, was not decided.

(s) Co. Lit. 232; 2 Roll. Ab. 410, pl. 47,

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deed the instrument of release contain merely a covenant not to sue that one(t); and this legal operation of a release to one of several acceptors, &c. Payment. may be restrained in some cases by the express terms of the instrument(u); 7thly, though it cannot be defeated by a mere parol agreement (v).

It has been decided, that the release of a surety, and still more of a prin-quences of

cipal, may have the effect of discharging a co-surety (x).

*In the instances before stated (y), where the laches of the holder in not Releasing giving notice of the non-acceptance of a bill, will be excused by the circum- Acceptor, stances of the drawer, indorser, &c. not having effects in the hands of the 1 *417] drawee, such parties would also not be discharged by the holder's giving time to or taking security from the acceptor(z). Therefore the holder for a valuable consideration of a bill, accepted for the accommodation of the drawer, may prove the bill under a commission against the drawer, notwithstanding he has taken security from the acceptor, and given him time for

giving Time to or

412, G.; Bac. Ab. Release, G.; and see Nicholson r. Revill, 4 Ad. & El. 675, post, 418,

(t) Deane v. Newhall, S T. R. 168; Twopenny v. Younge, 8 B. & C. 212; 5 D. & R.

(u) Solly r. Ellerman, 2 Moore, 90; 2 B & B. 38, S. C., where a release was given to one of two partners, with a proviso that it should not operate to deprive the plaintiff of any remedy which he otherwise would have against the other partner, and that he might, notwithstanding the release, sue them jointly, and it was held he might do so. But see the judgment of the court in Nicholson r. Revill, 4 Ad. & El. 675; 6 N. & M. 192, S. C.

(v) Brooks v. Stuart, 1 Perry & Dav. 615; Cocks v. Nash, 9 Bing. 341; 2 Moore & S.

434, S. C.

(x) Stirling r. Forester, 8 Bligh, R. 575, 590. The bank of Scotland having discounted bills to the amount of \$0001., which were dishonoured, the acceptors, becoming bankrupts, agree with the drawers to retain the dishonoured bills, and receive the dividends which might become payable from the bankrupt's cstate; and, as additional security, to take four promissory notes indorsed by four sureties of 2000l. each, to guarantee the unsatisfied bills, or any balance upon them, which might remain unpuid, to the extent of 2000l. each. This agreement having been carried into effect, when the notes was nearly due, upon the application of the original debtors for delay of payment, the bank of Scotland gave up one of the promissory notes, and accepted a new one from the surety, who had indorsed it: renewed notes were also given by two other of the sureties, and, with the fourth surety, a treaty was carried on respecting a renewal, pending which he died. The dishonoured bills had also been delivered over by the bank to the original debtors, upon the treaty for the renewal of the notes. Held (reversing protanto the judgment of the Court below), that the fourth surety and his estate, by the legal effect of the transaction, was discharged as to three-fourths, and liable only us to one fourth of the balance due upon the dishonoured bills, after giving credit for all monies received or receivable from any of the parties upon the bills or their estates; and that

on payment of such fourth part of such balance. the bank were responsible to the estate of the fourth surety for all future dividends upon the dishonoured bills.

Formerly it was supposed, that in the case where one of the several sureties paid the whole debt owing from the principal, his remedy was only in equity for a contribution, but, in modern times, it has been held, that if one in the nature of a surety pays a debt, he may minimum an action against the party liable for the debt.

(y) Ante, 327 to 330. (z) Walwyn v. St Quintin, 1 Bos. & P. 652; 2 Esp. Rep. 516, 517, (Chit. j. 578); Gould r. Robson, 8 East, 576, (Chit. j. 735); ante, 409, n. (m); Ex parte Holden, Cooke's B. L. 167.

Collet r. Haigh, 8 Campb. 281, (Chit. j. 877). This was an action on a bill of exchange, drawn by the defendant upon J. Dufton, accepted by him, and indorsed to the plaintiffs. It appeared that when the bill became due, the plaintiffs gave time for some weeks to Dufton, upon his lodging some security in their hands, which did not turn out to be available; but it was likewise proved, that Dufton had accepted the bill merely for the defendant's ac commodation, without any consideration whatsoever. Lord Ellenborough ruled, that under these circumstances the defendant was not discharged by the time given to the neceptor. The drawer of an accommodation bill must be considered as the principal debtor, and the acceptor only in the light of a surety. reason why notice of the dishonour of a bill must in general be given to the drawer, is, that he may recoup himself by withdrawing his effects from the hands of the acceptor, and he is discharged by time given to the acceptor without his consent, because his remedy over against the acceptor may thus be materially affeeted. But where the hill is accepted merely for the accommedation of the drawer, he has no effects to withdraw, and no remedy to pursue, when conquelled to pay. He therefore suffers no injury either by want of notice, or by time being given to the acceptor; and in an action on the bill, he cannot defend himself upon either of these grounds. Verdict for plain-

II. Of Payment.

payment(a); but this would not be allowed if the bill was drawn for the accommodation of the acceptor(b). So if the acceptor of a bill be merely an agent for the drawer, who is the purchaser of goods, the holder's renewing the bill without the consent of the drawer will not discharge him(c).

Of receiving Part-Payment of the Acceptor, Ac. [*418]

It appears to have been holden, that if on presentment for payment the holder takes less than the whole sum due thereon of the acceptor or *indorser, in part satisfaction, without the assent of the other parties to the bill, he thereby discharges them, because, as has been said, it is an election to receive payment from the acceptor (d). But it is now settled, that the holder may receive part-payment from the acceptor or indorser, and may sue the other parties for the residue, provided he do not also release or give time to the acceptor for the payment of such residue(e); and if the holder of a joint and several promissory note enter up judgment by cognovit against one of the makers, and levy part under a f_i . f_a ., this is no discharge of the other (f). The holder, however, of a joint and several promissory note of A. and B., by discharging A. discharges B. also: where, therefore, the holder of two such notes, one of which only is due, receives from A. a sum exceeding the amount of the note which is due, and exceeding A.'s moiety of the two sums for which he is liable on both notes, and gives up the note which is due, and erases A.'s name from the other note, A. is discharged, and thereby B. also(g).

It is said, that if the drawee have, on presentment for acceptance, engaged to pay only a part, and the holder has given notice of such partial acceptance to the other parties, he should, when the bill becomes due, receive of the drawee the sum for which he accepted, and cause a protest again to be

made for non-payment of the remaining sum (h).

Effect of Indulgence to subseties, &c.

Though the giving time to an acceptor or indorser will thus in general discharge all subsequent indorsers, who would be entitled to resort to the quent Par- party indulged (i); the giving time to a subsequent indorser will not discharge a prior indorser(k); and, therefore, the holder of a bill may sue a prior in-

L. 167; 1 Mont. 153; Cullen, 100.

(b) Hill v. Read, Dow. & Ry. C. N. P. 26. (c) Clark v. Noel, 8 Campb. 411, (Chit. j. 896). Held, that the purchaser of goods, to be paid for by bill upon his agent, is not discharged by the seller taking a renewal of the bill, without giving him notice, if the agent had not funds in his hands to pay the bill when it became due. Lord Ellenborough was of opin-ion, that Aaron was only in the nature of a surety, and remarked, that as he was not in cash to pay the bill when it became due, it was rather in favour of the defendant to allow it to be renewed. The debt was originally due from the defendant, and the security taken from his agent could be no extinction of it. It was impossible to say the purchaser of goods could be discharged under these circumstances by want of notice, like the drawer of a bill of exchange. The plaintiffs had a verdict, which, in the ensuing term, upon a motion for a new trial, was approved of by the court.

(d) Hewitt v. Goodrich, 2 Carr. & P. 468, (Chit. j. 1315); Tassel v. Lewis, 2 Ld. Raym. 744, (Chit. j. 192); Kellock v. Robinson, 2 Stra. 745, (Chit. j. 264); Sel. Ca. 147, S. C.;

(a) Id. ibid. Ex parte Holden, Cooke's B. Bul. N. P. 273; Hull v. Pitfield, 1 Wils. 48, (Chit. j. 306).

(e) Gould v. Robson, S East, 580, (Chit. j. 735); ante, 409, note (m); Walwyn v. St. Quintin, 1 Bos. & Pul. 652; 2 Esp. 515, (Ch. j. 578); Bul. Ni. Pri. 271, 273, 275; Mar. 86.

(f) Ayrey v. Davenport, 2 New Rep. 474, (Chit j. 736); Ex parte Gifford, 6 Ves. 805. But see the observations of the court upon the latter case in Nicholson v. Revill, 4 Ad. & El. 675, 683; 6 N. & M. 192, S. C.

(g) Micholson v. Revill, 6 Nev. & M. 192; 4 Ad. & El. 675; 1 Har. & W. 756, S. C.

(h) Mar. 69, 85, 86.

(i) Smith v. Knox, 3 Esp. Rep. 46, (Chit. j. 617); and observation in English v. Darley, 2 Bos. & Pul. 62, (Chit. j. 620); ante, 405, note (m). When time given to a party who is both first and last indorser will discharge an intermediate indorser, Hall v. Cole, 4 Ad. & El. 577; ante, 409, note (p).

(k) Claridge v. Dalton, 4 Maule & S. 282, (Chit. j. 934); Hayling v. Mullhall, 2 Bla. R. 1285; English v. Darley, 2 Bos. & Pul. 61, (Chit. j. 620); Smith v. Knox, 3 Esp. Rep. 47, (Chit. j. 617); Nadin v. Battie, 5 East, 147; 1 Smith, 362, S. C.; and see Ex parte Barcley,

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dorser after having let a subsequent indorser, whom he had taken in execution, out of gaol, on a letter of license, without paying the debt(l). has been decided, that the holder of an accommodation note, who has re-7thly, ceived a composition from, and who has covenanted not to sue the payee for Consewhose accommodation the note was *made, may, notwithstanding, sue the quences of maker, though on payment of it, he, the maker, will have a right of action Time to or against the payee(m); and if the holder release to the payee all claims in re- Releasing spect of the note, not knowing that the maker is a surety only, this will not &c. discharge the latter(n); and although at the time of executing the release the [*419] holder knows the bill or note to have been made for the accommodation of the payee, this will not discharge the acceptor or maker, provided he did not know it at the time of the indorsement(o). The giving time to an acceptor will not discharge the drawer if the acceptance was to accommodate the drawer, and he ought to have provided for it (p). And it has long been settled, that if the holder of an accommodation bill receive a part from the drawer, and take a promise from him upon the back of the bill for the payment of the residue, at an enlarged time, such act will not discharge the ac-And though in one case it was held, that if the indorsee of a bill of exchange, having notice that it was accepted without consideration, receive part-payment from the drawer, and give him time to pay the residue,

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7 Ves. 597, (Chit. j. 656); Bayl. 5th edit. 254; Selw. 9th edit. 365.

Claridge v. Dalton, 4 Maule & S. 232, 233, (Chit. j. 934). Per Bayley, J. "If the holder gave time to the payee, he cannot call on the indorsers; but this rule does not apply to a party lower down on the bill, as if the fifth indorsee were to give time to the last indorser for six months, proposing in the meanwhile to endeavour to get payment from the indorsers lower down on the bill: this might well be done."

Hayling v. Mullhall, 2 Bla. Rep. 1235, (Ch. 400). A bill was indorsed by Sheridan to Boon, and by him to the plaintiff: he sued Boon, and took him in execution, but discharged him upon a letter of license. He then sued Sheridan, for whom the defendant became bail; and upon an action against the defendant, he contended, that the debt was satisfied by the imprisonment of Boon, but the court was clear it was not, and Mullhall was obliged to pay the money. See the observations on the error in the marginal analysis of this case, in English v. Darley, 2 Bos. & Pul. 62, (Chit. j. 620); ante, 408, note (m).

(1) Hayling v. Mullhall, 2 Bla Rep. 1235; supra, note (k). And see decisions as to re-

ducing and expunging proof in case of bank-ruptcy, post, Part II. Ch. VIII. s. iv. (m) Mallet v. Thompson, 5 Esp. R. 178, (Chit. j. 702); and see Maltby v. Carstairs, 7 Bar. & C. 735; 1 Man. & R. 549, (Chit. j.

(n) Carstairs v. Rolleston, 5 Taunt. 551; 1 Marsh. 207, (Chit. j. 909). To an action by the indorsees of a promissory note against the maker, the defendant pleaded that he made the note as surety only for the payee, and that the plaintiffs had released the payee from all claims in respect of the said note, without alleging that the plaintiffs had notice of the want of consideration between the defendant and payee. Held,

that the release did not operate as an extinguishment of the consideration which the plaintiffs had given to the payee for the note, so as to make it a note without consideration between themselves and the defendant, and, therefore, that the plea was bad on general demurrer. Gibbs, C. J. "This case has been argued on the only ground on which it could be supported for a moment, and ingenuity has furnished an argument which I had not discovered. The object of the defendant was to accommodate the payee, and I admit that the payee could not have sued the maker of the note, nor could an indorsee have done so, unless he had given consideration for it. But it is insisted, that the release which has been given by the bankrupts, who were indersees to the original payee, operates as an extinguishment of the consideration which they gave for it, and therefore puts them in the condition of indorsees without consideration. I am not of that opinion; the indorsement was for a valuable consideration, and the indorsees had the security of the defendant as maker of the note for their debt, and though they released the original payee, they still retain their remedy against the maker. Whatever might have been the case if the bankropts had had notice that the instrument was given originally without consideration, as to which I give no opinion. I am decided, that as the matter now stands, the plaintifis' right of action remains against the defendant." The rest of the court concurred in the opinion of the C. J. Judgment for the plaintitls.

(o) Harrison v. Courtauld, 3 B. : Ad. 86;

anle, 315, 316, note (y). (p) Collet v. Haigh, 3 Campb. 281, (Chit. j.

877); antc, 417, note (z).

(q) Ellis v. Galindo, cited in Dingwall v. Dunster, Dougl. 250, (Chit. j. 403, 427); and see Rolfe v. Wyatt, 5 C. & P. 181. See also ante, 315, 316.

11. Of Payment.
Tably, Conse
The payment of the thereby discharges the acceptor (r); yet in subsequent cases a different doctrine has been established(s). Entering into an *agreement of composition with the drawer, without any clause as to delivering up securities, and without extinguishing the original debt, does not preclude the holder from

quences of giving
Time to or

(r) See Laxton v. Peat, 2 Campb. 185, (Ch. Releasing j. 773). But the doctrine in that case seems to Acceptor, have been disputed by Gibbs, J. in the case of Kerrison v. Cooke, 3 Campb. 302, (Chit. j. [*420 | 885), who denied any distinction between an acceptor in the ordinary course of business, and an accommodation acceptor. And Lord Eldon (in 11 Ves. 411) also objected to any such distinction; and in the case of Anderson v. Cleveland, 13 East, 430, notes, (Chit. j. 400), Lord Mansfield seems to have been of opinion, that a neglect to call upon the acceptor affords no defence, saying that the maker of a note, and the acceptor of a bill remain liable; the acceptance is proof of the acceptor's having effects in hand, and he ought never to part with them, unless he is sure that the bill has been paid by the drawer. And see Dingwall v. Dunster, Dougl. 235, 247, (Chit. j. 401); Mallet v. Thompson, 5 Esp. Rep. 178, (Chit. j. 702). In the Trent Navigation Company v. Harley, 10 East, 34, the court considered that the neglect of the obligee of a bond to compel the principal to ac-

(s) Kerrison v. Cooke, 3 Campb. 262, (Chit. j. 885); Ragget v. Axmoro, 4 Taunt. 730, (Chit. j. 881); Fentum v. Pocock, 5 Taunt. 192; 1 Marsh. 14, (Chit. j. 896); Carstairs v. Rolleston, 5 Taunt. 551; 1 Marsh. 507, (Chit. j. 909); Mallet v. Thompson, 5 Esp. Rep. 178, (Chit. j. 702); Rolfe v. Wyatt, 5 C. & P. 181; Harrison v. Courtauld, 3 B. & Ad. 36; Nichols

count did not release the surety from his limbil-

v. Norris, ib. 41. Kerrison v. Cooke, 3 Campb. 362, (Chit. j. 835). Indorsee against acceptor. The plaintiff, after notice that the bill was accepted for the accommodation of the drawer, gave time to the drawer without concurrence of the defendant, and yet it was held the plaintiff was entitled to recover. Per Gibbs, J. admitting Laxton v. Peat to be law, of which grave doubts have been entertained, the present case may be distinguished from it. Lord Elleuborough's decision there proceeded upon the ground that the drawer, according to the understanding of the different parties to the bill, was considered as primarily liable, and was in the first instance looked to for payment. But here payment is demanded of the acceptor when the bill becomes due, and he then promises to pay it. This shews that he was held liable, as in the common case of the acceptor of a bill of exchange, and I am of opinion that he was not discharged by time given, under these circumstances, to the drawer. I am sorry the term "accommodation bill" ever found its way into the law, or that parties were allowed to get rid of the obligations they profess to contract, by putting their names to negotiable securities.

Fentum v. Pocock, 5 Taunt. 192; 1 Marsh. 507, (Chit. j. 896); cited and approved of in The Bank of Ireland v. Beresford, 6 Dow's Rep. 232; Price v. Edmunds, 10 Bar. & Cree. 584;

ante, 416, note (r); and Nichols v. Norris, 3 B. & Ad. 41; infra, note (u) Indorsee against acceptor. When the bill became due it was duly presented for payment, and refused; and the plaintiff was then informed that it was an accommodation bill, and that defendant had no effects of the drawer. The plaintiff received from the drawer 651., in part discharge of the bill, and afterwards, without the concurrence of the acceptor, took a cognovit from the drawer, payable by instalments; and it was held that this did not discharge the acceptor. Per Lord Mansfield, C. J. " No doubt if the defendant can succeed in establishing the principle, that we must so subvert and pervert the situation of the parties, as to make the acceptor merely a surety, and the drawer the principal, the consequence contended for must follow. The case of Laxton v Peat certainly is the first in which it was ever supposed that the acceptor of a bill of exchange was not the first person and the last person compellable to pay that bill to the holder of it, and that any thing could discharge the acceptor except paymentor a release; and I never before knew there was any difference between an acceptance given for an accommodation and an acceptance for value. When I first saw that case in Campbell, I was in the same state as Mr. Justice Gibbs, and doubted a great deal whether it could be law. The case of Collet v. Haigh must be considered not as a separate decision, but as resting on the nuthority of the former. It is utterly impossible for any judge, whatever his learning and abilities may be, to decide at once rightly upon every point that comes before him at Nisi Prius; and whoever looks through Campbell's Reports will be greatly surprised to see, among such an immense number of questions, many of them of the most important kind, which came before that noble and learned judge, not that there are mistakes, but that he is, in by far the most of the causes, so wonderfully right, beyond the proportion of any other judges. But in this case we think that we are bound to differ from him, and to hold that it is impossible for us to consider the acceptor of an accommodation bill in the light of the surety for the payment of the drawer, and that we cannot therefore say that he is discharged by the indulgence shown to the drawer: certainly the paying respect to accommodation bills is not what one would wish to do, seeing the mischiefs arising from them. One might find here a very important distinction between this case and the case decided by Lord Ellenborough, namely, that here the person taking the bill did not, at the time when he took it, know that it was an accommodation bill, and that if he did not then know it, what does it signify what came to his knowledge afterwards, if he took the bill for a valuable consideration; but it is better not to rest this case upon that foundation; for as it appears to me, if the holder had known in the clearest manner at the time of his taking the

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recovering from the acceptor, and retaining the money so recovered(t); and still less is the acceptor discharged where by the composition deed it is ex- Payment. pressly stipulated that the creditors shall not thereby be prevented from suing on any securities they hold(u). We have seen, however, that the acceptor of an accommodation *bill may be discharged by the holders, who are bank- [*421] ers of the drawer, receiving more than sufficient to cover it (x).

If the acceptor of a bill, or maker of a note, have become a bankrupt, the Of provholder may, without the assent of the other parties, prove the bill under the ing under commission, and receive dividends, and will not thereby discharge the other mission, or parties to the bill from their respective liabilities to him, if he have given regular against an parties to the bill from their respective habitudes to him, it is in a solution notice of non-payment (y)(1). So the circumstance of one of the parties to Debtor, a bill having been charged in execution, and discharged as an insolvent debt- and of or does not preclude the holder from proceeding against the other par-compoundties(z).

ing with

But if the holder of a bill compound with the acceptor or other party, ceptor. without the assent of the drawer or other subsequent parties, he thereby releases them from their liabilities, if they had effects in the hands of the acceptor or prior indorser; for there is a material distinction between taking a sum of money in part satisfaction of a debt, as in the case of a dividend by compulsion of law under a commission of bankruptcy, or discharge under

bill, that it was merely an accommodation bill, it would make no manner of difference; for he who accepts a bill, whether for value or to serve a friend, makes himself in all events liable as the acceptor, and nothing can discharge him but payment or a release. The case before Gibbs, J. has shaken this decision in Laxton v. Peat, and we think rightly; the case cited, English r. Darley, is not applicable, where the giving time to an acceptor was held to be a discharge of an indorser, who stands only in the situation of a surety for the first. The rule therefore which has been obtained for setting aside the verdict, and entering a nonsuit, must be discharged."

(t) Thomas v. Courtney, 1 B. & Ald. 1, (Chit. j. 998); ante, 412, n. (k); Mattley v. Carstairs, 7 B. & C. 735; 1 Man. & Ry. 549, 8. C

(u) Nichols v. Norris, 8 B. & Ad. 41. gave a promissory note payable to B. (for which A. had received no consideration), as a security for goods to be sold to B. on credit; and B. indorsed the note over to the creditors. B. nfterwards executed a deed of composition with the creditors, by which he undertook to pay his debt to them by instalments, and it was stipulated that they should not be prevented by that arrangement from suing on any securities which they held, and that on any default in paying the instalments the deed should be void: held, that the delay granted to B. by this agreement did not discharge A; et per Parke, J. ib. 42, "I am of opinion that Fentum v. Pocock, (5 Taunt. 195) is sound law, and that the present case falls within its authority; independently of which, there is an answer to the present objection, in the proviso which reserves a power of enforcing the securities at any time." See Ex parte Glendiening, 1 Buck, 517, as to the effect of a special reservation of securities.

(x) Ante, 404, note (x)

(y) See observations in English v. Darley, ante, 408, note (m); Ex parte Wilson, 11 Ves. 412, (Chit. j. 720); Stock v. Mawson, 1 Bos. & Pul. 286; see Langdale v. Parry, 2 D. & R. 337. A surety for a bankrupt is not discharged by the creditor's signing the bankrupt's certificate, even after notice from the surety not to do Browne v. Carr, 7 Bing. 508; 1 M. & P. 497, S. C.

(z) Macdonald v. Bovington, 4 T. R. 825, (Chit. j. 497). A bill drawn by Macdonald on Bovington was indorsed to Thompson, who charged Bovington in execution on it. Povington was discharged as an insolvent, then Thompson sued Macdonald, and recovered. Macdonald paid the bill, sued Bovington, and charged him in execution, and on a rule nisi to discharge him and cause shewn, it was urged that Bovington had satisfied the bill by being charged in execution at the suit of Thompson. Sed per Lord Kenyon, "nothing can be clearer than that he has not; it was a mere formal satisfaction as to Thompson, not like actual payment, and when Macdonald was obliged to pay the bill, a new cause of action arose against the defendant by the payment, without regard to what passed in the former action." And per Buller, J. "the consequence would be, that because the drawer was obliged to pay the holder, the acceptor would be discharged without paying either." Rule discharged.

⁽¹⁾ So it has been held in New York, that the proceeding under a commission of bankruptcy in London, against the acceptor, was no discharge of the indorser of a bill drawn here. Kenworthy v. Hopkins, 1 John. Cas. 107.

II. Of Payment.

sequences quences of Releasing Acceptor, &c. [*422]

the insolvent act, and the voluntarily taking a sum in satisfaction of such debt, where the party has an option to refuse less than the whole, but com-7thly, Con- pounds with the acceptor, and thereby releases and deprives all other parties to the bill of the right of resorting to him(a). And it seems questionable whether, if the holder had the consent of the other parties that he might acgiving Time to or cept the composition and hold them liable, without resorting to the principal debtor, *he would not still be deprived of his remedy against them, if the composition operated as a release of the debt, inasmuch as it would be a fraud on the other creditors, who had supposed they had contracted with each other on equal terms (b). Though the agent of the holder by mistake signed a composition deed in favour of the acceptor, thinking that the proceedings were a bankruptcy, yet it was decided that the drawer was dis-And where the indorser of a bill of exchange becomes bank-

> (a) Ex parte Wilson, 11 Ves. 410, (Chit. j. 720); post, 422, note (c); Cooke's Bank. Law, 168; Cullen, 158, 159, and cases there cited; Ex parte Smith, 3 Bro. C. C. 1; Lewis r. Jones, 8 Bar. & Cres. 556; 6 Dow. & Ry. Jones, 8 Dar. & Clea. 550, 5 Don. & 251. 567, (Chit. j. 1265). See observations in English v. Darley, ante, 408, note (m), and post, Part II. Ch. VIII. Bankruptcy; 1 Mont. 546. Quare, as to the effect of a composition between the creditor and a surety in discharging a co-surety, Nicholson v. Revill, 6 Nev. & M. 192; S. C. 4 Ad. & El. 675; 1 Har. & W. 756.

> Ex parte Smith, 8 Bro. C. C. 1, (Chit. j. 457). Lewis and Potter indorsed certain bills and notes to Esdaile, and between bankrupt. Esdaile proved the amount of the bills and notes under their commission, and afterwards received a composition from the acceptors of the bills, and the makers of the notes, and gave them a full discharge without the knowledge of the assignees of Lewis and Potter. On petition by the assignees to have the debt in respect of the bills and notes expunged, the Chancellor held, that by discharging the acceptors and makers without the consent of the indorser, the latter was discharged also. To the same effect is the case of Ex parte Wilson, 11 Ves. 410. See also Smith v. Knox, 3 Esp. Rep. 46, (Chit. j.

> In a case where an action was brought by several partners, as indorsees of a promissory note against the defendant as indorser, and it appeared in evidence that one of the partners had discharged a prior indorser by a deed of composition, it was holden, that such deed operated as a release to the defendant. Ellison and others v. Dezell, Bristol Summer Assizes, 1811, Selw. 9th edit. 365.

> (b) See per Littledale, J. in Lewis v. Jones, 4 Bar. & Cres. 506, 514; 6 Dow. & Ry. 567,

> (Chit. j. 1265). (c) Ex parte Wilson, 11 Ves. 410, (Chit j. 720). In July, 1799, A. P. Pourtales and A. G. Pourtales drew two bills of exchange upon Claessen, Kieckhoefer, and Co. of Hamburgh, at three months after date, for 350l. and 2501. payable to the order of the petitioner, for a valuable consideration. The bills were accepted; but before they were due, the acceptors stopped payment, and the bills were returned protested. The drawers afterwards became bankrupt. The petitioner's proof in respect of

the bills was objected to, until he should have had recourse to the estate of the acceptors, and have received such dividend as should be payable from their estate. The petitioner sent the bills to his agent at Hamburgh for that purpose, who received a dividend from the estate of the acceptors, and was afterwards admitted to prove the residue of his debt under the commission against the drawers: but before any dividend was received under that proof, it appeared that no proceeding in nature of a commission of bankruptcy had issued against the acceptors, but their affairs were settled by a deed of composition, which the petitioner's agent had signed upon receiving the dividend, in full discharge of the estate of the acceptors. The petition prayed that the dividends under the commission should be paid to the petitioner. It was admitted there was no fraud; but the deed of composition was signed, and the dividend received by his agent without inquiry. The petition stated, that the assignees and the solicitor under the commission pressed the petitioner to apply and receive what might be obtained from the estate of the acceptors, representing, that he should prove for the residue; but upon the affidavits there was no special undertaking; and the transaction appeared to originate in a mistake of all parties; supposing the proceeding at Hamburgh was in the nature of bankruptcy. The Lord Chancellor, "The law is not disputed: it was very well settled by Lord Thurlow, upon great deliberation, that, if a person, having security of drawer and acceptor, with offects (a distinction much to be regretted, having given very mischievous authenticity to accommodation paper) gives the acceptor time, and much more if the holder fully discharges the acceptor by composition, the holder can no longer make a demand upon the drawer, whether solvent or not; for this reason, that if the drawer could come upon the acceptor afterwards, the acceptor does not receive any benefit by the composition. The nature of the contract must therefore be, that the holder shall so deal with the bill, that no third person shall come upon the acceptor in consequence of his act. I remember Lord Thurlow said he had consulted the judges upon that case. The decision is therefore of very high authority. Lord Rosslyn was struck with this considera-tion, that if the holder did all he could substantially do for the benefit of the persons whose

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rupt, and the holder proves the amount of the bill under his commission, and afterwards compounds with and discharges the acceptor without the consent Pa) mentof the assignees of the indorser, he thereby also discharges the indorser's estates, and the proof of his debt must *be expunged(d). If the composition [*423] deed operates as a release and extinguishment of the original claim, the holder has no remedy against any of the parties to the bill(e). But we have seen that the compounding with or releasing a drawer would not discharge an acceptor, although he had accepted for the accommodation of the drawer, unless so expressly stipulated (f).

On payment of the amount of a bill or note, it has been considered doubt- Sthly, Of ful whether a person paying can insist on a receipt being given(g); but now the Rethe party, it should seem, is entitled to demand a receipt (h). It is usual Payment. to give a receipt on the back of a bill, and it has been said, that it is the duty of bankers to make some memorandum on bills and notes paid by them(i). Such receipt need not, like other receipts, be stamped (k). Where a part is paid, the person paying should take care to have the partial receipt marked on the bill, or he may, as is said, be liable to pay the amount again to a bonû fide indorsee(1). Where an action was brought by the indorser of a bill (who had paid it to an indorsee) against the acceptor, he was nonsuited, although he produced the bill and protest, because he could not produce a receipt for the money paid by him to the indorsee upon the protest, according to the custom of merchants; though Holt, C. J. seemed to be of opinion, that if the plaintiff could have proved payment by any evidence, it would have been sufficient (m)(1). However, a receipt is an admission only, and

names were upon the bill, that was all that could be expected, and held that he should, if he really acted for the benefit of the other parties by taking a composition from the acceptor, go on against the drawer. But the misfortune of that is, that the other parties have a right by law to consider what is for their benefit, and are the judges of that; and that has been carried so far, that the actual bankruptcy of the acceptor does not dispense with the necessity of notice to the drawer. That being the law, I felt a wish to find that part of the petition sustained, which represents, that the assignees and the solicitor pressed the petitioner to get what benefit he could in the affairs at Hamburgh, intimating that he should afterwards prove under the commission. But the affidavits amount only to this, that the assignees and the solicitor, being persuaded that there was a bankruptcy at Hamburgh, and a dividend actually set apart, so that in bankruptcy it was to be considered as received in diminution of the proof, do make that representation; and that the petitioner shall receive dividends under that bankruptcy, before he comes to prove under the commisson in this country, and the future dividends after proof. The petitioner accordingly sent to his agent at Hamburgh, not inquiring whether the proceedings there was a bankruptcy or a composition, and the agent signed the deed of composition, which, in respect of payments under it, actually discharges the acceptor. The question whether the petitioner was by fraud drawn in, or required to sign the deed of composition is a more question of fact. The whole was a

common mistake, under the apprehension of all, that it was a bankruptcy; but, that being misapprehension, the consequence from not knowing what the act was, must fall upon the person who did the act, who therefore having, by himself or his agent, accepted a composition in full of the whole demand, is unfortunately, but effectually, under circumstances, that exclude any demand by him against the drawer's estate.

(d) Ex parte Smith, 3 Bro. C. C. 1, (Chit. 457); ante, 421, note (a); Cooke's Bank. Law, 168, 169; Cullen, 158, 159; 1 Mont. 546; and Ex parte Wilson, 11 Ves. 410; ante. **422**, note (c).

(e) Lewis v. Jones, 4 Bar. & Cres. 507; 6 D. & R. 567, (Chit. j. 1265); Ex parte Hall, 1 Dea. Rep. 171; post, Part II. Ch. VIII. s. iv.

Bankruptcy—What Bills proveable.
(f) Ante, 418, 419; Maltby v. Carstairs, 7
B. & C. 785; 1 Man. & Ry. 549, S. C.

(g) Cole v. Blake, Peake N. P. 179, 180; see Green v. Croft, 2 Hen. Bla. 80 to 82.

(h) 48 Geo. 8, c. 126, s. 5.

(i) Burbridge v. Manners, 3 Campb. 193. (Chit. j. 855).

(k) 44 Geo. 3, c. 98, Sched. A.; 28 Geo. 8, c. 49, s. 4 and 7. See the exemptions in 55 Geo. 8, c. 184, Sched. part 1, tit. Receipts; ante, 111.

(1) Cooper v. Davies, 1 Esp. R. 463, (ht. j. 548).

(m) Mendez v. Carreroon, Ld. Raym. 742, (Chit. j. 215).

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II. Of Payment. Sthly, Of the Receipt for Payment.

the general rule is, that an admission, though evidence against the person who made it and those claiming under him, is not conclusive evidence except as to the person who may have been induced by it to alter his condition (n): a receipt may, therefore, be contradicted or explained; and there is no case in which a receipt upon a negotiable instrument has been considered to be an exception to the general rule; on the contrary Lord Kenyon, in the case of Scholey v. Walsby (o), was of opinion, that a receipt on the back of a bill might be explained by parol evidence, and shewn to be a receipt from the drawer, and not from the acceptor. Accordingly, where a bill of exchange was drawn by A. on B. and indorsed to C., and the bill was not satisfied when due, but part payments were afterwards made by the drawer and acceptor, and two years after it had become due, D. paid the balance to C., the holder, and the latter indorsed the bill, and wrote a receipt on it in general terms; it was held, that such receipt was not conclusive evidence that the bill had been satisfied either by the acceptor or drawer, but that parol testimony was admissible to explain it; and it appearing thereby that D. paid the balance, not on the account of the acceptor or drawer, but in order to acquire an interest in the bill as purchaser, it might be indorsed by D. after it became due, so as to give the indorsee all the rights which C., the holder, [*424] had before the indorsement, and *such indorsee might recover from the drawer the balance unpaid by him(p). So, in a very recent case (q), where a receipt had been given by one partner in the name of the firm, but without the knowledge of the other partners, such receipt was held not to be conclusive evidence against the firm in an action brought by them to recover the balance due upon a bill of exchange. But inasmuch as a general receipt on the back of a bill of exchange is prima facie evidence of its having been paid by the acceptor(r)(1), it would perhaps be advisable, in all cases when payment is made by a drawer or indorser, for the holder to state in the receipt by whom it was paid. It has however been held, that the mere production of a bill of exchange from the custody of the acceptor is not prima facie evidence of his having paid it, without proof that it was once in circulation after it had been accepted(2); nor is payment to be presumed from a receipt indorsed on the bill, unless such receipt is shewn to be in the handwriting of a person entitled to demand payment(s)(3). Though in another

> (n) Stranton v. Rastal, 2 T. R. 366; Wyatt v. Marquis of Hertford, 3 East, 147; Herne v. Rogers, 9 B. & C. 586.

(o) Peake's Rep. 24, 25.

(r) Scholey v. Walsby, Peake R. 25, (Chit.

j. 469); but see Pfiel v. Van Battenberg, 2 Campb. 439, (Ch. j. 797); infra, next note.
(8) Pfiel v. Van Battenburg, 2 Campb. 439, (Chit. j. 797). See this case more fully, post, Part II. Ch. V. s. i. Evidence—Proof of Plaintiff's interest, &c. The delivery of a check to the payee operates as payment until dishonoured; Pierce v. Davis, 1 Mood. & Rob. 365; ante, 173, note (u).

(2) { But if it is proved that it has been put in circulation by the drawer, the possession of the draft by the accommodation acceptor is sufficient to enable him to recover. Wilkinson v. Phelps, 16 Louis. Rep. 304; Baring v. Clark, 19 Pick. 220.

⁽p) Graves v. Key, 3 Bar. & Adol. 313. (q) Farrar v. Huchinson, 1 Perry & Dav. 437; overruling Alner v. George, 1 Camp. 392; and see Benson v. Bennett, ib. note; Scaife v. Jackson, 3 B. & C. 421; 5 D. & R. 290, S. C.

⁽¹⁾ The possession of a joint note by one of the drawers, with a receipt of payment by the holder or possessor, indorsed on it by the person entitled to receive it, is prima fucie evidence of the liability of the other drawer to refund one half of the note. Ingram v. Croft, 7 Louisiana

⁽³⁾ It has been held in Pennsylvania that the mere production of the bill and protest without a receipt of the money, is not sufficient evidence in an action by the indorser against the acceptor, that the indorser has paid the same to a subsequent indorsee. Gorgerat v. M'Carty, 9 Dall., Rep. 144, S. C. 1 Yates' Rep. 94. And the mere possession of a note by an indorsee, who had indorsed it to another porson, is not sufficient evidence of his right of action against a prior

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case(t) it was held, that payment of money might be proved by the lender producing a check drawn by him upon his banker, in favour of the borrow- Payment. er, and indorsed by the latter, although without such indorsement it would stally, Of not be evidence(u). And where an unstamped promissory note was indors- the Reed with a receipt for interest, Lord Ellenborough, C. J. is reported to have Payment. left it to the jury, that though they could not consider the note, containing this endorsement, as read in evidence, for want of a stamp, yet the receipt might be read as evidence for them to consider whether a principal sum of money was not thereby admitted to be due from the defendant to the plaintiff, yielding an interest equivalent to the sum which the indorsement purported, without any reference to the note itself(x). We have seen, that a deed reciting the actual payment of money, is conclusive at law against the recovery of such money; but not so where from the whole tenor of the deed it shows no such payment was made (y).

Indorsements of partial payments made by the holder himself might, before the 9 Geo. 4, c. 14, s. 3, in some cases, be sufficient to take the case out of the Statute of Limitations. On this point Lord Ellenborough observed, "I have been at a loss to see the principle on which these receipts in the hand-writing of the creditor have sometimes been admitted as evidence against the debtor, and I am of opinion they cannot properly be admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest(z). But this has

been altered by the above statute(a).

It has been considered, with analogy to the presumption of payment of a bond after twenty years have elapsed, that a note payable on demand, and dated upwards of twenty years before the commencement of *the action, [*425] may be presumed to have been paid(b). But in an action by the payee of a bill of exchange, accepted by the defendant for a valuable consideration, evidence that the plaintiff has been discharged as an insolvent debtor since

(1) Egg v. Barnett, 3 Eap R. 196. (Chit. j.

(u) Aubert v. Walsh, 4 Taunt. 293; Gow, N. P. C. 15, (Chit. j. 860); ante, 400, n. (y).

(x) Manley r. Peel, 5 Esp. Rep. 121, sed

(y) Ante, 314, notes (k), (l). (z) Rose r. Bryant, 2 Campb. 523.

(a) 9 Geo. 4, c. 14, s. 3, post, Part II. Ch. IV. Defences and Pleas.

(b) Duffield v. Creed, 5 Esp. Rep. 52. (Chit. j. 684); Tidd, 9th edit. 19.

indorser, without a re-assignment or receipt from the last indorser. Welch v. Lindo, 7 Cranch,

An intermediate indorser of a note may sue a previous indorser without showing actual payment by such intermediate indorser, to any subsequent indorsee, by a receipt, and without showing an indorsement back to such intermediate indorser. Possession of the note is, prima facie, sufficient evidence of payment. Norris v. Badger, 6 Cowen, 449. Elsworth v. Brewer, 11 Pick. Rep. 816.

If a person who endorses a bill to another, for value or collection, shall again come into the possession of it, he shall be regarded, unless the contrary appear in evidence, as the bona fide holder of the bill, and entitled to recover; although there may be upon it his own or a subsequent endorsement, which he may strike from the bill or not at his pleasure. Warren v. Gilman, 15 Maine Rep. 70; Green v. Jackson, id. 136; Mourain v. Deval, 12 Louis. Rep. 93; Freeland v. Hodge, id. 177. Pond v. Storrs, 18 Conn. 412. Possession of a note endorsed in blank is prima evidence of property in the plaintiff, sufficient to throw the burthen of proof on the defendant. Burns v. Haynes, 13 Louis. Rep. 12; Colton v. Union Eank, 15 id. 369; Waring v. Crawford, 14 id. 376; Netterville v. Stevens, 2 How. Rep. 643; Mullen v. French, 9 Watts, 96; Lord v. Appleton, 15 Maine 270. So where bills of exchange were specially endorsed, and the endorsement still remained uncancelled, and there were no re-endorsements or other evidence of any subsequent assignment, it was held, that possession by the original endorser is prima facial evidence that he is the owner of them. Picquet v. Curtis, 1 Sum. 478. But see Hart v. Windle 18 June 19 June dle, 15 Louis. Rep. 265. And the possession, by an indorsec, of a negotiable promissory note or of a bill of exchange, is presumptive evidence, not only of the fact that it was thus transferred to him upon a good consideration, but also of the fact that it was thus transferred before it was due and dishonoured. Pratt r. Adams, 7 Paige, 616. }

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II. Of Payment. the bill became due, and has given in a blank schedule, is not enough to shew that the bill has been satisfied (c)(1).

8thly, Of the Recoipt for Payment.

Upon payment or satisfaction of a bill or note, the party making such payment should take care that the instrument be delivered up to him, or that his payment or satisfaction be indorsed, or he may be liable to an action by a third person, who was a holder of the bill before it became due, for the recovery of the amount (d)(2). And, therefore, where an indorser delivered to the holder another bill, and plaintiff, who was also an indorser, was called upon and paid the full amount of the first bill, not knowing of the deposit, it was held, that he might sue the depositing indorser for the full amount(e). And where there is a competition of evidence upon the question, whether the security has been satisfied by payment, it has been held, that the possession of that security by the claimant ought to turn the scale, and entitle him to a verdict(f). And where A. gave an accommodation acceptance to B., which B. gave to C., as a security for some acceptances of his, and these acceptances, when they became due, were paid by B. out of the produce of other acceptances given by C., but A.'s acceptance was not given up, though C. was desired not to present it, and A. was informed that it would not be presented, it was held, that the original transaction was continued, and A. not calling for the delivery of the bill, must be presumed to have allowed it to remain as a security in the hands of C. for such of his acceptances as were subsequent to those for which it was at first given (g). The cases in which the production of the bill or note, in order to entitle a party to demand payment, is dispensed with, have already been considered (h).

9thly, Of the Effect of Payment, and of Payments by Mistake, &c.

The effect of payment may in a great measure be collected from the immediately preceding paragraphs, and from what has been said with respect to a transfer of a bill of exchange after it has been paid(i). If a person, without having a full knowledge of facts, or a reasonable means of ascertaining them, pay a bill, which he is under no legal obligation to discharge, and where the person whom he pays has been guilty of laches, which, had the bill not been paid, would, in an action brought upon it, be a sufficient ground of defence, he may, especially if prejudiced by the laches by having been deprived of his remedy against other parties, recover back the money from him, as had and received to his use; and this point of law seems to be fully settled by a And where a party knowing a check to be post-dated, *and late decision(k). that the drawers were insolvent, but concealing those facts, presented it for

(c) Hart v. Newman, 3 Campb. 13, (Chit. j. 832).

(d) Buzzard v. Flecknoe, 1 Stark. R. 333, (Chit. j. 966); ante, 394, note (f).

(e) Id. ibid.

(f) Brombridge v. Osborne, 1 Stark. R. 374, ante, 394, note (f).

(g) Woodroffe v. Hayne, 1 Car. & P. 600, (Chit. j. 1241); and see Attwood v. Crodie, 1 Stark. R. 483, (Chit. j. 979).

(h) Ante, 268, 394, 395. (i) Ante, 223, 224; see also Hull r. Pitfield, 1 Wils. 46, (Chit. j. 306); Bacon v. Searles, 1 Hen. Bla. 88, (Chit. j. 449).

(k) Milnes v. Duncan, 6 Bar. & C. 671; 9 D. & R. 731, (Chit. j. 1330). A hill of exchange was drawn in Ircland upon the stamp required by law there, and which was less in amount than the stamp required for such a bill drawn in England, but there was nothing on the face of the bill to shew that it had been drawn in Ireland. The holder in England neglected to present it for payment, and held it a month after it was due. The acceptor having become bankrupt, the holder applied for payment to the defendant, from whom he had received it; the latter refused to pay it, alleging, that the holder had made it his own by his

(1) { On the subject of presumption of payment of a bill arising from lapse of time, see Hopkirk v. Page, 2 Brock. 20. }

⁽²⁾ When the original payee is in possession of a note, on which his name is indorsed in blank, no proof of a re-transfer is necessary to enable the holder to recover. Barbarin v. Daniels, 7 Louis. Rep. 479.

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payment to the plaintiffs, who were the bankers of such drawers, and who, without knowledge of these facts, paid its amount, although they had no funds Payment of the drawers in their hands at the time, but expected some in the course of 9thly, Of the day, it was held, that the plaintiffs were entitled to recover it back in an the Effect action for money had and received (l). But an inderser who has paid the of Payholder of a returned bill in ignorance of his laches, in not giving due notice of Payholder of Payholder of a returned bill in ignorance of his laches, in not giving due notice of Payholder of Payh of non-acceptance, cannot sue a prior indorser or the drawer who has been mean by discharged by such laches; for the ignorance of the party so paying, though Mistake, blameless, and which has prevented his availing himself of the laches as a defence, cannot alter or revive the liability of the prior party who has been discharged by the same laches (m). Nor can a party who has knowingly and voluntarily paid a bill of exchange which the policy of the law would have enabled him to resist the payment of, sue for money had and received to recover back the amount (n).

So where a bill purporting to have been accepted by ${f A}$, payable at the Forgery. plaintiffs' bank, was presented for payment to the plaintiffs on the day when it became due, and the latter believing it to be the genuine acceptance of A., paid the amount, and on the following day having discovered the acceptance to be a forgery, they gave notice of that fact to the defendant, to whom they had paid the bill, and required him to return the money, it was held, that the latter was entitled to know on the very day when it became due, whether it was honoured or dishonoured, and that no notice of the forgery having been given on that day, the plaintiffs, who had paid the money, were not entitled to recover it back(o). And where A. drew a bill on B. in the country, making it *payable at the house of C. in London, without authority from C., and B. 1 *427]

laches. The holder then threatened to sue him, alleging that the bill was void, on the ground that it was drawn on an improper stamp, (in which case we have seen the laches would have been no answer). The indorser inspected the bill, and finding that the stamp was not that required for a bill of the same amount drawn in England, but ignorant of the fact that it had been drawn in Ireland, paid the amount to the holder; and it was held, that this was money paid in ignorance of the fact, and there being no laches imputable to the party who paid the money in not making due inquiries, he might recover it back in an action for money had and received. See the judgment of Bay-

(1) Martin v. Morgan, 3 Moore, 635; Gow, 128; 1 Bro & B. 289, (Chit. j. 1065).

(m) Roscoe v. Hardy, 12 East, 434; 2 Campb. 458, (Chit. j. 801); Turner v. Leach, 4 B. & Ald. 454, (Chit. j. 1108), S. P.; ante, 391, note (t). When such laches no defence as between principal and agent in action founded upon an implied indemnity, Huntley v. Sanderson, 1 C. & M. 467; 3 Tyrw. 469, S. C.; ante, 331, note (z), 343, note (c).

(n) Wilson v. Ray, 2 Perry & Dav. 253;

ante, 86, note (k). (0) Cocks and others v. Masterman and others, 9 B. & C. 902; Dans. & Lloyd R. 329, S. C.; 4 Man. & Ry. 676, (Chit. j 1446). Bayley, J. "The case of Wilkinson v. Johnson, 8 Bar. & C. 428; 5 Dow. & Ry. 403, (Chit. j. 1231), post, 427, n. (r), was relied on. That case differs from the present in one material point, viz. that the notice of the for-

gery was given on the very day when payment was made, and so as to enable the defendant to send notice of the dishonour to the prior parties on that day. In this case we give no opinion upon the point whether the plaintiffs would have been entitled to recover, if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to the other parties on the bill. But we are all of opinion, that the holder of a bill is entitled to know on the day when it becomes due, whether it is an honoured or dishonoured bill. and that if he receive the money, and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonoured by the acceptor) to take any steps against the other parties to the bill till the day after it is dishonoured; but he is entitled to do so if he thinks fit, and the parties who pay the bill ought not by their negligence to deprive the holder of any right or privilege. If we were to hold that the plaintiffs were entitled to recover, it would be in effect saying that the plaintiffs might deprive the holder of a bill of his right to take steps against the parties to the bill on the day when it becomes due." Judgment for the defendants. See the reasons and decisions, post, 430, 431; and see ante, 260, 261. But in Archer v. Bank of England, 2 Dougl. 638, money paid in honour of a bill with a forged indorsement was recovered back, though it did not appear that notice of the forgery was given on the day of payment, Buller, J. dissentiente.

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II. Of Payment. 9thly, Of the Effect of Payment, and of Payments by Mistake, & c.

accepted the bill in this form, without giving notice to C. or providing for the payment of the bill at C.'s house, and A. negotiated the bill, which upon becoming due was presented by the holder to C., who paid it under the supposition that the bill so presented was another bill of a different amount and date, drawn by B. on and accepted by himself, and did not discover his mistake until a fortnight afterwards, when the other bill was presented, and B. became bankrupt, it was held, that C. could not recover against A. in an action for money had and received (p). But it should seem, that if A. himself had received payment of the bill, he would have been liable, he having no authority to make the bill payable at C.'s house(q). And where a party, having by mistake paid a bill for the honour of a supposed indorser, but immediately afterwards discovered that the indorsement was forged, and gave notice thereof on the same day to the parties who received the money, it was held, that he might recover it back from him; and this, although the banker had cancelled the indorsements, such cancelling by mistake not having discharged the indorsers, and the party receiving the money being enabled by the prompt notice of non-payment, given to him on the same day, to give notice of the circumstances to such indorsers, and being, therefore, precisely in the same situation as if the bill had been refused payment on presentment(r).

The amount of some forged instruments, paid or received by mistake, appears in some cases to have been considered as recoverable back without regard to any inquiry whether the forgery was immediately discovered and communicated, as in the case of bank-notes, navy-bills, and victualling-bills. Thus where a forged navy-bill was discounted by A. for B., both being ignorant of the fraud, it was held, that the discounter might recover back the amount, because the supposed navy-bill was not such as it purported to be; and Gibbs, C. J. assimilated the case to that of a forged bank note, where a party is answerable that the instrument is that which it purports to be(s). So where a victualling bill was fraudulently altered and enlarged, and was [•428] paid by the Victualling Office, on whom it was drawn, before the *forgery was discovered, the court decided that the money was recoverable back(t).

Where bankers discounted for the defendants a bill which they did not indorse, and it turned out that the names of the drawer and acceptor were

(p) Davis v. Wateon and another, 2 Nev. & Man. 709.

was in defendant's notary, who brought the bills to them as genuine, and thereby led them into the mistake; they corrected the mistake in time to prevent any party to the bills being discharged by want of notice, and before the situation of any of the parties could have been altered. The cancelling the indorsements being by mistake did not vacate them, the indorsers might still be sued; and if such cancellation caused damage or additional expence to any one, it might make plaintiffs liable to bear that damage, but that damage would not necessarily extend to the whole amount of the bills, and therefore there was no defence to the action." Postea to plaintiffs. See post, 430, 431. That a cancellution by mistake does not vitiate, see Fernandey v. Glynn, 1 Campb. 426, note; ante, 296, note (m); Novelli v. Rossi, 2 B. & Ad.

757; ante, 309, note (t).
(s) Jones v. Ryde, 5 Taunt. 488; 1 Marsh. 157, (Chit. j. 906); ante, 245, note (k)

(t) Bruce v. Bruce, 5 Taunt. 495; 1 Marsh. 165, (Chit. j. 908); recognized in Wilkinson v. Johnson, 3 Bar. & C. 428; 5 D & Ry. 403, (Chit. j. 1231).

⁽q) Id ibid. (r) Wilkinson, v. Johnson, 3 B. & C. 428; 5 D. & R. 403, (Chit. j. 1231). Three bills with an indorsement in the name of "A. Heywood, Sons, and Co." being dishonoured, the notary carried them to plaintiffs, the London bankers of A. Heywood, Sous, and Co. that they might take them up for the honour of A. Heywood, Sons, and Co., which they did immediately, at about 11, A. M. Plaintitis cancelled the name of every indorser subsequent to the name of A. Heywood, Sons, and Co. by running the pen through them as soon as they paid the bills. But plaintiffs very soon discovered that the indorsements were forged, and before 1, P. M. they gave notice to Smith and Co., defendant's agents, (by whom the notary had been employed and who had received the money,) and demanded the money back, and on non-payment sued defendants. Case and two arguments, and after time to consider, the Court held plaintiffs entitled to recover; "that they were not alone to blame; part of the fault

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forged, it was held, that the bankers might recover the amount from the defendants, although it appeared that they were bill-brokers, and acted only Payment. as agents, and had paid over the amount; because they delivered the instru- 9thly, of ment to the plaintiffs as a bill, whereas it turned out not to be a bill(u).

We have seen that if a check, which has the genuine signature of the of Paydrawer, be fraudulently altered to a larger sum, and the banker, by mistake, of Paypays it, he cannot debit his customer with the larger amount (x). But if a ments by bill or check be drawn in so careless and improper a manner, as thereby to &c. enable a third person to practise the fraud, then the customer, and not the banker, must bear the loss (y). And as it is the regular *and usual course [*429] of business in commercial transactions to deliver out a bill of exchange, left for acceptance, to any person who mentions the amount and describes any private mark or number upon it, if the clerk of the party leaving it by his conduct enables a stranger to discover the mark or number, in consequence

(u) Fuller v. Smith, Ry. & Mood. 49; and 1 Car. & P. 197, (Chit. j. 1205); ante, 245, note (k).

(x) Anie, 261, 262; Hall v. Fuller, 5 Bar. & Cres. 750; 8 Dow. & Ry. 464, (Chit. j.

1294); and post, 480, note (m). (y) Young v. Grote, 4 Bing. 259; 12 Moore, 484, (Chit. j. 1844). A customer of a banker delivered to his wife certain printed checks signed by himself, but with blanks for the sums, requesting his wife to fill up the blanks according to the exigency of his business. She caused one to be filled up with the words " fifty pounds, two shillings," the fifty being commenced with a small letter, and placed in the middle of a line, the figures 50l. 2s. were also placed at a considerable distance from the printed £; in this state she delivered the check to her husband's clerk to receive the amount, whereupon he inserted, at the beginning of the line in which the word fifty was written, the words "three hundred and," and the figure 8 between the £ and the 50, and the bankers having paid the 8501. 2s. it was held that the loss must fall on the customer. And per Best, C. J. "Although I entertain no doubt on the subject, this is a case of considerable importance, and the question has been properly raised by the ar-bitrator. Undoubtedly a banker who pays a forged check is in general bound to pay the amount again to his customer, because, in the first instance, he pays without authority. this principle the two cases which have been cited were decided, because it is the duty of the banker to be acquainted with his customer's hand-writing, and the banker, not the customer, must suffer, if a payment be made without authority. But though that rule be perfectly well established, yet if it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again. That principle has been well illustrated by Pothier, in commenting on the case put by Scacchia, 'Cependant si c'etait par la faute du tireur que le banquier eat ete induit en erreur, le tireur n'ayant pas eu le soin d'ecrire sa lettre de manier à prevenir les falsifications patues s'il avait ecrit en chiffres la somme tiree par la lettre et qu'on est ajoute zero, le tireur serait en ce cas

tenu d'indemniser le banquier de ce qu'il a souffert de la sulsification de la lettre à laquelle le tireur par sa faute a donne lieu; et c'este a ce cas qu'on droit restreindre la decision de Scacchia.' In the the present case, was it not the fault of Young that Grote & Co. paid 3501. instead of 501.? Young leaves a blank check in the care of his wife. It is urged, indeed, that the business of merchants requires them to sign checks in blank, and leave them to be filled up by agents; if that be so, the person selected for the care of such a check ought at least to be a person conversant with business as well as trustworthy; but it was not likely that the drawer's wife should be acquainted with business, and she, acting as her husband's agent, ought not to have trusted to receive the contents of the check any person with whose character she was not perfectly acquainted. If Young, instead of leaving the check with a female, had left it with a man of business, he would have guarded against fraud in the mode of filling it up; he would have placed the word fifty at the beginning of the second line, and would have commenced it with a capital letter, so that it could not have had the appearance of following pro-perly after a preceding word; he would also have placed the figure 5 so near to the printed £ as to prevent the possibility of interpolation. It was by the neglect of these ordinary precautions that Grote and Co. were induced to pay. The case of Smith v. Mercer bears no resemblance to the present, but Chambre, J. grounded his judgment on the same principle as that on which we now proceed. In Hall r. Fuller the check was properly drawn by the plaintiff in the first instance, the words which he had written were expunged and supplied by others in a different hand-writing, and the alteration was made, not by the plaintiff's clerk or a person improperly trusted by him, but by an entire stranger, who accidentally became possessed of the check. If the banker had been discharged, in that case there could be none in which he would be liable. We decide here on the ground that the banker has been misled by want of proper caution on the part of his cus-tomer." And see Morrison r. Buchanan & C. & P. 18; S. P. next note.

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9thly, Of the Effect of Payment, and of Payments by Mistake, &c.

of which the bill is delivered out to him, the party leaving it cannot maintain trover for the bill against the party who so delivered it out(z).

In France, it seems that if a drawee should, after paying a bill, discover that his own name was forged, or that he had originally accepted for a smaller sum, he cannot recover back any part from the holder(a); but that if any person pay a bill for the honour of the indorsers, he has a right afterwards to require the holder, whom he paid, to state the name and residence of at least his immediate indorser, and if that indorsement appear to be forged, the party so paying may recover back from the holder the money so paid to him(b).

Where A. paid a sum of money into his bankers for a specific purpose, and the bankers' clerk, by mistake, paid this money to B., for whom it was not intended, it was held, that A. could not maintain an action against B. to recover it back, but must sue the bankers, and they sue B.(c)(1). appears to have been considered, that if the holder of a check, immediately after the death of the drawer, and before the banker is apprised of it, receive the amount, he will not be liable to refund, though in general the death of a party is a countermand of a bare authority (d). Where bills of exchange drawn upon and accepted by the East India Company in favour of W. H., in India, were afterwards indorsed to D. and C., by a person assuming to act as an agent for W. H., under a supposed authority given by a power of attorney, which was seen and inspected by the acceptors; and D. and C. indorsed the bills to B. and Co. their bankers, in order that they might, as their agents, present them for payment when due; and B. and Co. put their names on the back of the bills, presented them for payment, and received the amount, which they soon after paid over to their principals; and it was afterwards discovered that the power of attorney was no authority for the agent to indorse the bills, and the authorised indorsee of W. H. recovered the amount against the East India Company, it was held, that as the Company paid the bills on the faith of the power of attorney, and not of the indorsement, they could not recover back the amount of defendants B. and Co., they also having paid over the money before notice of the facts(e).

We have already seen who must bear the loss in the case of a lost bill, If bankers pay a cancelled check, drawn by a customer, under circumstances which ought to have induced them to make inquiries before paying it, and which shew a want of bona fides in making the payment(g); [*430] for if they pay a check after notice from their *customer not to do so, they

(z) Morrison v. Buchanan, 6 Car. & P. 18. II. Ch. IV. Defences and Pleas.

(a) 1 Pardess. 476.

(b) Id. 474, 475

(c) Rogers v. Kelly, 2 Campb. 123. (d) Tate v. Hilbert, 2 Ves. jun. 118, (Chit.

j. 510); ante, 282, note (y).

(e) East India Company v. Tritton, 3 B. & C. 280; 5 D. & R. 214, (Chit. j. 1216); ante, 28, note (m).

(f) Ante, 253, &c. The rule laid down ante, 257, viz. that to defeat the claim of the holder of a lost bill, &c. who has given value, a case of mala fides must be established, has since been recognized in the late case of Uther v. Rich, 2 Perry & Dav. 579, 585, post, Part

(g) See ante, 257, and last note; Scholey v. Ramsbottom, 2 Campb. 485, (Chit. j 807); et Pothier Traite du Contrat de Change, part 1, c. 4, s. 99, ct seq.

Scholey v. Ramsbottom, 2 Campb. 485, (Chit. j. 807). The defendants were bankers, with whom the plaintiff kept cash. an action to recover the balance of his account, and the only question was, whether they were entitled to take credit for a sum of 366l. On Wednesday, the 20th September, 1809, the plaintiff being indebted to Messrs. Miller and Co. drew a check in their favour, in the following form :-

⁽¹⁾ So where money remitted to pay one bill was applied to the payment of another bill, it was held that no action lay against the holder of the latter in favor of the party remitting the money, but he must look up to the other parties to rectify the mistake, if any was made. v. Murray, 9 John Rep. 171.

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II. Of

cannot take credit for the amount in their account. We have before noticed

the effect of a delivery of a bill, &c. in payment(h).

It has been decided (i), that in an action for money had and received by 9thly, of the holder of a bill of exchange against a person who has received a sum of the Effect money from the acceptor to satisfy it, any defence may be set up which of Payment, and would have been available if the action had been brought against the accept- of Pay-In trover for bank-notes, to prove that they belonged to plain- ments by tiff, the evidence was, that they had been delivered out by a banker's clerk &c. (to what person he could not tell), in payment of a check which was payable to the plaintiff or bearer, and this was held to be prima facie evidence of property (k). If upon a bill becoming due, the party to it requests another to pay the amount out of a particular fund, and the latter agrees to comply with that request, in consequence of which the holder gives up the bill, he will be entitled to seek for payment out of the fund in pursuance of the agree- \mathbf{m} ent(l) .

With respect to payments by mistake of bills or notes where there has been forgery, the decisions and opinions have been contradictory. It seems however clear on principle as well as authority, that a drawee of a bill, or a banker acting for his customer, cannot, in case he pays a bill where the drawer's signature has been forged, or where the sum has been fraudulently enlarged, without the fault of the drawer, debit the drawer with the sum so paid without his authority, or recover the amount from him(m). But there are many conflicting decisions upon the question, whether the party paying shall be allowed to recover back the money from the person to whom he has inadvertently paid. It has been contended, that if the party paid was a bond fide holder, ignorant of the forgery, then he ought not to be obliged to refund under any circumstances, although he could not have enforced payment, and although he had immediate notice of the forgery, because the drawee was bound to know the hand-writing of the drawer and the genuineness of the bill(n), and because the holder being ignorant of the forgery, ought to have the benefit of the accident of such payment *by mistake, and not [*431] to be compelled to refund (a) W But on the other hand it may be observed, that

"London, Sept. 20, 1809.
"Messrs Ramsbottom, Newman, Ramsbottom and Co. pay Mesers. Miller and Co. or bearer, three hundred and sixty-six pounds. "ROBERT SCHOLEY."

But finding that the sum was incorrect, he tore the check into four pieces, which he threw from him, and drew another in the same form for 360l. The latter was presented for payment, and paid by the defendants the same day. On Monday, the 25th of September, the first check was likewise presented for payment by a person unknown. The four pieces into which it had been torn were then neatly pasted together upon another slip of paper, but the rents were quite visible, and the face of the check was soiled and dirty. The defendant's clerk paid it, however, without making any inquiries. Lord Ellenborough was of opinion, that under these circumstances, bankers were not justified in paying the check, and the jury found a verdict for the plaintiff for 3661.

(h) Ante, 172. (i) Redshaw v. Jackson, 1 Campb. 362, (Chit. j. 751).

(k) Richard v. Carr, 1 Campb. 551.

(1) Yates v. Groves, 1 Ves. jun. 280. (m) Hall v. Fuller, 5 Bar. & Cres. 750; 8 Dowl. & Ry. 464, (Chit. j. 1294); ante, 262, note (x). Plaintiff lent Wagstaffe a check on his bankers for 31. Wagstaffe altered the 81. into 2001 and defendants paid it. They insisted on charging plaintiff with 2001. and on a special case it was objected, that plaintiff ought not to have drawn for so small an amount as 31., and that as the forgery could not have been detected by ordinary observation, therefore the payment ought to be allowed. But the Court said, that it did not appear defendants had ever prohibited plaintiff from drawing for so low a sum, and hard as the case might be, defendants had authority to charge against plaintiff such sums only as plaintiff had ordered him to pay, and here plaintiff had only ordered him to pay 81., so plaintiff recovered.(n) See the opinions of Dallas and Heath,

Justices, in Smith v. Mercer, 6 Taunt. 76; 1 Marsh. 453, (Chit. j. 923); ante, 261, n. (u),

and post, 431, note (r).
(o) Id. ibid.; and Price v. Neale, 3 Burr.
1355; 1 Bla. R. 390, (Chit. j. 364, 365).

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II. Of 9thly, Of the Effect of Payment, and of Payments by Mistake. & c.

the holder who obtained payment cannot be considered as having altogether shewn sufficient circumspection; he might, before he discounted or received the instrument in payment, have made more inquiries as to the signatures and genuineness of the instrument, even of the drawer or indorsers themselves; and if he thought fit to rely on the bare representation of the party from whom he took it, there is no reason that he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when, by an immediate notice of the forgery, he is enabled to proceed against all other parties precisely the same as if the payment had not been made, and, consequently, the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems, that of late, upon questions of this nature, these latter considerations have influenced the court in determining, whether or not the money shall be recoverable back; and it will be found, on examining the older cases, that there were facts affording a distinction, and that upon attempting to reconcile them they are not so contradictory as might, on first view, have been supposed (p).

It has been decided that a drawee, who had accepted and afterwards paid a bill, and who had waited a considerable time after discovering that the drawer's name was forged, could not recover back the amount, for there, by his acceptance, he gave credit to the bill, and thereby induced the plaintiff to take it, and he also delayed giving notice of the forgery (q). So, in another case, where bankers paid a forged acceptance, supposed to have been made by their customer, and payable at their bank, but did not discover or give notice of the forgery to the party they had paid for a week afterwards, it was held, that such delay precluded them from recovering back the amount, because thereby the means of resorting, with affect, to the prior parties, was prejudiced if not defeated (r); but the court were not unanimous in that decision, Chambre, J. being of opinion that the case came within the general [*432] *rule, of money paid under a mistake of facts, being recoverable back, and that, therefore, the defendant was liable to refund; and Dallas and Heath,

Two forged bills were drawn upon the plaintiff, which he accepted and paid. On discovering the forgery, he brought this action for money had and received, to recover back the money; but on a case reserved, the court held, that it would not lie; and Lord Mansfield said, it was incumbent on him to have been satisfied, before he accepted or paid them, that the bills were in the drawer's hand. And in Smith v. Chester, 1 T. R. 655, (Chit. j. 439), Buller, J. says, when a bill is presented for acceptance, the acceptor looks to the handwriting of the drawer, which he is afterwards procluded from disputing, and it is on that account that he is liable, even though the bill is forged.

(p) See the cases, ante, 426, 427. (q) Price v. Neale, 3 Burr. 1355; 1 Bla. R.

890, (Chit. j. 364, 365); ante, 430, note (o).
(r) Smith v. Mercer, 6 Taunt. 76; 1 Marsh. 453, (Chit. j. 923). A bill of exchange, with a forged acceptance, purporting to be payable at the house of A. and Co. bankers, in London, with whom the supposed acceptor keeps cash, is indorsed to B. for a valuable consideration; B. indorses it to his agent in London, who presents it on the 23d of April, at the kouse of A.

and Co for payment: A. and Co. pay it, and after keeping it until the 30th of April, send it to the supposed acceptor, who disavows it; A. and Co. thereupon immediately afterwards give notice of the forgery to B., and demand repayment, which B. refuses; all parties are ignorant of the fraud: held, that A. and Co. by paying the bill, without ascertaining that the acceptance was genuine, and delaying to give notice for a week, were precluded from recov-ering the amount from B., for it is a general principle that the acceptor is bound to know the hand-writing of the drawer; and therefore, it is more by his fault or negligence than by mistake if he pays on a forged signature. Chambre, 9. dissentiente. N. B. In Wilkinson v. Johnson, 3 Bar. & C. 437; 5 Dow. & Ry. 403, (Chit. j. 1231), Abbott, C. J. said, "It is not easy to reconcile the opinions of some of the judges in this case of Smith v. Mercer, with v. Bruce, t Marsh. 165; 5 Taunt. 495, (Chit. j. 908)." But note, Gibbs, C. J. decided But note, Gibbs, C. J. decided Smith v. Mercer principally on the delay of a week in giving notice, which reconciles that case with the recent decisions.

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Justices, thinking otherwise, on the ground that it was the plaintiff's duty to know their customer's hand before they paid the bill; and Gibbs, C. J. be- Payment. ing the only judge who put the case on its true ground, viz. the plaintiff's delay in giving notice of the forgery, and having thereby destroyed the defendant's remedy over.

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*CHAPTER X.

OF NON-PAYMENT:—NECESSARY PROCEEDINGS THEREON, AND OF PAYMENT SUPRA PROTEST.

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I. Of Nonpayment, and neces sary Proceedings thereon.

I. OF Non-payment, and necessary Proceedings thereon.

Conduct of Holder in eneral on Non-payment.

In general, if on presentment for payment, the drawee of the bill or maker of a note refuse to pay the amount, it is incumbent on the holder, if it be a foreign bill, to protest for non-payment, and whether it be foreign or inland, or a promissory note, the holder must in general give notice of the non-payment by the drawee or maker to all the other parties against whom he means to proceed, or they will be discharged from their respective liabilities(a)(1). The conduct which the holder should pursue on non-payment is very similar to that which should be adopted on non-acceptance, which we have previously considered(b); but it will be advisable here to arrange all the law on the subject under the above subdivisions, even at the risk of repetition, but omitting any detail of the decisions and rules more peculiarly applicable to cases of non-acceptance.

(a) Smith v. Wilson, Andrew's Reports, 187, R. 239, (Chit. j. 506). (Chit. j. 285, 286); Rogers v. Stephens, 2 T. (b) Ante, 325 to 343. R. 718, (Chit. j. 446); Gale v. Walsh, 5 T.

Where in a notice of non-payment dated on the day that a draft falls due, it is stated that the where in a notice of non-payment acted on the day that a draft fails due, it is stated that the draft was protested on the evening before, for non-payment, and that the holders look to the indorser for payment, it is right and proper to submit the question to a jury, whether or not the defendant has been misled. Ontario Bank v. Betrie, 3 Wend. Rep. 456.

A notice of protest to an indorser that the note of A. B. indorsed by him is protested for non-payment, is sufficient to put him on inquiry, although the amount of the note is erroneously stational in the sufficient to be the sufficient to be a

are satisfied that the indorser was not misled by the notice, they are authorized to find a verdict against him. Bank of Rochester v. Gould, 9 Wend. Rep. 279.

And see Bank of Alexandria v. Swann, 9 Peters, 38; Mills v. The Bank of the U. S., 11 Wheat. 431.

Where a note is indorsed, however, upon which nothing is due, it is a fraud, and notice is not necessary to subject the indorser. Bissell v. Bozman, 2 Dev. Eq. Rep. 162.

⁽¹⁾ If there be a slight mistake in the description of the note or bill it will not vitiate the notice, if the party would not be led into an error by it. As if in case of a note payable at a bank, where the indorser had no other note but the one described, the time when it became due should be wrongly stated. Smith v. Whiting, 12 Mass. Rep. 6; or the sum should be mistaken. Reed v. Seizas, 2 John. Cas. 337.

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The general rule is, that in case a bill, check, or note, be not paid on the I. Of Nonday it has been duly presented for payment, notice must be duly given or payment, forwarded in the manner and within the time presently stated, to the draw-and neces-sary Proer and indorsers of the bill or check, and to the indorsers of the promisso- ceedings ry note, or the parties to whom notice has not been so given will be dis-thereon. charged from liability, not only to pay the instrument itself, but also the debt 1st, When or transaction in respect of which he became a party to it(c). Thus, the Notice of neglect to give notice to the drawer of a *renewed bill, not only discharges Non-payhim from liability to pay that bill, but also discharges him from liability to mention pay the prior bill, to satisfy which it was drawn(d); and this, although it be not; Conexpressly agreed that the taking such second bill shall not exonerate any of sequences expressly agreed that the taking such second bill shall not exonerate any of of Omisthe parties to the first bill until actual payment (e). And if one of the parties, sion; and even in blameless ignorance of the laches of the holder, should pay him or what exany other party the amount of the bill, the person so paying will not be able cuses such to recover from the drawer or indorser or other party who had been so pre-viously discharged; so that no *indorser* can safely pay a bill without first ascertaining whether or not due notice of non-acceptance or non-payment has been given (f).

Even an express verbal agreement between all the parties to a bill or note, that it shall not be put in suit till certain estates have been sold, although it mislead and induce the holder not to give regular notice of non-payment when the bill or note falls due, constitutes no excuse for such neglect; because, in point of law, no such parol agreement is available to the party as a defence to an immediate action; and as it is inoperative for one purpose it ought not to have any effect, and therefore, notwithstanding it, notice should be given(g). And although there are some exceptions excusing the omission to give notice, yet they are so qualified, that it is very imprudent in any case to rely on them, and every cautious holder should, immediately after he has received notice of the dishonour of a bill or note, give a separate and distinct notice thereof, not only to his immediate indorser, but to every

(c) Smith v. Wilson, Andr. Rep. 187, (Ch. j. 285, 286); Rogers v. Stephens, 2 T. R. 713, (Chit. j. 446); Gale v. Walsh, 5 T. R. 239, (Chit. j. 506); Bridges v. Berry, 3 Taunt. 130, (Chit. j. 804); 3 Maule & S. 362; Rucker v. Hiller, 16 East, 43; 3 Campb. 217, (Chit. j. 861)

In Bridges v. Berry the defendant was accepttor of a prior bill, and after it was dishonoured he drew and indorsed a larger bill, on a third person, in payment, and delivered it to plaintiffs, who paid him the difference, and which bill was dishonoured, but no notice thereof given to defendants. Action on beth bills, and Mansfield, C. J. held, that by such laches defendant was discharged from liability to pay either of the bills.

It is not, however the practice among respectable houses to take advantage of a slight omission or irregularity in giving notice of dis-honour, except where an actual loss or injury has arisen from the neglect.

(d) Sec cases, ante, 433, note (c).

(e) Reid v. Coats, 6 Bro. P. C. 21st Feb. 1794. Where on a bill of exchange being dishonoured and protested, a fresh bill was received by the holder (accepted by new parties) as an additional security; held, that the holder was bound to use due diligence to obtain payment of this latter bill, and that in a case of gross neglect in so doing, he shall not recover against the acceptor or indorsers of the first bill, though the acceptors of the second bill become bankrupt, and though in the receipt given for such second bill, it is expressly stated to be agreed " that such bill was in no respect to exonerate the acceptors of the first bill, or any of the parties thereby bound, until actual payment thereof made.

(f) Roscoe v. Hardy, 12 East, 434; 2 Campb. 458, (Chit. j. 801); ante, 215, n. (x), see also ante, 391, n. (s), 426, n. (m). And yet it has been held, that if, after presentment for acceptance and refusal, and neglect of the holder to give due notice of such dishonour, the bolder indorse the bill to a new party before it becomes due, he, if ignorant of such laches, may recover on the bill. O'Keefe v. Dunn, 6 Taunt. 805; 1 Marsh. 613; 5 Maule & S. 282, (Chit. j. 937); ante, 214, note (r), affirmed on error. This distinction proceeds on the impracticability of ascertaining, in some cases, whether or not, and at what time, a bill has been refused acceptance, whereas every person can in general ascertain whether there have been laches as to non-payment.

(g) Free v. Hawkins, Holt, C. N. P. 550; 9 Taunt. 92; 1 Moore, 28, 535, (Chit. j. 1000); and see Gunson v. Metz, 2 Dowl. & R. 334; 1 Bar. & C. 193, (Chit. j. 1168).

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and necessary Proceedings thereon.

Notice of Non-payment necessary or not; Consequences of Omission; and what excuses such Omission.

in general necessary. [*435]

I. Of Non- other party to the instrument, whether by indorsement or transfer by mere delivery or by guarantee, or otherwise responsible for the payment; for although the want of effects may in some cases excuse the neglect, or a notice from any party to a bill may enure to the use of the holder, yet these are mere accidents in his favour on which no prudent person should rely. We 1st, When will now proceed to consider the exceptions to the general rule requiring notice, and their qualifications.

We have seen, that if the bill or note were given on a wrong stamp, the neglect to present it for payment, or togive notice of the refusal, will not prejudice(h). And if a bill or note be so framed as to afford the indorser no remedy over against the drawer or maker, as if it be not made payable to order, and consequently not negotiable, the want of notice of dishonour will not preclude any indorsee from suing his immediate indorsers for the original consideration of the bill or note(i). *And where a bill has been previously re-When not fused acceptance, and due notice thereof given, it has been considered unnecessary to give notice of the subsequent refusal to pay, because a right of action against the drawer and indorsers had previously been complete on their receiving notice of non-acceptance (k)(1). So, if the holder has given due notice of non-payment, but intimated that he expects the bill will be paid at the end of the week, and that he will keep it that time without incurring expense unless he hears from the defendant to the contrary, he need not give a further notice of the non-payment at the end of the time unless he engaged to do so, and actual damage be sustained (l). So, if a bill were given only as a collateral security, and the party causing it to be made or delivered to the holder were no party to it, it will be seen that he will not be discharged from his original liability to pay the prior debt, unless he has been actually prejudiced by the want of notice(m). And as no laches are imputable to the Crown, if a bill be seized under an extent before it is due, the neglect of the officer of the Crown to give notice of the dishonour, will not discharge the drawer or indorsers (n). And where persons who are bankers, as well for the acceptor as for the drawer, receive a bill from the drawer, and give credit for it in account between them, and before it becomes due receive directions from the acceptor to stop the payment of it at their bank, where it is by the acceptance made payable, and they do so accordingly, it suffices for them to give to the drawer general notice of non-payment, and

> (h) Anie, 124, 125; Wilson v. Vysar, 4 Taunt. 288, (Chit. j. 860); Cundy v. Marriot, 1 Bar. & Adol. 696, (Chit. j. 1522).
> (i) Plimley v. Westley, 2 Scott, 428; S. C.

> 2 Bing. N. C. 249; 1 Hodges, 324, S. C. See ante, 177; see also ante, 242, note (i), that in such case the indorser cannot be sued as the drawer of a new bill.

> (k) Price v. Dardell, Sittings at Guildhall, London, 11th December, 1794, cor. Lord Ken-yon, His lordship said, "It is in no case necessary to give notice when it is a second dishon-our;" and in De la Torre v. Barclay and an-

other, 1 Stark. C. N. P. 7, (Chit. j. 905), Lord Ellenborough said, "That as the bill had been protested for non-acceptance, a second protest was perfectly gratuitous and unnecessary. See also Forster v. Jurdison, 16 East, 105, (Ch. j. 862); and see Hickling v. Hardy, 7 Taunt. 312; 1 Moore, 61, (Chit. j. 983); ante, 259, note (p)

(1) Forster v. Jurdison East, 105, (Chit. j. 862).

(m) See post, 441 to 443.

(n) West on Extents, 28, 29.

⁽¹⁾ Williams v. Robinson, 18 Louis. Rep. 419; Jordan v. Bell, 8 Port, 53. So where one draws a bill on himself and accepts it, and is afterwards sued as drawer, in default of payment. Smith v. Paul, 8 Port. 503. So where the drawer agreed with the payee that in case of non-payment by the drawer, the payee should wait until a certain day, when the drawer would pay the bill, notice was held not to be necessary till such day, and if the drawer died before such day, no notice was necessary to his executors. Long v. Moore, 2 Brev. 172. }

PART L

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they need not give any notice to the drawer of the private directions, which I. Of Nonare confidential(o).

The reason why the law in general requires the holder to give prompt no- sary Protice of non-payment by the drawee of a bill or maker of a note is, that the coolings drawer of a bill and indorser of the note may, by such notice, be enabled thereon. forthwith to withdraw his effects from the hands of the drawee or maker, or Why the to stop those which were about to be delivered to him, and to suspend any Lawingefurther credit, and that the drawer and indorsers respectively take the necessary prompt measures against all parties liable to them to obtain and enforce Detriment payment; and if such prompt notice be delayed, it is a presumption of law to Indonsthat the drawer and indorsers have been prejudiced(p). Such damage is ers, &c. always in this country presumed (q), and almost the only allowed proof of ∞ , &c. the negative is that of the entire want of effects in the hands of the drawee continually, from the time of drawing the bill until and after the day it fell due, and this under such circumstances as to establish that the drawer had no right to expect the drawee, or any other person, to accept or pay, and that the notice of non-payment would have been of no use to the drawer, because he could not have sued the drawee, or any other person, on account of his neglect to pay; nor will any other *proof, however clear, that the drawee [*436] had not, in fact, been prejudiced by the want of notice, be admitted (r). And it is always presumed, until the contrary has been proved, that the drawer of a bill had effects in the hands of the drawee, or had a right to draw upon him for the amount, and that the indorser or assignor had given value for it, and that each has been prejudiced by the holders neglect to give due notice, by the delay in the opportunity of resorting to the prior parties liable to them respectively(s); for if due notice had been given to them, they might, by instant solicitation and pressure, perhaps have obtained payment or security from the drawee, and a day or even an hour's delay, in mercantile affairs, will frequently occasion a total non-payment, when, by a prompt notice, payment might have been obtained(t). This presumption of damage or prejudice having arisen from the laches of the holder, is so strong and uniform, that it is only allowed to be rebutted by one description of proof, viz. that the party who objects to the want of notice had no effects in the hands of the drawee, and that the bill was for his accommodation, and consequently that he had no right to draw, and that the notice of non-payment would have been of no avail to him; and in no other case is evidence admissible to shew that in truth the drawer or indorser was not prejudiced by

and neces-

(o) Crosse v. Smith, 1 Maule & S. 454,

(Chit. j. 886).
(p) Whitfield v. Savage, 2 Bos. & Pul. 280, (Chit. j. 630); Orr v. Magennis, 7 East, 862; 2 Smith, 328, (Chit. j. 726); Claridge v. Dalton, 4 Maule & S. 226, (Chit. j. 934); Long v. Scott, 8 Bar. & Ald. 621.

(q) Id. ibid. In France it seems that the drawer is sometimes required to prove affirmatively that he had effects in hands of drawee. 1 Pardess. 458.

(r) Per Abbott, C. J. Hill v. Heap, Dow. & Ry. N. P. C. 59; Dennis v. Morrice, 3 Esp. Rep. 158, (Chit. j. 626). In an action on a bill brought by an indorsee against the drawer, it appeared that no notice had been given to the defendant of non-payment by the acceptor, to excuse which, the plaintiff offered to prove that in fact the defendant had not been prejudiced by the want of such notice. But Lord Kenyon said, "The only case in which notice

is dispensed with is, where the drawer has no effects in the hands of the drawee. would be extending the rule still further than ever has been done, and opening new sources of litigation, in investigating whether, in fact, the drawer did receive a prejudice from the want of notice or not." He rejected the evidence, and nonsuited the plaintiff. Sed vide Pothier Traite du Contrat de Change, part I., chap. 5, num. 157, 158. It was formerly held, that a neglect to give notice did not furnish a defence, unless the defendant could prove that he was actually prejudiced thereby, Meggadon v. Holt, 12 Mod. 15; 1 Show. 317, (Chit. j. 182).
(s) Per Buller, J. in Bickerdike v. Bollman,

1 T. R. 406, 409, (Chit. j. 435).

(t) Russell v. Langstaffe, Dougl. 497, 515, (Chit. j. 415); and Esdaile v. Sowerby, 11 East, 114, (Chit. j. 767).

sary Proceedings thereon.

I. Of Non- the neglect (u). And although the holder may be certain that he can prove that the drawer had no effects in the hands of the drawee, yet, as there are so frequently exceptions even to that circumstance constituting any excuse, it would be most imprudent in any such case to omit giving a proper no-

Want of effects.

But if the bill was accepted for the accommodation of the drawer, and he when it ex- expressly or impliedly engaged to pay it(x), or if the drawer of a bill, from cuses No- the time of making it to the time when it was due, had no effects or property whatever in the hands of the drawee or acceptor, and had no right upon any other ground to expect that the bill would be paid by him, or anyother party to the bill, he is prim? facie not entitled to notice of the dishonour of the [*437] bill(y)(1); nor can be object, in *such case, that a foreign bill has not been

> (u) Dennis v. Morrice, 3 Esp. Rep. 158, (Chit. j. 626), supra, note (r); Bayl. 5th edit. **\$**02.

> (x) Sharp v. Bailey, 9 Bar. & C. 44; 4 Man. & Ry. 18, (Chit. j. 1416); and cases in the next note.

> next note.
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> (y) Sharp v. Bailey, 9 B. & C. 44; 4 Man. & Ry. 18, (Chit. j. 1416); Cory r. Scott, 3 Bar. & Ald. 619, (Chit. j. 1081); Claridge v. Dalton, 4 Maule & S. 229. (Chit. j. 934); Legge v. Thorpe, 2 Campb. 310; 12 East, 171, (Chit. j. 783); Terry v. Parker, 6 Ad. & El. 502; 1 N. & P. 752, S. C.; ante, 390, note (e). where the rule, principle, and inconveniences are stated; and see Walwyn v. St. Quintin, 1 B. & P. 654, 655, (Chit. j. 578); Clegg r. Cotton, 8 B. & P. 241, 242, (Chit. j. 657); Gale v. Walsh, 5 T. R. 239, (Chit. j. 506); Poth. pl. 157; Bickerdike r. Bollman, 1 T. R. 105; Goodall v. Dolley, 1 T. R. 712, (Chit. j. 440); Rogers v. Stephens, 2 T. R. 713, (Chit. j. 446); Nicholson v. Gouthit, 2 Hen. Bla. 610, (Chit. j. 556); Staples v. Okines, 1 Esp. Rep. 833, (Chit. j. 544); Wilkes v. Jacks, Peake's C. N. P. 202. The progress of the cases on this subject is also stated in Brown v. Maffey, 15 East, 216. See also as to the French law, Pothier, pl. 157, 158; and the reasoning Pailliet Man. de Droit Français, 842.

Bickerdike, assignee, v. Bollman, 1 T. R. 405, (Chit. j. 435). The only question upon a case reserved was, whether the bill the bankrupt had drawn in favour of the petitioning creditor, upon a man, who then, and from that time till the bill became due, was one of the bankrupt's creditors, had discharged so much of the petitioning creditor's debts, no notice having been given of its dishonour to the bankrupt; and the court, after argument, were of opinion it had not, because the reason why notice is in general necessary is, that the drawer may, without delay, withdraw his effects from the drawee, and that no injury may happen to him from want of notice; but where the drawer has no effects in the hands of the drawee, he cannot be injured, and is not entitled to any notice. In Brown v. Maffey, 15 East, 221, Lord Ellenborough, C. J. observed, "that the doctrine of dispensing with notice of the dishonour of a bill, had grown almost entirely out of this case, and that though there might have been previous decisions to the same effect at nisi prius, yet none had been brought in revision before the court till this case; that decision dispensed with notice to the drawer, where he knew before-hand he had no effects in the hands of the drawce, and had no reason to expect that the bill would be paid when it became

Goodall v. Dolley, 1 T. R. 712, (Chit. j. 440). In this case, upon the application for a new trial, the plaintiff's counsel offered an affidavit that the drawer had no effects in the hands of the drawee; but the court thought that made no difference, the action being brought against the payee; but by Buller, J. "Had the action been against the drawer, I should have been willing to let in the affidavit; tha

(1) A party who draws a check on a bank without funds in the bank to meet it, is not entitled to notice of non-payment nor is he discharged by the holder's not presenting it in due time. Eichelberger v. Finley, 8 Har. & Johns. 381.

drawer is entitled to notice. Dickins v. Beal, 10 Peters, 572: Hopkirk v. Paige, 2 Brock. 20.
But unless he draws under some such circumstances, his drawing without funds, property, or authority, puts the transaction out of the pale of commercial usage and law. Ibid. See also Bloodgood v. Hawthorn, 9 Curry's Louis. 124. }

An established exception to the general rule that notice of the dishonor of a bill must be given to the drawer, is where he has no funds in the bands of the drawee; but of this exception there are some modifications: If the drawer has made, or is making a consignment to the draw-ee, and draws before the consignment comes to hand: if the goods are in transitu, but the bill of lading is omitted to be sent to the consignee, or the goods were lost: if the drawer has any funds or property in the hands of the drawee, or there is a fluctuating balance between them: or a reasonable expectation that the bill would be paid: or if the drawer has been in the habit of accepting the bills of the drawer, without regard to the state of their accounts, this would be deemed equivalent to effects: or if there was a running account between them: in all these cases the

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In this case, the drawer, being himself the real debtor, ac- I. Of Nonpresented (z). quires no right of action against the acceptor by paying the bill, and suffers payment, no injury from want of notice of non-acceptance or non-payment, and there-sary Profore the laches of the holder afford him no defence(a). So where the draw- coodings er had supplied the drawee with goods on credit, which did not elapse until thereon. after the bill would fall due, and the drawer had no right to draw the bill, it 1st, When was held, that he was not discharged by want of notice of non-payment(b). Notice of And in America, this doctrine has been on the same principle extended to ment necases where the transaction between the drawer and drawee has been illegal, cessary or and which consequently he could not have enforced against the drawee(c). not; Con-We have seen that if the drawer of a bill make it payable at his own house, of Oznisthe jury may fairly infer that it was accepted for his accommodation, and sion; and consequently that it was not necessary to give him notice of non-payment; what exfor why did he, the drawer, make the bill payable at his own house, unless or Omission. he was to provide for the payment of it when it was due(d)?

But it is no excuse for not giving notice to the indorser of a bill, that the acceptor had no effects of the drawer(e). And although no consideration has passed between the payee and drawer of a bill of *exchange, it is not to [*438] be considered an accommodation bill as to the latter, if there was a valuable consideration as between the payee and the acceptor (f). So where a person, without consideration, but without fraud, and at the request of another person, indorsed a bill, the drawer and acceptor of which proved to be fictitious, it was held, that he was entitled to due notice of the dishonour(g).

would be like the case of Bickerdike v. Bollman. If the drawer has no effects in the hands of the drawee, he cannot be injured by want of

Legge v. Thorpe, 12 East, 171; 2 Campb. 810, (Chit. j. 783), was a case of non-acceptance, in which the same sule was laid down,

see the case, ante, 327, note (r).
(z) Legge r. Thorpe, 2 Campb. 310; 12
East, 171, S. C.; ante, 327, note (r).

(a) Per Chambre, J. in Leach v. Hewitt, 4 Taunt. 783, (Chit. j. 881); 1 Pardess. 458,

(b) Claridge v. Dalton, 4 Maule & S. 226,

(Chit. j. 984); post, 446, note (u), et seq.
(c) In Copp v. M'Dougall, 9 Mass. R. 1; Bayl. Amer. edit. 204, where Sewell, J. in giving the opinion of the court to the above effect, compared this to the case of a bill where the drawer had no funds in the hands of the drawee, and said, "when the promise or acceptance is void, as is the case of usury between the drawer and acceptor, if he will resort to that defence sgainst his promise, the contract becomes, as it respects the indorser, a draft accepted without funds, that is, in the case of a promissory note.'

(d) Sharp r. Bailey, 9 Bar. & Cres. 44; 7 Law J. 138, K. B.; 4 M. & Ry. 4, (Chit. j.

1416); ante, 158, note (f).
(e) Wilks v. Jacks, Peake R. 202. The French law is the same. 1 Pardess. 459. In an action against inderser of a bill, drawn by Vaughan on Eustace and Holland, it appeared that notice had not been given to defendant, upon which plaintiff offered to show that Vaughan had no effects in the hands of Eustace and Holland. Sed per Lord Kenyon, C. J. "That circumstance will not avail the plaintiff, the rule extends only to actions brought against the drawer; the indorser is in all cases entitled to notice, for he has no concern with the accounts between the drawer and the drawee." The plaintiff then proved a letter from the defendant, acknowledging the debt, and promising to pay, and upon that he had a verdict.

(f) Scott r. Lifford, 1 Campb. 246; 9 East, 847, (Chit. j. 747, 749). Payee against drauer; the defence was, that the bill was drawn without consideration, and that the plaintiffs had received satisfaction. Agar having an acceptance due to the plaintiffs, requested it to be renewed, to which they consented, provided the defendant would draw a bill upon Agar fer the amount, which he was to accept, and which was accordingly done. Agar also lodged policies of insurance to a large amount with the plaintiffs, by way of collateral security, upon which a certain per centage had since been awarded due upon them. Lord Ellenborough held, that the bill was not an accommodation bill, there having been a consideration between the payers and acceptor, and that if it had been proved that the plaintiffs had received any thing upon the policies, that would pro tanto be satisfaction, that the plaintiffs were entitled to recover the whole sum mentioned in the bill, and must deliver up the policies or refund the money received under them.

(g) Leach v. Hewitt, 4 Taunt. 731, (Chit. j. S81). Action against indorser of a bill, purporting to be drawn by Rogers, Crooke, and Co., and dated from the Northampton Bank, and purporting to be accepted by Rogers and Co., Lombard Street, in favour of defendant. It appeared that defendant had indored the bill at the request of one Cuttle, and that it had come to the hands of the plaintiff for a velocide I. Of Nonpayment. and neces sary Proceedings thereon.

Notice of Non-payment necessary or not; Consequences of Omission; and what excuses such Omission.

[*439]

It was decided in one case, that where a bill has been drawn for the accommodation of the payee, and the drawer had no effects in the hands of the drawee, though the payee had, such drawer is not entitled to notice of nonpayment(h)(1); but that decision was doubted and finally over-ruled; and whenever a party to a bill is entitled to his remedy over against another par-1st, When ty, either on the bill or otherwise, as he may be prejudiced by the delay in giving him notice of the dishonour, he is entitled to due notice thereof(i). It has, therefore, been held, that the drawer of a dishonoured bill is entitled to the notice of the dishonour, although he knew that the bill would not be paid by the acceptor, provided he had any reason or right to expect that it would be paid by any other person, or provided he have any remedy over against such persons(k). And where a bill was drawn by A. upon B. for the accommodation of C., who indorsed it for value to D., and neither A. nor C. had any effects in the hands of B., and the bill was dishonoured by B., it was held, that the drawer was nevertheless entitled to notice(l).

> *It has been holden, that if the payer of a note lend his name, and indorse it merely to give it credit, and to enable the maker to raise money upon it, and knows at the time that the maker is insolvent, this is not a fair transaction, and he therefore is not entitled to notice, and it is no defence for him, that the note was not properly presented for payment(m). But as the payee

consideration. When the bill became due, no such persons as Rogers and Co. were to be found in Lombard Street, nor the drawers at Northampton. After four days, the plaintiff found the defendant, who lived in Clerkenwell. The defence was, that he had not had due notice of the dishonour of the bill. There was no evidence that the defendant was party to the fraud. Mansfield, C. J. directed the jury, that if the conduct of the defendant was not fraudulent he was entitled to notice, and the jury finding that the defendant was not privy to the fraud, the plaintiff was nonsuited; and upon a rule to set aside the nonsuit, and for a new trial, the court held, that the defendant was entitled to notice, and discharged the rule.

(h) Walwyn v. St. Quintin, 1 B. & P. 652; 2 Esp. Rep. 515, (Chit. j. 578). In an action by the indorser against the drawer of a bill, it appeared to have been drawn to accommodate the payee, who had placed securities, on which he wished to raise money, in the hands of the acceptor; the defendant had no effects in the hands of the drawee, and no notice having been given to him of the dishonour of the bill, the question was, whether that were made necessary by the payee's having effects in the hands of the drawee. Eyre, C. J. directed a verdict for the defendant, with liberty for the plaintiff to move to enter a verdict for him. After a rule nisi accordingly, and cause shewn, the court held that the defendant was not enti-But the plaintiff recovered on tled to notice. another ground.

(i) See Norton v. Pickering, 8 Bar. & C. 610; 3 Man. & Ry. 23; Dans. & Ll. 210, (Chit. j. 1411); Cory v. Scott, 3 Bar. & Ald. 619, (Chit. j. 1081); Rucker v. Hiller, 16 East, 3; 8 Campb. 217, (Chit. j. 861); post, 446, note (1); Laffitte v. Slatter, 6 Bing. 623; 4 Moore & P. 457, (Chit. j. 1502); Smith v. Beckett, 18 East, 187, (Chit. j. 816); post, 439, note (n); and Brown v. Maffey, 15 East, 187, (Chit. j. 816); post, 439, note (n); and Brown v. Maffey, 15 East, 187, (Chit. j. 816); post, 439, note (n); and Brown v. Maffey, 15 East, 187, (Chit. j. 816); post, 439, note (n); and Brown v. Maffey, 15 East, 187, (Chit. j. 816); post, 439, note (n); and Brown v. Maffey, 15 East, 187, (Chit. j. 816); post, 439, note (n); and Brown v. Maffey, 15 East, 187, (Chit. j. 816); post, 446, note (n); and Brown v. Maffey, 15 East, 187, (Chit. j. 816); post, 446, note (n); post, 216, (Chit. j. 852); post, 440, note (p); Bayl. 306.

(k) Laffitte v. Slatter, 6 Bing. 623; 4 Moore

& P. 457, (Chit. j. 1502.)

& P. 457, (Chit. j. 1502.)

(1) Norton v. Pickering, 8 B. & C. 610; 3

Man. & Ry. 23; Dans. & Ll. 210, (Chit. j. 1411). In this case, Walwyn v. St. Quintin, 1 B. & P. 652, was quoted as in direct contradiction to Cory v. Scott, S B. & Ald. 619, and Lord Tenterden said, "I think the case of Cory v. Scott, S B. & Ald. 619, was properly decided, and that it must govern the present case. It may be questionable whether it might not have been more conducive to the interests of commerce, to have decided that the holder of a bill is not at liberty to give evidence of any circumstance to excuse the want of notice. Here the defendant does not seek to avail himself of circumstances dehors the bill. He being drawer of the bill, by the law of merchants was entitled to notice of dishonour. The plaintiff does attempt to get rid of the law-merchant, for he says the acceptor has no effects of the drawer in his hands. I think the defendant was entitled to notice of dishonour, and that the

nonsuit was right." Rule refused.
(m) De Berdt v. Atkinson, 2 Hen. Bla. 336, (Chit. j. 526). In an action against the payee of a note, it appeared that the note was not pre-

A drawer of a bill accepted for his accommodation is not entitled to notice of non-payment, Evans v. Norris, 1 Ala. Rep. n. 5, 511; But where a bill is drawn by the defendant for the accommodation of the acceptors, within the knowledge of the payees, the want of funds in the hands of the acceptors belonging to the drawer, will not excuse the omission of notice. Shirley v. Fellows, 9 Port. 800. }

sented for payment till the day after it became

due, and that no notice was given to the defendant till five days after such presentment, but it

also appearing that the defendant gave no value

for the note, that he lent his name merely to

give it credit, and that he knew at the time the

maker was insolvent, Eyre, C. J. directed the

rule to shew cause why a new trial should not

be had was granted, and upon cause shewn, Eyre, C. J. said, "If the maker is not known

to be insolvent, insolvency will not excuse the want of an early demand, but knowledge ex-

clades all presumption, which would otherwise

arise; here the money was to be raised upon the defendant's credit; he meant to guarantee

the payment, and no loss could happen to him from the want of notice." And per Buller, J. "the general rule is only applicable to fair

transactions, where the bill or note has been given for value in the ordinary course of trade. It is said, insolvency does not take away the

necessity of notice; that is true, where the value has been given, but no further; here the de-

fendant lent his name merely to give credit to

the note, and was not an indorser in the com-

Justices, concurring, the rule was discharged.

In Sisson v. Tomlinson, Selw. N. P. Oth ed. 335, and observed upon in Brown r. Maffey,

15 East, 222, Lord Ellenborough, C. J. ruled,

on the authority of the preceding case, that

where the indorser has not given any conside-

ration for a bill, and knows at the time the

drawer has not any effects in the hands of the

drawee he (the indorser) is not entitled to no-

tice of non-payment as a bon't fide indorser for

307, note 160, it is observed, that the courts ap-

pear to have proceeded on a misapplication of the rule which obtains as to accommodation ac-

ceptances; in those cases, the drawer being

himself the real debtor, acquires no right of ac-

tion against the acceptor by paying the bill, and

suffers no injury from want of notice of non-

payment by the acceptor. But in this case the

maker of the note was the real debtor, and the payee the mere surety, having a clear right of

But in Bayley on Bills, 3d edit. 136; 5th ed.

a valuable consideration would be.

Heath and Rooke.

mon course of business."

jury to find for the plaintiff, which they did.

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would in that case, upon paying the note, have a clear right of action against I. Of Nonthe maker, it should seem, that the decisions alluded to are erroneous, and payment, that he is entitled to notice of the dishonour(n)(1). And in a very recent sary P_{ro} case(o) the court said, *that De Berdt v. Atkinson could hardly be support- ceedings ed, inasmuch as the defendant there was not the party for whose accommo- thereon. dation the note was made, but, on the contrary, lent his name to accommo- 1st, When date the maker. And where a bill was drawn for the accommodation of a Notice of remote indorsee, and the names of all the prior parties were lent to him, it ment newas holden, in an action against one of those parties, an indorser, that the cessary or latter was entitled to notice of the dishonour of the bill, because, upon pay-not; Con-

requences of Omission: and

action against the maker, upon paying the note, what exand therefore entitled to notice, to enable him cuses such to exert that right; see Terry r. Parker, 6 Ad. Omission. & El. 502, 507, 508, infra, note (o); and see Lafitte v. Slatter, 6 Bing. 523, (Chit. j. 1502); which proves that knowledge that a bill will not be paid by the acceptor is no excuse for want of notice; see also Smith v. Beckett, 13 East, 187, (Chit j. 816); and next note; and Brown v. Matfey, 15 East, 216, (Chit. j. 852); in which latter case it was holden, that an indorser is entitled to notice of dishonour, although he has not received any value for his indorsement, if he did not know that the bill was an accommodation bill in its inception.

(n) Smith r. Beckett, 13 East, 187, (Chit. i. 816); Bayl. 3d edit. 136; 5th edit. 308; and see Nicholson c. Gouthit, 2 Hen. Bla. 609, (Chit. j. 556); just, 441, note (u); Norton v. Pickering, 8 Bar. Cres. 610; 3 Man. & Ry. 23; Dans. & Ll. 210, (Chit. j. 1411); ante.

438, notes (I), and supra, note (m). Smith r. Beckett, 13 Last, 187, (Chit. j. \$16). In an action against the pavec and indorser of a note drawn by Canning, dated 28th October, 1809, and payable on demand, it appeared that the defendant had lent his name to this and other notes, merely to enable Canning to obtain credit with the plaintiffs, his bankers. he having then lately stopped payment, which was well known to all the parties. The plaintills made advances for six months on these notes, which advances they afterwards renewed, without any communication with the defendant. On the 28d May, 1810, Canning became bankrupt, and payment was afterwards demanded and refused, but no notice of this dishonour was given to the defendant. Lord Ellenborough thought a notice necessary, and nonsuited the plaintiffs; and on a notion to set aside the nonsuit, De Berdt v Atkinson was cited, but the court held clearly, that a notice was necessary, especially as the advances had been renewed without the plaintiff's knowledge, and see Free r. Hawkins, 8 Taunt. 92;

Holt, C. N. P. 559. (a) Terry r. Parker, 6 Ad. & El. 502, 507, 508; 1 N. & P. 752, 755, S. C.

^{(1) \} Where a note was indersed for the accommodation of the maker, the inderser having no funds in the makers hands; and during all the time from the making of the note until its arriving at maturity, the maker was insolvent, but that fact was not known to the indorser, at the time of his indersement; held, that these circumstances did not constitute any ground for dispensing with notice to the indorser. Holland r. Turner, 10 Con. 308. }

and necessary Proceedings thereon.

Notice of Non-payment necessary or not; Consequences of Omission; and what excuses such Omission. [*441]

I. Of Non- ing it, he would be entitled to sue such indorse for re-payment (p)(1). And the same point was determined in an action against the drawer(q). But if the payee and indorser of a note lend his name to secure a composition from the maker to a creditor, and take effects of the maker's sufficient to pay it, he is not entitled to notice, because it would be a fraud in him to call upon the 1st, When maker who had thus deposited effects in his hands to answer the amount of his indersement (r)(2). So in France an inderser or party to whom funds

> (p) Brown v. Maffey, 15 East, 216, (Chit. j. 852), where a bill was drawn, accepted, and indorsed by several indorsers, for the accommodation of the last indorser, and the acceptor had no effects of the drawer in his hands, but that fact was not known to the defendant, one of the prior indorsers; it was held, that the defendant, was entitled to notice of the dis-honour before the holder could maintain an action against him, in order to enable him (even if he had no remedy upon the bill), to call immediately upon the last indorser to whom he had lent the security of his indorsement, without value received, and who had received the money upon that security. Lord Ellenborough, after observing upon the case of Bickerdike v. Bollman, (ante, 437), said, "that decision dispensed with notice to the drawer, where he knew beforehand that he had no effects in the hands of the drawee, and had no reason to expect that the bill would be paid when it became due. But that exception must be taken with some restrictions, which, since I have sat here, I have often had occasion to put upon it, as where a drawer, though he might not have effects at the time of the drawing of the bill in the drawee's hands, has a running account with him, and there is a fluctuating balance between them, and the drawer has reasonable ground to expect that he shall have effects in the drawee's hands when the bill becomes due; in such cases I have always held the drawer to be entitled to notice, because he draws the bill upon a reasonable presumption that it will be honoured, (vide Orr v. Magennis, 7 East, 259; 2 Smith, 328, (Chit. j. 726); Legge v. Thorpe, 12 East, 171, (Chit j. 783)), when indeed it is a mere accommodation bill, without assets in hand or any expected, no notice to the drawer is necessary according to the established authorities; but I should be sorry to extend the doctrine further. It is said, however, that I extended it to the case of an indorser, in Sisson v Tombisson, (aute, 430, n (m)). But without surrendering that case, the circumstances of which were different from the present, and may make it at least more questionable, here it is clear that the defendant had no knowledge of the neceptor's having no assets of the drawer in his hands, and that the

drawer put his name to it merely as a cosurety for Woods, and therefore, when it was dishonoured, it became most material to the defendant, that he should have had notice, in order to enable him to proceed against Woods, for whom he was in substance, though not in form, a surety; for, if he had no notice, he might lose his benefit of reimbursement against Woods, who had received the money upon the security of the defendant. I therefore think that the nonsuit was proper for want of such notice." Grose, J. concurred, and Bayley, J. said, "he was of the same opinion, and that the foundation of Mr. Justice Buller's opinion in Bickerdike v. Bollman, was this, that the drawer, having no assets in the drawee's hands, could not be injured by the non-payment of the bill, or the want of notice that it had been dishonoured: and that is true, as against the drawer, but as against an indorser, who is not the party to provide for taking up the bill in the first instance, and who has a remedy over, the want of notice is an injury to him. In Corney v. Mendez Da Costa, I Esp. R. 302, (Chit. j. 538), it would have been a fraud in the indorser to call upon the maker of the note, because, before it became due, the maker had deposited effects in his hands to answer the amount of his indorsement, and therefore he had no right to complain of the want of notice. But in this case, if the defendant had had notice of the non-payment at the time, he would have been enabled to call upon Woods immediately. The case of Smith v. Beckett has established, that a party does not waive his right to notice by lending his indorsement as a security to enable the drawer to raise money on it " Rule discharged. See also Latitte v. Slatter, 6 Bing. 623; 4 Moore & P. 457. (Chit. j. 1502).

(q) Cery v. Scott, 3 B. & Ald. 619, (Chit.

(r) Cerney v. Da Costa, 1 Esp. Rep. 303, (Chit. j. 535). Da Costa and Co. compounded with their creditors, and to secure the conposition, draw notes in favour of the defendant, which he indorsed to the creditors. The dcfor band took a Treets of Da Costa and Co. at the time to the amount of the composition, and an action being brought against him upon one of these indorsements, he insisted that he had had .

(2) An indorser of a promissory note, who, before the note falls due, takes an assignment of all the estate of the maker to meet his responsibility, is hable, although no demand of payment is made, and notice of non-payment is not given. Mechanic's Bank of N. Y. v. Griswold, 7 Wend.

Rep. 165.

⁽¹⁾ The relative rights and duties of parties who indorse a promissory note for the accommodation of the maker, are the same as in the case of a business note; so that due notice of the dishonor of such accommodation note having been given, a subsequent indorser who pays it, may recover of a prior indorser the whole amount paid, and not merely a contribution as in the case of sureties. Church v. Barlow, 9 Pick. Rep. 547.

have been remitted to pay a bill, is not discharged by want of notice(s); and I. Of Nonin America, where the drawer of a check withdrew his funds from the bank- payment, ers, it was held, that no ice of the non-paym at of the check was not requisary Proste(t). It has been not been that I come in it. site(t). It has however been held, that it is no excuse for not having pre-ceedings sented a note in time for payment, that the defendant indor cd it to guaran-thereon. tee a debt due from the maker, or that the defendant knew, before it was 1st, When due, that the malier could not pay it, and had desired a banker, at whose Notice of house it was made payable, to send it to him, and he would pay it(u)(1).

In general, if the bill or note be given as a collateral security, and the cessary or party delivering it were no party to it, either by indorsing or transferring it not; Conby delivery when payable to bearer, but merely caused it to be drawn or in-sequences of Omisdorsed, or delivered over by a third person as a security, or has merely sion; and guaranteed the payment, it has been considered that he is not within the whatexcustom of merchants an indorser or party to it, so as to be absolutely enti- cuses such tled to strict regular notice, nor discharged from his liability by the neglect of the holder to give him such notice, unless he can show by express evidence, or by inference, that he has actually sustained loss or damage by the omission(x)(2); for if a person deliver over a bill to another without indorsing it, he does not subject himself to the obligations of the law-merchant, and cannot be sued upon the bill, and as he does not cubject himself to the obligation he is not entitled to the advantages(y); and if he can prove that he has sustain-

no notice of the non-payment of the note until five weeks after it was due; but Buller, J. held that he was not entitled to notice, and the plaintiff had a verdict. See observations on this case in Brown v. Maffey, 15 Uest, 222, 223, (Chit. j. 852); ante, 449, et reg. in notes; Pa-ker v. Birch, 3 Campb 107, (Chit. j. 848); post, 449, seems to the same effect, that the amount of deposited effects are received to the use of the holder.

(*) 1 Pardess, 459, 460. (*) Conroy v. Warren, 9 Johns. Ca. 259; Bayl. 148, American edit.; Roscoe, 389, note

(u) Nicholson v. Gouthit, 2 Hen. Pla. 609, (Chit. j. 556). Gouthit and Purton undertock to guarantee an instalment on the debt of Green, and for that purpose Green drew notes payable to Gouthit at Drury and Co.'s, which Gouthit and Burton indersed, after which they were delivered to the creditors. Pefore they became due, Gouthit inquired at Drury and Co.'s if they had any effects, and on their soying they had not, he desired them to send the notes to him and he would pay them. Many notes were accordingly presented and paid, but the note in question not being presented till three days after it was due. Got thit is fixed to pay it. Burton had supplied bim with money to take up all the notes, but as this was not presented when due, he had returned the money destined to pay it. An action was brought against Gouthit, and upon the trial, Evre, C. J.

thought, as he knew the note would not be paid at Drury and Co.'s and had provided money for it, and as his indorsement was by way of guarantee, he was not insured by the delay, and that the request to send the notes to him was either a waiver of notice or notice by anticipation; but on a rule aisi to enter a nonsuit, and cause shown, though he thought the justice of the case was clearly with the plaintiff, he thought he could not recover; for though the indorsement was by way of guarantee, it was liable to all the legal consequences of an indorsement; and Couthit's promise to pay was only to pay such as should be duly presented at Drury's. Heath and Rooke, Justices, were of the same opinion, and the rule was made abso-

(x) Warrington r. Purbor, 8 East, 242; 6 Esp. 89, (Chit. j. 7.3); Phillips e. Astling, 2 Thant. 203, (Chit. j. 777); Swinyard r. Bowes, 5 Yaule & S. (2, (Chit j. 955); Holbrow v. Wilkins, I Bar. & Cres. 10; 2 D. & Ry. 59, (Chit j 1652); Van Wort c. Woolley, 3 Bar, & Cros 409; 5 D. & Ry. 347; 1 Ry. & M. 4. (Chit. j. 1205). But see observations of Dayley, J. in Canadzo r. Allenby, 6 Bar & Cres. 513; 9 D. & Ry, 391, (Chit. j. 1319); a. le, "5", note (s); see further, post, 6thly, us to whose notice must be given

(y) Fer Abbott, C. J. in Van Wart v. Woolley, 3 For. & Co.s. 480; 5 D. & Ry. 847; 1 P.y. & M. 4, (Chit j. 1205).

Erwin r. Lamborn, 1 Har. 125, V

⁽¹⁾ The inderser of a note not negatible has no right in an action against him, to insist upon a previous demand of the profess and notice of non-payment; the indersement is equivalent to a guaranty that the note will be peid, and not a conditional undertailing to pay if the maker does not; an absolute guaranty may be written over the indersement, upon which a recovery may be had. Seymour v. Van Hyck, S.Wend, Rep. 493.

[2] {True v. Harding, 3 Fairf, 193; Reynolds et al. v. Douglass, 12 Peters, 497. Contra.

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sury Proceedings thereon.

Notice of Non-payment necessary or not; Conequences of Omission; and what excuses such Omission. [*442]

I. Of Non- ed damage, then he is only discharged to the extent of such actual damage(z)(1). If the parties who ought primarily to have paid the bill or note were solvent at the time when the same became due, and for some time afterwards, and only subsequently became insolvent, before notice, an inference of actual damage from the want of notice to the party guaranteeing, or other-1st, When wise collaterally liable, will *prevail(a), until rebutted by actual proof, that if notice had been given, payment would not have been obtained(b). But if the parties became bankrupt, or wholly insolvent before the bill or note fell due, then the inference will be, that no injury arose from the want of notice; though that inference may also be rebutte $\tilde{d}(c)$. Thus it was decided, that a person who had guaranteed the payment of money to be paid by a bill, was entitled (though no party to it) to insist on the neglect to make a proper presentment, or to give due notice of the dishonour of such bill(d), the drawer having become insolvent after it became due. In another case, the defendant, being indebted to the plaintiff for goods sold, and C. being indebted to the defendant, the plaintiff, with the consent of defendant, drew a bill on C. payable at two months, which C. accepted, but afterwards dishonoured, and it was held, that the defendant was not entitled to notice of the dishonour, his name not being on the bill, and that the bill was not to be esteemed a complete payment of the debt under the Statute of Anne(e); but then it appeared that the drawee was certainly, from the time the bill fell due, not in a condition to pay it. And it has been held, that proof that before the bill became due, the parties liable upon it were bankrupt or insolvent, will be prima facie evidence that a demand upon them would have been of no avail, and will dispense with the necessity of making such presentment or giving notice, because the same strictness of proof is not necessary to charge a guarantee, as is necessary to support an action upon the bill itself, and the circumstances created a presumption that the guarantee was not prejuced by [*443] the want of notice (f)(2). Thus *where the plaintiffs sold goods to C. and

(z) Id. ibid. (a) Phillips v. Astling, 2 Taunt. 205, (Chit. j. 777); and see observations of Abbott, C. J. in Holbrow v. Wilkins, 1 Bar. & Cres. 10; 2 D.

& Ry. 59, (Chit. j. 1652).
(b) Swinyard v. Bowes, 5 Maule & S. 62. (c) Warrington v. Furbor, S. East, 242; 6 Esp. 89, S. C.; Holbrow v. Wilkins, 1 Bar. &

Cres. 10; 2 D. & Rv. 59, (Chit. j. 1652).
(d) Phillips v. Astling, 2 Taunt. 206, (Chit. j. 777). The declaration stated, that in consideration that the plaintiffs would sell and deliver to Davenport and Finney certain goods, to be paid by a bill, to be drawn by D. and F. upon Houghton, at six months; the defendant undertook to guarantee the payment of such bill. It then averred delivery of the goods, acceptance of the bill, its presentment for payment, and dishonour. At the trial it appeared, that Houghton was at sea when the bill became due, which was on the 14th July, 1808, but that he had an agent residing in London, authorized to accept bills, and who had accepted this. That no presentment for payment was made to this agent when the bill became due; that on the 16th July, the plaintiff gave D. and F. notice that the bill remained unpaid, but no notice was given to the defendants. In February,

1909, Davenport and Finney became insolvent, and Houghton was declared bankrupt in 1809, after which payment was demanded of the defendants. A verdict was found for the plaintiff, but upon a rule nisi for entering a nonsuit, after referring to Warrington v. Furbor, (8 East, 242, and infra, note (f) said, that here the insolvency of the drawers and the bankruptcy of the acceptor did not hap-pen until long after the bill became due, and that for any thing that appeared, if the money had been demanded either of the drawer or acceptor, the bill might have been paid, but that the necessary steps not having been taken to obtain payment from the parties who were liable upon the bill, and solvent, the guarantee must be discharged, and therefore they made Taunt 130, (Chit. j. 804); Bishop v. Rowe, 3
Maule & S. 362, (Chit. j. 921); Cory v. Scott,
3 B. & Ald. 619, (Chit. j. 1081).

(e) Swinyard r. Bowes, 5 Maule & S. 62,

(Chit. j. 955).

(f) Warrington v. Furbor, 8 East, 242; 6
Esp. R. 89, (Chit. j. 733). The defendant applied to one Martin, to purchase some goods to the amount of 1000l., the price of which the plaintiffs undertook to guarantee at a credit of

(1) { Reynolds et al. r. Douglass, ubi supra. }

⁽²⁾ On a guaranty of a promissory note drawn and indorsed by others, if the drawer and in-

P., and took their acceptance for the amount, half of which was guaranteed I Of Nonby the defendant, and before the bill became due, C. and P. became insol- payment, vent, of which the defendant was then informed, and also that the plaintiffs sary Prolooked to him for the sum which he had guaranteed, it was held, that under ceedings these circumstances it was unnecessary for the plaintiffs to present the bill thereon. when due, or give the defendant notice of the non-payment of it(g). where A. and Co. resident in America, employed B. resident at Birming- Notice of ham in this country, to purchase and ship goods for them, and on account of ment nesuch purchases they sent to B. a bill drawn by C. in America on D. in Lon- cessary or don, but did not indorse it; and B. employed his bankers to present the bill not; Confor acceptance, and D. refused to accept, but of this the bankers did not of Omisgive notice until the day of payment, when it was again presented and dis-sion; and bonoured; and before the bill arrived in this country, C. became bankrupt, what exand he had not, either when the bill was drawn, or at any time before it be-Omission. came due, any funds in the hands of D., the drawee; in an action by B. against the bankers, for negligence in not giving him notice of the non-acceptance, it was held, that inasmuch as A. and Co., not having indorsed the bill, were not entitled to notice of dishonour, and still remained liable to B. for the price of the goods sent to them, and the drawer was not entitled to notice, as he had no funds in the hands of the drawce, B. could not recover the whole amount of the bill, but only such damages as he had actually sustained in consequence of having been delayed in the pursuit of his remedy against the drawer(h). And where even the party's name is on the bill, yet if he give a bond conditioned for payment by the acceptor, within a month after it was due, without any stipulation about notice, the want of notice is no defence, the bond being an absolute engagement that payment should be made (i). But we have seen, that the drawer of a renewed bill is,

six months. The goods were furnished, and the defendant accepted a bill at six months for the amount. This bill became due 3d December, 1801, but on the 21st November preceding, the defendants became bankrupts, and the plaintiffs were obliged to pay Martin 1000/, on their guarantee, and now brought this action to be reimbursed; one of the objections made by the defendant at the trial was, that the plaintiffs had not proved a presentment of the bill to the defendant for payment, without which it was insisted, that Martin could not have recovered against the plaintiffs on their guarantee, and therefore, that the latter had paid the money in their own wrong. Lord Ellenborough held the proof unnecessary, this not being an action on the bill, and it being obvious that notice would have been unavailable, the defendants having been then recently stripped of all their property, and the plaintiffs had a verdict; and on a rule nisi to set it aside, and cause shewn, the court held the verdict right, and Lawrence, J. said, "the guarantees were not prevented

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from shewing that they ought not to have been called upon at all, for that the principal debtors could have paid the bill if demanded of them." Rule discharged. But in Murray v. King, 5 Bar. & Ald. 165, (Chit. j. 1119), he considered this case as broken in upon by the case of Phillips v. Astling, They, however, are distinguishable in the material fact of the insolvency having occurred before the bill was due in one case, but in the other afterwards, and see Holbrow v. Wilkins, 1 Bar. & Cres. 10; 2 D. & Ry. 59, (Chit. j. 1652).

(g) Holbrow v. Wilkins, 1 Bar. & Cres. 10; 2 Dow. & Ry. 59, (Chit. j. 1652).

(h) Van Wart r. Woolley, 3 Bar. & Cres. 439; 5 Dow. & Ry. 874, (Chit. j. 1235). On the new trial, A. D. 1830, it appeared that the whole debt had been satisfied, and that therefore the plaintiff was entitled to recover, and he did recover only nominal damages, id; Mood. & M. 520.

(i) Morray v. King, 5 B. & Ald. 165, (Chit. j. 1119).

dorser are insolvent when the note becomes due, this would prima facie be evidence that the guarantor was not prejudiced, and therefore the giving him notice of non-payment is in such case dispensed with. Gibbs r. Cannon, 9 Serg. & Ruwle, 198. | Erwin r. Lamborn, 1 Harr. Del. R. 125. }

Where the maker of a promissory note is utterly insolvent, so that process against him would be useless, the guarantor will be bound by his indorsement, though no suit be brought against the maker. Prentiss r. Danielson, 5 Conn Rep. 175.

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sary Proceedings thereon.

Notice of Non-payment necessary or not; Consequences of Omission; and what excuses such

Omission.

I. Of Non-by the neglect to give notice of the dishonour of it, not only discharged from payment, the Hallibly to pay it, but also from all Hability to pay the prior bill(k), and neces-

The dectrine, that unless a person is a party to a bill or note, he cannot complain of the want of regular notice of the dishonour, must be understood with coal-iderable qualification; and we have seen, that if a person has trans-1st, When ferreal, by mere delivery, a note payable to beaver, he is entided to regular notice, for though he has not indorsed, he, as having been the bearer, is to be considered as a party to the instrument(l).

It is no excuse for not giving notice to the dra ver, that on an apprehension that the bill would be dishonoured, he ledged other money *which he had of the drawee's in the hands of the indorser, on an undertaking by the indorser, that he would return it whenever it should appear that he was exonerated from the bill; for his having other money of the drawee's does not entitle him to apply it to the dishonored bill, unless he had notice of the dishonour(m). And where the defendant, as drawer of the bill, was at 「*444] that time liable on his acceptances given to a much greater amount for the accommodation of the acceptor of the bill in question, it was held, that the plaintiff, the indorsee, was not relieved from the necessity of proving notice of the dishonour(n). Nor is it any excuse for not giving notice to the drawer of the bill, if he had effects in the hands of the drawee, that the drawce represented to the drawer, when the bill was drawn, that he should not be able to provide for it, and that the drawer thereby understood that he should have to provide for it(e).

> If at any time between the drawing of the bill and its presentment and dishonour, the drawee had some effects or property of the drawer in his hands, though insufficient to pay the amount, he will nevertheless, in general, be entitled to notice of the dishonour, and the laches of the holder will discharge him from liability; for this case differs from that where there are no effects whatever of the drawer in the hands of the drawee at the time, because the drawer must then know that he is drawing upon accommedation, and without any reasonable expectation that the bill will be honoured; but if he have

(k) Bridges v. Berry, 3 Taunt. 120, (Chit j. 804); ante, 436, note (c).

(1) Camidge v. Allenby, 6 Par. & Cres. 373; 9 D. & Ry. 3)1, (Chit. j. 1319); ante, 35), note (s). And see further, post, 6thly, As to

whom Notice must be given.

(m) Clegg v. Cotton, 3 B. & P. 233, (Chit. j. 657). Indorsee against the drawer of a bill. The bill was drawn in America, on Cuiler, ef Liverpool, in favour of Miller and Robertson, and by them indersed to Booth and Co., and it afterwards came to the plaintiff's hands. It was dated in 1794, and drawn at ninety days sight. In 1800, the defendant having other effects of Cullen's in his hands, deposited them with Miller and Robertson, and Looth and Co., on an undertaking from them, that they would return these effects whenever it should appear that they were exonerated from this bill. Cullen afterwards became bankrupt. The defendant was arrested, and then said he should apply to Cullen's assignees to bail him, for he had ledged property in America to answer the bill, and if he was discharged for want of notice, he should pay it over to them. Acceptance and payment were both refused, but no notice was ever given of it to the defendant. Chambre, J. nonsuited the plaintiff, on the ground that the defendant was discharged for want of notice; and on a rule nisi to set aside the nonsuit, and cause shewn. the court held, that the special circumstances did not excuse the want of notice; that there was no fraud in the defendant, which was the ground of the rule for dispensing with notice, and that when Miller and Robertson, and Booth and Co. were exonerated, which they were by want of notice, the money deposited with them belonged to Cullen's assignces. Rule discharg-

Note. It did not appear that the defendant had got back the property which he deposited, but that circumstance was not relied on. See further, 1 Pardess, 450, 460

(n) Spooner v. Gardiner, Ryan & Mood 84, (Chit. j. 1211).

(e) Staples v. Oxines, 1 Esp. R. 332, (Chit. 544). In an action against the drawer of a bill, the defence was want of notice. The plaintiff thereupon called the acceptor, who proved, that when the bill was drawn, he was indebted to the defendant in more than the amount of the bill, but that he then represented to the defendant that it would not be in his power to provide for the bill when it should become due, and that it was therefore then understood between them that the defendant should provide for it; and it was contended, that this superseded the necessity of giving the defendant notice. Lat Lord Kenyon held that it did not, and nonsuited the plaintiff.

some effects at the time, it would be dangerous and inconvenient, merely on 1. Of Nonaccount of the shifting of a balance, to hold notice not to be necessary; it payment, would be introducing a number of collateral issues upon every case upon a and necesbill of exchange, to examine how the accounts stood between the drawer cerdings and the drawee, from the time the bill was drawn, down to the time when thereon. it was dishonoured (p). For the same reason, if the *drawer of a bill of 1st, When exchange, when it is presented for acceptance, has effects in the hands of Notice of the drawees, though he is indebted to them in a much larger amount, and Non-payment nethey, with his privity, have appropriated the effects in their hands to the cessary or satisfaction of their debt, he is entitled to notice of the dishonour(q).

(p) Orr v. Magennis, 7 East, 359; 3 Smith, 328, (Chit. j. 726); Llackhan v. Poren, 2 Campb. 503, (Chit. j. 818); Hammend v. Dufrene, 3 Campb. 145, (Chit. j. 848); Thackray v. Blackett, 3 Campb. 164, (Chit j. 84.).

Orr v. Magennis. In an action by the payers against the drawer of a foreign bill, payable at ninety days after sight, the declaration averred presentment for acceptance and refusal, presentment for payment and refusal, and protest for non-payment; it then averred, that at the time of making the bill, and from thence until presentment for payment, the defendant had no effects in the hands of the drawees. At the trial it appeared, that at the time of drawing the bill, the defendant had effects in the hands of the drawees, but to what amount did not appear; but that when the bill was presented for acceptance, and thence until presentment for payment, he had not any. The bill was only noted for non-acceptance, but was protested for non-payment, no notice of non-acceptance was given to the defendant. The plaintiffs had paid the amount to an indorsec. They were nonsuited for want of proving protest for and notice of non-accept: nce. On motion to set aside the nonsuit, Bickerdike v. Loflman and other cases were cited to show that no notice, and therefore no protest, was necessary. But Lord Ellenborough said, that that case went on the ground that there were no checks in the hands of the drawee at the tine when the bill was drawn, and the other cases followed on the same ground, but that no case, had extended the exemption to cases where the drawee had effects of the drawer in his bonds at the time when the bill was drawn, though the belance neight vary afterwards, and be turned into the opposite scale. Rule refused.

Hammond v. Dufrene, 3 Campb. 145, (Chit. j. 838). Action on a bill for 3047, 47s, 40d. drawn by defendant upon and accepted by Messrs. Dufrene and Penny, payable at three months. To excuse the proof of notice to the defendant of the dishonour of the bill, one of the acceptors was called, who stated, that when the bill was drawn and accepted, they had no effects of the drawee in their hands, but that before the bill became due, he paid a sum of 400%, on their account. Parke, for the plaintiff, insisted, that this was an accommedation kill, and that the drawer therefore was not entitled to notice of its dishonour. Lord Ellenborough said, I think the drawer has a right to notice of the dishonour of a bill, if he has effects in the hands of the acceptor at any time before it becomes due. In that case, he may reasonably ex-

pect, that the bill will be regularly paid, and he sion; and may be prejudiced by receiving no notice that it what exis dishonouted. I am aware that the inquiry cuses such has generally been as to the state of accounts. Omission. between the drawer and the drawee, when the bill was drawn or accepted; but I conceive the [*445] whole period noist be looked to, from the drawing of the bill till it becomes due, and that notice is replaite if the drawer has effects in the hands of the drawer, at any time during that interval: therefore, if the defendant in this case paid a sum of money for Mes rs. Dufrene and Penny, before the 28th of July, you must prove that he had due notice it was not paid on that day by the acceptors. The case was afterwards brought before the court, but the direction of the judge at Nisi Prius upon this point was not question-

Thackray v. Blackett, 3 Campb. 164, (Chit. i. 348). The drawer of two bills of exchange, before they became due, received notice that they were accidentally destroyed, and was called upon to give others in their stend, according to the statute of 9 & 10 Will, 2, c. 17. When the bills were drawn, he had no effects in the hands of the acceptors, but before either was due, they were indebted to him to an amount less than one of the bills, and became bankingt; held, that he was nevertheless entitled to notice of the dishonour of both bills. Lord Ellenborough said, "The excuse of want of effects in their hands, I think is unavailing as to both bills; I cannot make any distinction between the two. If there was an open account between the parties, and the acceptors were indebted in any sum to the drawer before the bills became due, I cannot say that he must necessarily have been aware, before hand, that either of them would be dishonoured. Judges of the greatest authority have doubted of the propriety of the rule laid down in Bickerdike v. Bolhoan, and I certainly will not give it any extension." Plaintiff nonsuited.

But see the reasoning in 1 Pardess, 459,

(q) Blackhan r. Doren, 2 Campb. 503, (Chit. j. 849). This was an action against the drawer of a bill for 250% payable after sight, of which acceptance had been refused; and to excuse the want of notice of non-acceptance, it was proved, that when the bill was presented, though the drawer had effects in the hands of the drawce to the amount of 1500%, yet that he owed them 10,000%, or 11,000%, and that they had appropriated the effects to go in satisfaction of the debt: this appropriation, however, was without the defendant's privity. Lord

Nor not; Con-

sary Proceedings thereon.

Notice of Non-payment necessary or not; Consequences of Omission; and what excuses such Omission.

1. Of Non- is actual value in the hands of the *drawce at the time of drawing, essenpayment, tially necessary to entitle the drawer to notice of dishonour of the bill, for circumstances may exist which would give the drawer good ground to consider he had a right to draw a bill upon his correspondent; as where he has consigned effects to him to answer the bill, though they may not have come 1st, When to him at the time when the bill is presented for acceptance(1); to which may be added the case of bills drawn in respect of other fair mercantile agreements (r). So it is no excuse for not giving notice to the drawer that he had, in fact, no funds in the hands of the drawee, if he had made provision to have such funds there, and might reasonably expect they were there; as where a bill was drawn in respect of a cargo shipped by the drawer to this kingdom, and in the hands of a broker, who was to pay the proceeds to the drawee to enable him to take up the bill, in which case notice was held And, therefore, where the drawer had sold and shipped goods to the drawee, and drew the bill before they had arrived, and the drawee not having received the bill of lading, refused to accept the goods because they were damaged, and who refused to accept the bill, it was decided that the drawer was discharged for want of notice(t). But if the vendor of goods sold upon credit, draws upon the purchaser a bill, which would be due long before the expiration of the stipulated credit, he is not entitled to notice of the dishonour, because he had no reasonable expectation that the drawee would honour the bill, but on the contrary, a pretty clear assurance that it

> Ellenborough said, "If a man draws upon a house, with whom he has no account, he knows that the bill will not be accepted; he can suffer no injury from want of notice of its dishonour, and therefore he is not entitled to such notice, but the case is quite otherwise where the drawer has a fluctuating balance in the hands of the drawee; there notice is peculiarly requisite. Without this, how can the drawer know that credit has been refused to him, and that his bill has been dishonoured? It is said here, that the effects in the hands of the drawees were all appropriated to discharge their own debt; but that appropriation should appear by writing, and the defendant should be a party to it. wish that notice had never been dispensed with, then we should not have been troubled with investigating accounts between drawer and drawee. I certainly will not relax the rule still further, which I should do if I were to hold that notice was unnecessary in the present case." Plaintiff nonsuited; but see Smith r. Thatcher, 4 Bar. Ald. 200, (Chit. j. 1100); Roscoe, 224; Bayl. 5th edit. 311; post, 447,

> (r) Per Lord Ellenborough, in Legge v. Thorpe, 12 East, 175; 1 Campb. 310, (Chit. j. 783); per Eyre, C. J. in Walwyn r. St. Quintin, 1 Bos. & P. 654; 2 Esp. 515, (Chit. j. 578); Ex parte Wilson, 11 Ves. 411, (Chit. j. 720).

> (s) Robins v. Gibson, 3 Campb. 334, (Chit. j. 885); see also 12 East, 175; 1 Bos. & P.

> (t) Rucker v. Hiller, 16 East, 43; 3 Campb. 217, 334, (Chit. j. 861). Where one draws a bill of exchange with a bonh fide reasonable

expectation of having assets in the hands of the drawee, as by having shipped goods on his account, which were on their way to the drawee, but without the bill of lading or invoice, the drawer is entitled to notice of the dishonour, though in fact the goods had not come to the hands of the drawee at the time when the bill was presented for acceptance, or he had rejected them, and he returned it, marked "no effects." Lord Ellenborough, C. J. said, "When the drawer draws his bill on the toni fide expectation of assets in the hands of the drawee to answer it, it would be carrying the case of Bickerdike v. Bollman further than has ever been done, if he were not at all events entitled to notice of the dishonour. And I know the opinion of my Lord Chancellor to be, that the doctrine of that case ought not to be pushed further. The case is very different where the party knows that he has no right to draw the bill. There are many occasions where a drawee may be justified in refusing, from motives of prudence, to accept a bill, on which notice ought nevertheless to be given to the drawer; and if we were to extend the exception further, it would come at last to a general dispensation with notice of the dishonour in all cases where the drawce had no assets in hand at the very time of presenting the bill; and thus get rid of the general rule requiring notice, than which nothing is more convenient in the commercial world. A bona fide reasonable expectation of assets in the hands of the drawee has been several times held to be sufficient to entitle the drawer to notice of the dishonour, though such expectation may ultimately have failed to be realized.'

^{(1) {} Dickins v. Beale, 10 Peters, 572; Bloodgood v. Hawthorn, 9 Louis, 124. }

would be dishonoured(u). And in one *case it seems to have been suggest- I. Of Noned, that the want of notice is no defence where the defendant had not, at payment, the time the bill became due, sufficient effects, although he had such when sary Prothe bill was drawn; as where the party having 712l. at his banker's, accept-ceedings ed a bill for 3001., payable there, but when due he had only 411., in which thereon. case notice to him was considered unnecessary; but the decision proceeded 1st, When on the ground that an acceptor is not entitled to notice, and therefore cannot Notice of be relied upon as altering the general rule(x). Where the drawer of a bill of ment neexchange had no effects in the hands of the acceptor from the time of draw-cessary or ing the bill till it became due, but the acceptor had received from the draw-not; Coner prior to this bill on which the action was brought, acceptances of the sequences of Omisdrawer, upon which he had raised money, some of which acceptances had sion; and been returned dishonoured, and others were outstanding, it was held that the what exdrawer was entitled to notice of dishonour of the bill(y). And it should cuses such Omission. seem, that although the drawer or other party may not have advanced money or goods to the drawee, yet if he has deposited short bills or polices, or even title-deeds, in his hands, or has accepted cross bills, and had reasonable ground to expect that the drawee would accept or pay in respect thereof, he is entitled to notice of the dishonour(z).

(u) Claridge v. Dulton, 4 Maule & S. 226, (Chit. j. 934). The drawer of a bill of exchange, who has no effects in the hands of the drawee, except that he has supplied him with goods upon credit, which credit does not expire till long after the bill would become due, is not discharged by want of notice of the dishonour. Time given by indorsee to the payee does not discharge the drawee. Lord Ellenborough, C. J. said, "I accede to the proposition, that where there are any funds in the hands of the drawee, so that the drawer has a right to expect, or even where there are not any funds, if the bill be drawn under such circumstances as may induce the drawer to entertain a reasonable expectation that the bill will be accepted and paid, the person so drawing it is entitled to notice; but this bill was drawn in anticipation of the credit, and without any assurance of accommodation; and Bayley, J. said, "The case of Bickerdike v. Bollman has established, and I am disposed to think rightly, that a party who cannot be prejudiced by want of notice shall not be entitled to require it; but this rule extends only to cases where the party has no effects, or is not likely to have effects, or has no expectation that he will have any. In all other cases, the drawer is entitled to notice, and this is required in order that he may withdraw forthwith out of the hands of the drawee such effects as he may happen to have, or may stop those which he is in a course of putting into his hands. But at the period when the bill was refused payment, the defendant was not in a condition to have taken any steps against Pickford, the drawee, so as to derive any benefit from a notice; therefore he was not entitled to notice."

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(x) Smith v. Thatcher, 4 B. & Ald. 200, (Chit. j. 1100); Roscoe, 221; Bayl. 5th edit.

(y) Spooner v. Gardiner, Ry. & Mood. S4, (Chit. j. 1211).

(z) In Walwyn r. St. Quintin, 2 Esp. R. 515, (Chit. j. 578). Eyre, C. J. left it to the jury to say, whether title-deeds were effects or not,

and they found in the affirmative. See 1 Bos. & P. 652, S. C.; ante, 438, note (h).

Ex parte Heath, 2 Ves. & Bea. 240; 2 Rose, 141, (Chit. j. 894). In this case a distinction was taken as to the necessity of notice to the drawer of a dishonoured bill, depending on the fact whether the acceptor has effects, or whether it arose out of a single transaction, or out of rarious dealings. In the latter case it was held, that notice is equally necessary without effects. And it seems that securities, as title-deeds and short bills, are effects for this purpose. The Lord Chancellor said, "I have often lamented the consequences of the distinction introduced in modern times, as to the necessity of giving notice of the non-payment or non-acceptance of a bill of exchange, whether the acceptor had or had not effects, and I have the satisfaction of finding, that my opinion has been adopted by the courts of law. According to the old rule, a bill of exchange, purporting upon the face of it to be for value received, the implication of law from the acceptance was that the acceptor had effects. Then they came to this general doctrine, that it is not necessary for the holder to give notice, if he can shew that the acceptor had no effects. The first objection is, who is to decide whether there are effects or not? In the simple case, where there is nothing but the particular bill, and no other dealing between them, there is no difficulty; but if there are complicuted engagements, and various accommodation transactions, no one can say whether there are off cts or not, and there cannot be a stronger instance than that in the case of Walwyn r. St. Quintin (2 Esp. R. 515, ante, 438, n. (h)) referred to; Lord Chief Justice Eyre, a very good lawyer, left it to the jury to decide, without any solution of the question, whether titledec is are effects; but a rule that securities cannot be effects in any case would be quite destructive of all commercial dealing. Are not short bills, for instance, effects? Is it of no importance to the holder to have notice that he may withdraw them from the possession of the acI. Of Nonpayment, and necessary Proceedings thereon.

Notice of Non-payment necessary or not; Consequences of Omission; and what excuses such Omission.

The proof that the drawer had no effects in the hands of the *drawee only affords a prima facie excuse for the want of due notice of the dishonour, and it may be rebutted by its appearing that the drawer, on taking up the bill, would be entitled to some remedy over against some other party, as a right to sue the acceptor or any other party, or by shewing that he has been ac-1st, When tually prejudiced by the want of notice (a); as if the bill were drawn for the accommodation of the acceptor(b), or payee or indorser(c). And there is a distinction as to the necessity for notice to the drawer of a dishonoured bill, when accepted for the accommodation of the drawer, in a single transaction, and a case of various dealings, the excess for the accommodation of the drawer or acceptor; in the latter case, notice is equally necessary, without So where W. drew a bill upon a person to whom he actual effects (d)(1). had been sending goods for sale, and who accepted the bill, neither party knowing the state of accounts between them, and it turned out that W., at the time, was indebted to the drawee, yet the court held that this was not to be considered as an accommodation bill within the acceptation of that term, and consequently that there was no implied contract of indemnity as to If, in an action against the drawer of an accommodation bill, the defendant relies upon special damage resulting from the want of notice, it is incumbent upon him to prove that fact affirmatively, although the declaration allege (unnecessarily) that the defendant has not sustained damage, and issue be taken thereon (f).

Question whether Holder may pro-Funds. when he has discharged Party on Bill or Note.

Where a bill has been refused acceptance or payment, and the drawer has either stopped or withdrawn the effects from the hands of the drawee, though he may be primâ facie discharged by the neglect to give him due notice, it seems that in France and America the holder might recover from him the amount of such funds(g); but there is no decision to such effect in the coun-The case most like it is that of the payee and indorser of a note, or the drawer of a bill having received money from the maker of the note or acceptor of the bill, for the express purpose of paying it, and who has in that case been considered liable to the extent of that money to be sued for

ceptor? The courts were obliged necessarily to decide, that if bills were accepted for the accommodation of the drawer, and there was nothing but that paper between them, notice was not necessary, the drawer being, as between him and the acceptor, first liable; but if bills were drawn for the accommodation of the acceptor, the transaction being for his benefit, there must be notice without effects, and if in the result of various dealings, the surplus of accommodation is on the side of the acceptor, he is, with regard to the drawer, exactly in the same situation of an acceptor having effects, and the failure to give notice may be equally detrimen-tal, I will, in this instance, give an inquiry. It is upon the petitioner to prove, that in all this complication, there is nothing which the law calls effects, he may therefore have liberty to call a meeting, and must pay the costs of this application.'

(a) Brown v. Maffey, 15 East, 216, (Chit. j. 852); Cory v. Scott, 3 Bar. & Ald. 619, (Chit. j. 1081); Norton v. Pickering, 8 Bar. & Cres. 610; 3 M. & R. 23; Dans. & Ll. 210, (Chit. j. 1411); overruling Walwyn v. St. Quintin,

1 Bos. & P. 552; Bayl. 5th edit. 297; Roscoe,

(b) Ex parte Heath, 2 Ves. & Bea. 240; 2 Rose, 141, (Chit. j. 894).

(c) Cory v. Scott, 3 Bar. & Ald. 619, (Chit. j. 1081); Norton v. Pickering, 8 Bar. & C. 610; 3 M. & Ry. 23; Dans. & Ll. 210, (Chit. j. 1411); ante, 438.

(d) Ex parte Heath, 2 Ves. & Bea. 240, (Ch. j. 994).

(e) Bignall v. Andrews, 7 Bing. 217; 4 M.

& P. 839, S. C.

(f) Fitzgerald v. Williams, 6 Bing N. C. 68. { 8 Scott, 271, S. C. } Indorsee v. Drawer. Plaintiff, by way of excuse for not giving notice of dishonour, averred that defendant had no funds in the hands of the acceptor, nor had he sustained any damage for want of notice: defendant pleaded that he had sustained damage, because the acceptor had promised him to provide for the bill: held, that it was not incumbent on the plaintiff to prove that the defendant had sustained no damage.

(g) Ante, 440, 441; 1 Pardess. 459, 460; Conroy v. Warren, 9 Johns. Cases, 259.

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money had and received, although he had not had notice of the dishonour(h). I. Of Non-In such a case as that of Rucker v. Hiller, where the bill was refused ac-payment, ceptance, because the goods did not answer the sample, it should seem un- sary Proreasonable to allow the drawer to keep the goods and not pay the holder(i); ceedings and in a work of high authority it is suggested, that if the drawer got back thereon. the goods, he would be liable to the extent(k). *But we have seen, that [*449] where the drawer, apprehending that the bill would be dishonoured, placed other money which he had of the drawee's in the hands of an indorser, on his undertaking to return it when he should have been exonerated from the bill, the neglect of the holder to give due notice was not excused, because the drawer, having such money in hand, was not justified in applying it in taking up the bill, unless he had notice of the dishonour. (l).

The death(m), known bankruptcy(n), or known insolvency(o), of the Death, drawee or acceptor, or maker of a note, or an offer of composition by the Bankruptacceptor not acceded to, with a declaration, in the presence of the drawer Excuse. and holder, that he (the acceptor) had not and should not provide for the

(h) Corney v. Da Costa, 1 Esp. Rep. 203, (Chit. j. 538), as observed upon in Brown v. Maffey, 15 East, 222, (Chit. j. 852); and see Baker v. Birch, 3 Campb. 107, (Chit. j. 848); post, 149; Bayl. 5th edit. 303.

(i) Rucker v. Hiller, 16 East, 43; ante, 446,

note (t)

(k) Bayl. 5th edit. 296

(1) Clegg v. Cotton, 3 B. & P. 239, (Chit. j. 657).

(m) Poth. pl. 146; 1 Pardess. 450; see ante, 357.

(n) Russell r. Langstaffe, Dougl. 497, 515, (Chit. j. 415); Esdaile v. Sowerby, 11 East, 114, (Chit. j. 767); Ex parte Wilson, 11 Ves. 412, (Chit. j. 720); Boultbee r. Stubbs, 18 Ves. 21; Whitfield v. Savage, 2 Bos. & Pul. 279, (Chit. j. 630); Thackray r. Blackett, 3 Campb. 165, (Chit. j. 849); Rohde r. Proctor, 4 Bar. & Cres. 517; 6 Dow. & Ry. 610, (Chit. j. 1269); Ex parte Johnston, 1 Mont. & Ayr. 622; 3 Dea. & Chit. 433, S. C.; Baker r. Birch, 3 Campb. 107, (Chit. j. 848), accord.; Ex parte Smith, 3 Bro. C. C. 1, (Chit. j. 457), contra. See ante, 354, 355.

In Russell r. Langstaffe, Dougl. 497, 515, (Chit. j. 415), Lee said, arguendo, that it had frequently been ruled by Lord Mansfield at Guildhall, that it is not an excuse for not making a demand on a note or bill, or for not giving notice of non-payment, that the drawer or acceptor has become a bankrupt, as many means may remain of obtaining payment by the assistance of friends or otherwise; and Lord Mansfield, who was in court, did not deny the assertion. This dictum was also referred to arguendo in Bickerdike v. Bollman, 1 T. R. 408, (Chit. j. 435).

In Nicholson v. Gouthit, 2 H. Bla. 609, (Chit. j. 556), Eyre, C. J. said, "It sounds harsh that a known bankruztry should not be equivalent to a demand or notice; but the rule is to strong to be dispensed with."

Esdaile r. Sowerby, 11 East, 114, (Chit j. 767). Indorsees of a bill, drawn by Cheetham upon Hill, payable to defendants, and by them indorsed to plaintiffs, verdict for plaintiff, sub-

ject to a case. The bill, which was payable in London, became due on Saturday, 20th February, and was then dishonoured. By a mistake the notice of non-payment was not given to the defendants till the 27th, whereas it ought to have been given on the 24th, and payment was refused, on the ground of these laches. Before the bill became due the drawer had stopped payment and become bankrupt, and the acceptor was insolvent. The drawer had himself apprised the defendant of his situation at the time of his stopping payment, and that this bill would not be paid, and they knew that the acceptor had no funds but such as the drawer furnished him with; and on the 25th February they admitted to the plaintiff's agent, that they knew of the insolvency of the drawer and acceptor. It was contended that notice of the dishonour was unnecessary. But the court was clear that the insolvency of the drawer and acceptor, and the knowledge of it, did not dispense with the necessity of giving notice of the dishonour of the bill to the defendants. And Lord Ellenborough said, "It is too late now to contend that the insolvency of the drawer or acceptor dispenses with the necessity of a demand of payment or of notice of the dishonour."

Boultbee v. Stubbs, 18 Ves. 21. The Lord Chancellor, after deciding that indulgence to the principal, by taking a mortgage and giving time, discharges the surety, though such conduct may be for the benefit of the surety, said, "It is in most cases for the advantage of the surety, but the law takes so little notice of that circumstance, that if the acceptor of a bill becomes bankrupt, the holder must give notice to the drawer, as another person has no right to judge what are his remedies, and the original implied contract being, that as far as the nature of the original security will admit, the surety paying the debt shall stand in the place of the creditor."

(o) Ante, 354, 355, and supra, note (n). In Baker r. Birch, 3 Campb. 107, (Chit. j. 848), the acceptor told the drawer before the bill became due that he could not pay it, and that the drawer must give the latter five guin-

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and necessary Proceedings thereon. Notice of Non-payment necessary or not; Consequences of Omission; and what excuses such Omission. [*450]

1. Of Non- bill(p), or his being in prison(q), or the notorious stopping payment of a payment, banker(r), constitute no excuses, either at law or in equity, or in bankruptcy, for the neglect to give due notice of non-acceptance or non-payment;(1) because many means may remain of obtaining payment by the assistance of friends or otherwise, of which it is reasonable that *the drawer and indorsers 1st, When should have the opportunity of availing themselves, and it is not competent to the holders to shew that the delay in giving notice has not in fact been prejudicial(s). It has been observed, that it sounds harsh that the known bankruptcy of the acceptor should not be deemed equivalent to a demand or notice, but the rule is too strong to be dispensed with; and a holder of a bill has no right to judge what may be the remedies over of a party liable on a bill(t). It is no excuse that the chance of obtaining any thing upon the remedy over was hopeless—that the person or persons against whom that remedy would apply were insolvent or bankrupts, or had absconded. Parties are entitled to have that chance offered to them; and if they are abridged of it, the law, which is founded upon the usage and custom of merchants, says they are discharged (u). Nor can evidence of a parol agreement, not to require payment at the appointed time, be received to excuse the neglect to give due notice(x); for we have seen that such a stipulation would not be available as a defence, and being inoperative for that purpose, it ought to be equally so as an excuse for laches (y). And an agreement between the parties to a bill, that it should not be put in suit till certain estates were sold, isno excuse for want of notice (z). Nor will the circumstance of the drawee's having informed the drawer, before the bill was presented for acceptance or became due, that he could not honour it, be a sufficient excuse for not giv-

> ens towards it, and Lord Ellenborough held that the holder might recover the five guineas as money had and received, but no more. (p) Ex parte Bignold, 2 Mont. & Ayr. 633;

1 Dea. 712, S. C. (q) Per Lord Alvanley, C. J. in Haynes v. Birks, 3 B. & P. 601, (Chit. j. 690).

(r) Camidge v. Allenby, 6 Bar. & Cres. 282; 9 Dow. & Ry. 391, (Chit. j. 1319); Henderson v. Appleton, ante, 356, 357.
(s) Esdaile v. Sowerby, 11 East, 114, (Chit.

767); Russell v. Langstaffe, Dougl. 515, (Chit. j. 415); Bickerdike v. Bollman, 1 T. R. 408, (Chit. j. 435); De Berdt v. Atkinson, 2 Hen. Bla. 336, (Chit. j. 526); Nicholson v. Gouthit, 2 H. Bla. 612, (Chit. j. 556); and admitted by the court in Warrington v. Furbor, 8 East, 245 to 247, (Chit. j. 733); Cory v. Scott, 3 B. & Ald. 623, (Chit. j. 1081); and see reasons in Rohde v. Proctor, 4 Bar. & Cres. 517; 6 D. & Ry. 610, (Chit. j. 1269).

(t) Per Eyre, C. J. in Nicholson v. Gouthit, 2 Hen. Bla. 609; and per Lord Eldon, in Boultbee v. Stubbs, 18 Vcs. 21.

(u) Per cur. in Rohde v. Proctor, 4 Bar. & (a) xer cur. in Konge r. Proctor, 4 Bar. & Cres. 517; 6 D. & Ry. 610, (Chit. j. 1269).
(x) Free v. Hawkins, 8 Taunt. 92; Holt, C. N. P. 550, (Chit. j. 1000); ante, 434, note (g); see also ante, 142 to 144.
(y) Id. ibid.

(z) Supra, note (x).

(1) Although some doubt once existed upon the subject, it seems now to be settled in the United States, that the bankruptcy or insolvency of the drawer of a bill or maker of a note, at the time when the note or bill was given or was payable, is no excuse for not giving notice of the non-payment to the indorser, even though the indorsement should have been for the tice of the non-payment to the indorser, even though the indorsement should have been for the mere accommodation of the drawer or maker. May v. Coffin, 4 Mass. Rep. 341. Farnum v. Fowle, 12 Mass. Rep. 89. Crossen v. Hutchinson, 9 Mass. Rep. 205. Sanford v. Dillaway, 10 Mass. Rep. 52. Jackson v. Richards, 2 Caines' Rep. 343. Bank of America v. Varden, 2 Dall. Rep. 78. Mallory v. Kirwan, 2 Dall. Rep. 192. Warder v. Carson's Executors, 2 Dall. Rep. 233. Bank of America v. Petit, 4 Dall. Rep. 197. Ball v. Dennis, 4 Dall. Rep. 168. And see Agan v. M'Manus, 11 John. Rep. 189. Hussey v. Freeman, 10 Mass. Rep. 34. Stothart v. Parker, Overt. Rep. 261. contra. Buck v. Cotton, 2 Conn. Rep. 126. See Barker v. Parker, 6 Pick. 80. Course & M'Farlane v. Shackleford, 2 Nott & M'Cord, 283.

I have the inderser of a note, proof of demand of, and due diligence to obtain payment from the maker, who was declared bankrupt, or was notoriously insolvent, is not necessary, nor is notice to the indorser. Clark v. Minton, 2 Brev. 185; but a reputed insolvency merely is not sufficient to excuse the omission to give notice. Kiddell v. Ford, 3 Id. 178. But an administrator of an indorser, appointed before the maturity of the note, and who has given notice of such appointment, is entitled to the same notice as his intestate would have been.

Oriental Bank v. Blake, 22 Pick. 206. }

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And where A., to accommodate B., lent him a bill drawn I. Of Noning notice (a). by himself upon and accepted by C., who had effects of his in his hands, Payment, and B. indorsed it to D., who indorsed it over; and the day before the bill and necessary Probecame due B. paid the amount to A., who, on hearing that C. had failed, ceedings gave B. a check for the amount of the bill, and sent him with it to D. to en- thereon. able him to pay the bill when due; and four days after that time A., learning 1st, When that payment had not been demanded, desired D. not to pay the bill, as no Notice of notice of non-payment had been given by the holder, and offered to indemnimeat necmeat necfy him, notwithstanding which D. afterwards paid the bill; it was holden, county or first, that D. paid the bill in his own wrong; and, secondly, that A. was en- not; Contitled to recover back the money paid into the hands of D. by B. in an acof Omistion for money had and received (b). Again, in Esdaile v. Sowerby (c), it sion; and was held, that though the indorsers of a bill of exchange had full knowledge what exof the bankruptcy of the drawer and of the insolvency of the acceptor before Omission. the bill became due, and that it was impossible it *could be paid, yet that [*451] they were discharged by the holders not giving them due notice, on account of a mistake, by mis-directing a letter containing such notice.

But where the drawer of a bill, a few days before it became due, stated What to the holder that he had no regular residence, and that he would call and amounts to see if the bill had been paid by the acceptor, it was held that he was not en- sation with titled to notice of its dishonour, he having thus dispensed with it(d); and an Notice. order by the drawer to the drawee not to pay the bill, if presented, dispenses with notice of dishonour, though not with the presentment itself(e); and if the drawer, on being applied to by the holder, before the bill is due, to know if it will be paid, answer, that it will not, he is not entitled to notice of nonpayment(f): and where one of several drawers of a bill was also the acceptor, it was held, in an action against the drawers, that proof of these circumstances dispensed with the necessity for proving that notice of non-payment was in fact given, because notice to one of several joint drawers of a bill is sufficient, and the acceptor being himself a drawer, he had notice of his own default(p)(1).

(a) Nicholson v. Gouthit, 2 Hen. Bla. 612, (Chit. j. 556); Staples v. Okines, 1 Esp. Rep. 332, (Chit. j. 544); Ex parte Bignold, 2 M. & A. 63; ante, 449, note (p). In Esdaile r. Sowerby, 11 East, 117, (Chit. j. 767), Lord Ellenborough observed, that as to the knowledge of the dishonour being equivalent to due notice of it given to him by the holder, the case of Nicholson v. Gouthit is so decisive an authority against that doctrine, that we cannot enter even into the discussion of it.

(b) Whitfield v. Savage, 2 B. & P. 277, (Chit. j. 630); Clegg v. Cotton, 3 B. & P. 239, (Chit j. 657); but see Brett v. Levett, 13 East, 213, 214, (Chit. j. 820), as to an acknowledgment by a drawer before the bill became due that he knew it would not be paid, post, 451,

(c) 11 East, 114, (Chit. j. 767); ante, 449, note (n); but see Brett v. Levett, 18 East, 213, 214, (Chit. j. 820), post, 451, note (f).

(d) Phipson v. Kneller, 4 Campb. 285; 1

Stark. 116, (Chit. j. 946).
(e) Hill v. Heap, Dowl. & Ry. C. N. P. 57, but quære the distinction. See also Prideaux v. Collier, 2 Stark. Rep. 57, (Chit. j. 989); see post, 5thly, By whom Notice must be given.

(f) Brett v. Levett, 13 East, 214, (Chit. j 820); Burgh v. Legge, 5 M. & W. 418; post,

(g) Porthouse v. Parker and others, 1 Camp. 82, (Chit. j. 741), in which Lord Ellenborough held, that the plaintiff was not bound to prove that the defendant had received express notice of the dishonour of the bill, which must necessarily have been known to one of them, and the knowledge of one was the knowledge of all. But if there was any fraud in the transaction, a different rule would prevail; per Lord Ellenborough in Bignold v. Waterhouse, 1 Maule & 8. 259.

⁽¹⁾ The doctrines in some of the cases cited in this section, do not seem easily reconcileable; it will be necessary for the judicious reader carefully to weigh and consider them. Many decisions have occurred in the United States on the same questions. It seems to be generally acknowledged that the want of effects in the hands of the drawee will be a sufficient excuse as

I. Of Nonpayment. and neces sary Proceedings thereon.

In general, the drawer will, as already observed, be at liberty to rebut the presumption that he could not have been damnified, raised by the proof of his having no effects in the hands of the drawee, by proving that he has real-

Non-payment necessary or not; Consequences of Omission; and what excuses such Omission.

against the drawer for not giving him notice of the non-acceptance or non-payment of a bill. 1st, When Hoffman r. Smith, 1 Caines' Rep. 157. Tunno v. Lague, 2 John. Cas. t. Frothingham r. Notice of Price's Ex., 1 Bay's Rep. 291. Warder v. Tucker, 7 Mass. Rep. 449. So, the drawer, having no funds in the hands of the acceptor, or having withdrawn them without giving notice of the bill, and intercepting all other funds before they reach the acceptor, is not entitled to strict notice of non-payment; because he had no right to expect that the bill would be honored. Valk v. Simmons, 4 Mason, 113. See Van Wart v. Smith and Holly, 1 Wend. 219. But if the drawer have a right to draw in consequence of engagements between himself and the drawee, or in consequence of engagements made to the drawce, or from any other cause, he ought to be considered as drawing upon funds in the hands of the drawee, and as therefore entitled to strict notice. French v. Bank of Columbia, 4 Cranch, 141. The Court of King's Bench have also recently declared that a bona fide reasonable expectation of assets in the hands of the drawee had been several times held to be sufficient to entitle the drawer to notice of the dishonor, though such expectation may have ultimately failed of being realized. Reuker r. Hiller, 16 East's Rep. 43. And if a note be made for the accommodation of the indorser, and the money raised on it by a discount in the market, is in fact received by him, he may be considered as a drawer without funds in the hands of an acceptor, and not entitled to notice of non-payment by the maker, 4 Cranch, 141. Agan v. M'Manus, 11 John. Rep. 180. But the same reasons do not appear to exist where the note has been mude and discounted for the accommodation of the maker; and the indorser is in such case therefore entitled to strict notice, 4 Cranch, 141. And an indorser of a bill for the accommodation of the drawer is in all cases entitled to strict notice, although the drawee had no effects of the drawer in his hands. Warder v. Tucker, 7 Mass Rep. 449. borough v. Harris, 1 Bay's Rep. 177. Frothingham v. Price's Ex. 1 Bay's Rep. 291. May v. Coffin, 4 Mass. Rep. 341. Brown v. Maffley, 15 East's Rep. 216. Hussey v. Freeman, 10 Mass. Rep. 86. But where the drawee of a bill refused to accept or pay, notice need not be given to the indorser, if the bill was drawn and indorsed for the accommodation of the drawer, with the knowledge of the indorser, and there being no expectation that the bill would be paid by the drawee. Farmers' Bank v. Vanmeter, 4 Rand, 553.

Where a bill was drawn, accepted and indorsed, by several indorsers, for the accommodation Farmers' Bank v. Vanmeter, 4 Rand, 553.

of the last indorser, and the drawee had no effects in his hands, but this fact was not known to the defendant, who was a prior indorser, it was held that the defendant could not be charged without strict notice of the dishonour of the bill, because he would on payment have been entitled to call upon the last indorser, for whom he was, in fact, security. Brown r. Maffey, 15

East, 216.

And a person, who, without consideration, but without fraud, indorses a bill, in which both drawer and acceptor are fictitious persons, is entitled to strict notice, for he has only placed him-

self in the situation of a common indorser. Leach v. Hewitt, 4 Taunt. Rep. 731.

When upon a bill payable at so many days after sight, the holder presents the bill for acceptance, and elects to consider what passes on such presentment as a non-acceptance, (though in strictness he might have otherwise acted,) and protests the bill for non-acceptance, he is bound by such election, as to all the other parties to the bill, and must give due notice to them of the dishonor accordingly, otherwise they will be discharged. Mitchell v. Degrand, 1 Mason's Rep. 176.

It lies on the holder of a bill to prove that the drawer had no effects in the hands of the drawee

in order to excuse the want of notice. Baxter v. Graves, 2 Marsh. 152.

The drawer of a bill is entitled to notice of its dishonour though the drawee be not indebted to him when the bill was drawn or fell due, provided the drawer had reasonable ground to believe that it would be honored, and a written authority from the drawee to the drawer for the latter to draw is sufficient ground. Austin v. Rodman, 1 Hawks, 194.

Where the drawer of a hill is a partner of the house or firm on which it is drawn, it is not necessary for the holder to prove that notice of its dishonor was given to the drawer. Gowan v.

Jackson, 20 Johns. 176.

Where a demand cannot be made on the drawer, notice must nevertheless be given to the indorser, and that within as short a period after having ascertained that the demand could not be made as if the demand had been made. Price v. Young, 1 M'Cord, 399. See Galpin v.

Hard, 3 M'Cord, 394. Barker v. Parker, 6 Pick. 80.

Where there are any funds of the drawer in the hands of the drawee, or if at the time the bill is drawn there are circumstances sufficient to induce a reasonable expectation that the bill will be accepted or paid, the drawer is entitled to notice of its dishonor, and to due diligence in the presentment of it. Robinson v. Ames, 20 Johns. 146. Thus where there were dealings and an open account between the drawer and the drawee and the latter had received considerable shipments of cotton from the drawer, and accepted previous bills, but on account of a fall in the price of the cotton its value was not equal to the amount of the accepted bills, and the last bill drawn was therefore protested for want of funds, it was held that the drawer was entitled to no-1bid.

Notice of non-payment must be given back to the indorser, in order to charge him, notwithstanding the insolvency of the maker. Nash v. Harrington, 2 Aikin, 9.

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ly sustained damage(h); and a surety for the acceptor, who has been obliged L of Nonto pay the amount of the bill in consequence of the acceptor's bankruptcy, payment, need not, in an action against him for money paid, prove the due present-and neces ment of the bill, &c. (i).

ceedings

A party may, by his own agreement, dispense with the necessity of no-thereon. tice of dishonour; and where the drawer and indorser of a bill of exchange 1st, When entered into a bond, conditioned to pay the bill within one month after it be- Notice of came due, if not paid by the acceptor, they were held not entitled to notice Non-payof dishonour(k); but, as we have just seen, an agreement between the par- country or ties to a bill not to put it in suit till certain estates were sold, is no excuse(1). not; Con-In an action by the indorsee against the drawer of a bill, the plaintiff did not sequences of Omisprove any notice of dishonour to the defendant, but gave in evidence an sion; and agreement made between a prior indorser and the drawer after the bill be- what excame due, which recited that the defendant had drawn money on the bill in Cuses such Omission. question—that it was over-due, and ought to be in the hands of the prior indorser—and that it was agreed that the latter should take the money due to him upon the bill by instalments; it was held that this was evidence that the drawer was at that time liable to pay the bill, and dispensed with other proof of notice of dishonour (m)(1).

*A neglect or delay to give, or delay in giving immediate notice, may al- Delay in so be excused by some other circumstances. Thus, the absconding or ab-giving Nosence of the drawer or indorser may excuse the neglect to advise him(n); excused. and the sudden illness or death of the holder or his agent, or other acci-[*452] dent(o), or forcible obstruction(o), may constitute an excuse for the want of a regular notice to any of the parties, provided it be given as soon as possible

(h) Ante, 448; but see Rogers v. Stephens,

2 T. R. 713, (Chit. j. 446).
(i) Warrington v. Furbor, 8 East, 242; 6

Esp. 89, S. C.

(k) Murray v. King, 5 B. & Al. 165, (Chit. j. 1119). See Soward v. Palmer, 2 Moore, 274. (Chit. j. 1025).

(1) Free v. Hawkins, S Taunt. 92; Holt, C. N. P. 550, (Chit. j. 1000); ante, 450, note (x).

(m) Gunson and others v. Metz, 1 B. & C.

193; 2 D. & Ry. 334, (Chit. j. 1168).
(a) Walwyn v. St. Quintin, 2 Esp. Rep. 516; 1 B. & P. 652, (Chit. j. 578); Bul. N. P. 273, 274; and see Crosse v. Smith, 1 Maule & S. 545, (Chit. j. 886); Bowes v. Howe, 5 Taunt. 30, (Chit. j. 892).

(0) There is no reported case deciding whether accident will excuse a delay in giving notice of non-acceptance or non-payment. In Hilton r. Shepherd, 6 East, 16, in notes, (Chit. j. 710), Garrow and Russell contended, that whether due notice has been given in reasonable time, must, from the necessity of the thing, be a question of fact for the consideration of the jury; that it depended upon a thousand combinations of circumstances, which could not be-

reduced to rule; if the party were taken ill, if .. he lost his senses, if he were under duress, &c. how could laches be imputed to him? Suppose he were prevented from giving notice, within the time named, by a physical impossibility. Such a rule of law must depend upon the distance, upon the course of the post, upon the state of the roads, upon accidents, all which it is absurd to imagine. Lord Kenyon, C. J. "I cannot conceive how this can be a matter of law. I can understand that the law should require that due diligence shall be used, but that it should be laid down that the notice must be given that day or the next, or at any preciso time, under whatever circumstances, is, I own, beyond my comprehension. I should rather have conceived, that whether due diligence had er had not been used was a question for the jury to consider, under all the circumstances of the accident, necessity, and the like. This, however, is a question very fit to be considered, and when it goes down to trial again I shall advise the jury to find a special verdict. I find invincible objections in my own mind to consider that the rule of law requiring due dili-gence is tied down to the next day." In Dar-

^{(1) {} An express waiver of protest dispenses with its necessity. Carmena v. Mix, 15 Louis. Rep. 165; but a mere admission of liability by the indorser will not charge him if he has not been duly notified. Barkalow v. Johnson, 1 Harr. 397. But an express promise to pay, made with full knowledge of the laches, will cure the same, 7 Port. 175. Whether a waiver of notice by the indorser the day before demand, saying he knew the bills would not be paid, will excuse the omission to give notice, see Burgh v. Legge, 5 Mee. & Wels. 418. See also Bush v. Hayes, 1 Irish Law Rep. 327; Creamer Perry, 17 Pick. 332; Hoover v. Glascock, 16 Louis. Rep. 242; M'Mshan v. Grant, Id. 479; Sussex Bank v. Baldwin, 2 Harr. 487; Tebbetts v. Dowd, 23 Wend. 379. >

and necessary Proceedings thereon.

I Of Non- after the impediment is removed. So the circumstance of an indorser himself having handed over to the indorsee the bill too late to make protest, or give notice in the time usually required, would preclude him from objecting to the delay (p). But absence from home in consequence of the dangerous illness of a near relative, is no excuse for not leaving there a competent agent to receive and forward notice (q).

Delay in

*The holder of a bill of exchange is also excused for not giving regular nogiving No- tice of its being dishonoured to an indorser, of whose place of residence he is ignorant(r), if he use reasonable diligence to discover where the indorser [*453] may be found(s)(1). And Lord Ellenborough observed, "When the hold-

> bishire v. Parker, 6 East, 3; 2 Smith, 195, (Chit. j. 707), it was held, that reasonable time is a matter of law for the court. In Poth. pl. 144, and Pardess. du Contrat de Change, pl. 426, it is considered that inevitable accident excuses delay, provided notice be given as soon as circumstances will admit; and it is stated that the death of a correspondent, to whom the bill has been sent for presentment, and a sudden accident happening to a messenger will excuse delay. In America the decisions are contradictory, whether the prevalence of a malig-nant fever, or epidemic, would excuse delay of notice during its continuance. Tunno v. Lague, 2 Johns. Cas. 1; Roosevell v. Woodhull, Anth. N. P. 35; Bayl. Amer. edit. 175. In Thompson on Bills, 548, the excuse as to accidents is laid down as in the above text, but that the accident must not be attributable to the holder's And in Young v. Forbes, Morrison, 1580; Thompson, 483, it is stated to have been the opinion of London merchants, that any cause preventing the holder, without his fault, from protesting the bill, as his detention by contrary winds, or sickness, would excuse him from protesting It certainly is not the practice among merchants of respectability to avail themselves of the neglect to give immediate no-tice of dishonour, where no loss has resulted from the delay.

(p) 1 Pardess. 451.
(q) Turner v. Leach, sittings at Guildhall, post, Hilary Term, 1818, cor. Lord Ellenbor-Assumpsit by the eleventh indorser of a bill of exchange against the eighth indorser, for default of pryment. It appeared that in due time, on the 4th September, 1817, the It appeared that returned bill, with notice of the dishonour, was left at the house or Richard Bennett, the tenth indorser, inclosed in a letter addressed to him. That in consequence of the dangerous illness of his wife at a distant place, he had, on the

1st September, left his house in care of a lad, who had no authority to open letters, intending to return on the 3d September, but that in consequence of the increased dangerous illness of his wife, he did not return till after the 8th September, on which day his brother opened the letter, and immediately gave notice of the dishonour of the bill to the plaintiff, who paid it, and then called upon the defendant, who insisted that he was discharged for want of earlier notice. It was urged for the plaintiff, that the dangerous illness of Richard Bennett's wife excused his absence from home, and the delay in giving notice of the dishonour, and that as the dishonour of a bill is contrary to the contract and expectation of the parties, there is no reason for requiring an indorser to be in the way, or to appoint an agent in his absence to provide for such an event. But Lord Ellenborough ruled that these circumstances constituted no excuse for the delay in giving notice. A case was reserved upon another point. See 4 Bar. & Ald. 451, (Chit. j. 1109); and Smith v. Mullett, 2 Campb. 208, (Chit. j. 775). Sed quære as to the doctrine, that the illness and consequent absence did not constitute a sufficient excuse in in this case. Is a party to a bill obliged to be at home, or have a competent agent there at all times, to forward notice of dishonour of a bill, which is an irregularity in breach of the im-pliet contract, as well of the drawer and indorsers as of the acceptor, that a bill should be duly honoured?

(r) Poth pl. 144; but a mistake in directing a letter is no excuse. Esdaile v. Sowerby, 11

East, 114, (Chit. j. 767); ante, 449, note (n).
(s) Bateman v. Joseph, 2 Campb. 461; 12
East, 433, (Chit. j. 801); ante, 337, note (s); Browning v. Kinnear, 1 Gow's Rep. 81, (Chit. j. 1054); post. 454, note (a). What is due diligence, see Harrison v. Fitzhenry, 3 Esp. R. 240. Quære, whether reasonable diligence is

The certificate of the notary who makes the protest is prima facie evidence that due diligence was used to find the residence of the maker and endorser of a note, and that notice to the endors-

or was put in the post office. Delarigue v. Amet, 14 Louis. Rep. 437.

^{(1) {} Nichol v. Hill, 7 Yerg 305. The general rule is that a party is bound to exercise reasonable, not excessive diligence. Sussex Bank v. Baldwin, 2 Harrison, 487. Bank of Utica v. Bender, 21 Wend. 643; Roberts v. Mason, 1 Ala. Rep. (New Series) 373; Clark v. Bigelow, Inquiry made of such persons where a security is made payable as may reason-16 Maine, 246. ably be supposed to know the residence of the endorser, is diligent inquiry, in legal contempla-Marsh v. Barr, 1 Meigs, 68. Where there is no dispute as to the facts, what is reasonable diligence is a question of law for the court to determine. Bank of Utica v. Bender, 21 Wend. 643; Remer v. Downer, 23 id. 620. Contra. Thompson v. Bank of South Carolina, 3 Hill, 77.

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er of a bill of exchange does not know where the indorser is to be be found, I. Of Nonit would be very hard if he lost his remedy by not communicating immediate payment, notice of the dishonour of the bill; and I think the law lays down no such sary Prorigid rule.) The holder must not allow himself to remain in a state of passive ceedings and contented ignorance; but if he uses reasonable diligence to discover the thereon. residence of the indorser, I conceive that notice given as soon as this is dis- Delay in covered is due notice of the dishonour of the bill, within the usage and cus-giving Notom of merchants(t)." And where the traveller of A., a tradesman, receiv-tice, when ed in the course of business a promissory note, which he delivered to his excused. master, and the note having been returned to A. dishonoured, the latter, not Ignorance knowing the address of the next preceding indorser, wrote to his traveller, of resiwho was then absent from home, to inquire respecting it; it was held, that A. was not guilty of laches, although several days elapsed before he received an answer, and before he gave notice to the next party, as he had used due diligence in ascertaining his address(u); and a delay of two days, after ascertaining the residence, in forwarding notice has been excused, the holder and his attorney occupying that time (x). And it has been considered sufficient, when a promissory note has been dishonoured, to make inquiries at the maker's for the residence of the payer (y). But in a subsequent case it was held, that, to excuse the not giving regular notice of the dishonour of a bill to an indorser, it is not enough to shew that the holder, being ignorant of his residence, made inquiries upon the subject at the place where the bill was payable: he should have inquired of every other party to the bill, and have applied to all persons of the same name in the directory (z). However, applying to the last indorser, and last but *one, the day after the bill was due, [*454] to ascertain where the drawer lives, and on his not being in the way calling again the next day, and then giving the drawer notice, has been considered sufficient(a). And sending verbal notice to a merchant's counting-house is sufficient, and if no person be there in the ordinary hours of business, it is not necessary to leave or send a written one, nor is it nece sary to make in-

in this case a question of fact or law? Sturges v. Derrick, Wightw. 76; 12 East, 433; 2 Campb. 461; 3 Campb. 262; 6 East, 3. As to what is reasonable diligence, see 4 Maule & S. 49. It is a mixed question of law and fact

to be left to the jury after the judge has stated to them the law. See ante, 336, 337.

(t) Boteman v. Joseph, 2 Campb. 462; 12 East, 433, (Chit. j. 801). In this case the plaintiff received notice of dishonour on the 30th September, and did not give notice to the defendant until the 4th October; and see Brown-

ing v. Kinnear, Gow's Rep. 81, (Chit. j. 1054). (u) Baldwin r. Richardson and another, 1 Bar. & Cres. 245; 2 D. & Ry. 285, (Chit. j.

(x) Firth v. Thrush, 8 Bar. & Cres. 387; 2 M. & Ry. 359; Dans. & Ll. 151, (Chit. j.

(y) Sturges v. Derrick, Wightw. R. 76, (Ch. j. 800).

(z) Beveridge r. Burgis, 8 Campb. 262, (Chit. j. 870). Indersee against inderser of a bill. The plaintiff had given the defendant no notice of its dishonour till several months after it became due; the excuse alleged for this omission was, that the plaintiff was ignorant of the defendant's address, which did not appear upon the bill, but the only evidence adduced to shew that he had used any diligence to discov-

er this, was, that he had made inquiries upon the subject at a house in the Old Bailey, where the bill was made payable by the acceptor. Lord Ellenborough, "Ignorance of the indorser's residence may excuse the want of due notice, but the party must shew that he has used reasonable diligence to find it out. Has he done so here? How should it be expected that the requisite information should be obtained where the bill was payable? Inquiries might have been made of the other persons whose names appeared upon the bill, and application might have been made to persons of the same name with the defendant, whose addresses are set down in the directory. Ignorance may excuse notice, but reasonable diligence must be used to obtain knowledge." Plaintill nonsuit-

(a) Browning r. Kinnear, Gow's Rep. 81, 'hit. j. 1054). The defendant indorsed to (Chit. j. 1054). Newman, he to Maberly, he to Chesterman, and he to plaintiff. The bill became due 23d November; on 24th plaintiff applied to Chesterman to know where defendant lived. Chesterman could not tell, and referred him to Maberly. He called on Maberly at 4 P. M., but Maberly not being at home, he did not call again till next morning, and then Maberly gave him the information, and he gave notice to defendant. Dallas, C. J. left the question of rea-

But in the

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case of the bankruptcy of a drawer or indorser, notice of the dishonour must

I. Of Non-quiries after the party so as to give him notice elsewhere (b)(1). payment, and necessary Proceedings thereon.

sonable diligence to the jury, stating his opinion that due diligence had been observed. (b) Goldsmith and others v. Bland and oth-

if they thought the defendants ought to have

had somebody in the counting-house at the time, he was of opinion that the plaintiffs had done

all that was necessary by sending their clerk;

that the notice was in law sufficient, if the time

ers, cor. Lord Eldon, 1st March, 1800, Bayl. 5th edit. 246, (Chit. j. 626). The plaintiffs Delay in giving Notice, when sued the defendants as indorsers of two foreign bills, and to prove notice the plaintiffs shewed excused. that they sent a clerk to the defendants' counting-house, near the Exchange, between four and five o'clock in the afternoon; nobody was in the counting-house; the clerk saw a servant girl at the house, who said that nobody was in the way, and he returned, having left no mes-sage with her. Lord Eldon told the jury, that was regular, whether the defendants were solvent at the time or not. The jury thought the defendants ought to have had somebody in the counting-house at the time, and that the plaintiffs had done all that was necessary. for the plaintiffs, for 1633l.

Crosse v. Smith, 1 Maule & S. 545, (Chit. i. 886). Notice to the drawers of non-payment of a bill of exchange, by sending to their counting-house during the hours of business on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient without leaving a notice in writing, or sending by the post, though some of the drawers lived at a small distance from the place. See also Bowes v. Howe, 5 Taunt. 30, (Chit. j. 892); ante, 355, note (p).

(1) Where the holder, who was ignorant of the indorser's residence, sent the notice to A. who was acquainted with it, requesting him to add to the direction the indorsee's place of residence, it was held, that reasonable diligence had been used. Hartford Bank v. Stedman, 3 Conn. Rep. 489.

It is not incumbent on the indorser of a promissory note to show the holder where the maker is to be found, so that he may make a demand on the maker, where no application is made to him by the holder. Duncan v. M'Cullough, 4 Serg. & Rawle, 480.

If the maker of a promissory note is not to be found when the note becomes due, a demand on him of payment is not necessary in order to charge the indorser. But it is necessary to prove either a demand, or due diligence in endeavoring to make a demand. Duncan v. M'Cullough, 4 Serg. & Rawle, 480.

When the holder of a bill was ignorant of the drawer's place of residence, but it appeared that he had not used due diligence to make inquiry, a notice put into the post office directed to a place other than that in which the drawer lived, was held to be insufficient. Barnwell v. Mitchell, 3 Conn. Rep. 1. The failure of a bank holding a bill payable after date for collection, to give notice to the drawer, that the drawee was not found at home, when called upon to accept the bill, will not discharge the drawer. Bank of Washington v. Triplett, 1 Peters, 25.

So where the notary called at the house of the indorser, which was shut up and the door locked, and was informed that the indorser and his family had left town, on a visit; but whether for a day, week, or month, he did not know, nor did he inquire. He made use of no further diligence to ascertain whither the indorser had gone, or whether he left any agent in town. He also left a notice at the house of the next neighbor, with a request that it might be delivered to the indorser when he should return: Held, that this was sufficient diligence to charge the indorser. Williams v. Bank of the United States, 2 Peters, 96, 100. See Galpin v. Hard, 3 M'Cord, 894.

And where the drawer of a bill or maker of a note, has removed from the place where the instrument represents him to reside, or where he resided when it was drawn, the holder is bound to use reasonable diligence to find out the place to which he has removed, and if he succeed, he

must present it for payment, to charge the indorser. Id.

In Maine, it has been determined, that where the residence of the drawer of a bill is unknown to the holder, he ought to inquire of the other parties to the bill, if their residence is known to

Hill v. Varrell, 3 Greenl. 233. Where a note is payable at a bank, it is not necessary to make any personal demand of the

maker elsewhere. Bank of the United States v. Carneal, 2 Peters, 543 A promissory note was made at Georgetown, payable at the Bank of Columbia in that town; the indorser living in the county of Alexandria within the district of Columbia, and having what was alleged to be a place of business, in the city of Washington; and notice of non-payment, inclosed in a letter and superscribed with his name, was put into the post-office at Georgetown, addressed to him at that place. Held, that the notice was sufficient to charge the indorser. Bank of Columbia v. Lawrence, 1 Peters, 578. Q notice of dishonor by a special messenger. Id. Quere as to the necessity and propriety of sending

Notice of non-payment must be given to the indorser of a promissory note, indorsed after due, as in any other case. Course & M'Farlane v. Shackleford, 2 Nott & M'Cord, 283. Poole v. Tolleson, 1 M'Cord, 199. Stockman v. Riley, 2 M'Cord, 398.

If the maker of a promissory note be absent when it falls due, demand should be made at his domicil if he have any; otherwise, diligent search for him will be sufficient. Whittier v. Graffam, 8 Greeni. 82.

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still be given to the bankrupt or his assignee(c); and if the bankrupt's house I. Of Noncontinue open, and the messenger of the assignees be in it, notice of the dis- payment, honour should be left there(d); though it does not appear to be absolutely and necessary Prosettled whether, in the event of the bankruptcy of a party entitled to notice, ceedings the holder is bound to endeavour to find out the assignees at all events.

The holder of a bill of exchange is also excused for not giving notice in Pablic the usual time, by the circumstance of the day on which he should regularly Feetival, have given notice being a public festival, on which he is strictly forbidden by Rest Day,

(c) Rohde v. Proctor, 4 Bar. & Cres. 517; 6 D. & By. 610, (Chit. j. 1269); Ex parte Johnston, 1 Mont. & Ayr. 622; 3 Dea. & C. 433, S. C.; Cooke's B. L. 168; Cullen's B. L. 100; Mont. B. L. 143, note; Eden's B. L. 132, acc.; Ex parte Smith, 3 Bro. C. C. 1,

(Chit. j. 457), contra. (d) Rohde v. Proctor, 4 Bar. & Cres. 517; 6 D. & Ry 610, (Chit. j. 1269); Ex parte Johnston, 3 Mont. & Ayr. 622; 3 Dea. & Chit. 433, S. C.

A notice of protest need not state who was the holder of the bill. Shreive v. Duckham, 1 Litt. 194.

Two notes dated in October and fulling due in January and February following, were indorsed by the defendant, who was an Englishman, a master mariner and an unmarried man, having no botne in this country, and, when in England, residing in Liverpool. On the 12th of December, he wrote from Boston to the holder at Providence, that he should leave Boston in a day or two for Liverpool, but in fact he remained in Boston till the middle of March. The holder did not know of this fact nor of his residing in Liverpool, and sent no notice to him of the dishonour of the bill, neither did it appear that the holder made any inquiries for his residence. due diligence had not been used to give notice to the indorser. Hodges v. Galt, 8 Pick. Rep.

Notice of protest, sent to a town where a note bore date, where the officers of the bank were told by the person who presented it for discount the indorser resided, and where in fact he did reside until a few weeks previous to the date of the note, was held sufficient to charge the indors-Bank of Utica v. Davidson, 5 Wend. Rep. 587.

If the holder of a bill uses reasonable diligence to discover the residence of the indorser, notice given as soon as this is discovered, is due notice of the dishonour of the bill, within the usage and costom of merchants. Preston v. Dayson et al., 7 Louisiana Rep. 7.

When notice is directed to the post office nearest the residence of the indorser, that is proof

that he received the notice. Dunlap v. Thompson & Dreunen, 5 Yerger's Rep.

So, where the indorser lived at A. five years before the note fell due, and the notary made diligent inquiry for his place of residence, and was informed it was at Paris, a notice directed to Paris will be sufficient, though the defendant might have removed his residence to B. a few days before the note fell due. Ibid.

But where the indorser lived at A., and the notice was directed to him at B., where he was supposed to have been when the note fell due, the charge of the Court, that if the jury believed it probable the defendant received notice at the latter place as soon as he would if the notice had

been sent to the former, was held to be erroneous. Ibid.

If notice of protest is shown to have been sent to the indorser at a post office in the parish where he resides, it lies with him to show that there is another post office nearer to his residence.

Yeatman v. Erwin et al., 7 Miller's Louisiana Rep. 268.

According to the act of the legislature, passed the 13th March, 1827, concerning protests of bills and notes, whenever the notary certifies that after diligent inquiry for the residence of the party intended to be charged by notice, he is unable to find it, and has lodged the notice in the nearest post office, addressed to him at the place where the contract was made, it is deemed equivalent to a personal notice. Preston v. Dayson et al., 7 Louisiana Rep. 7.

The holder of a bill or note ought not to avail himself of the ignorance of the notary as to the residence of the indorsers, in giving them notice of protest; if he knows, he must disclose their

residence, or it seems, that his neglect will discharge the indorsers.

Where the place of an indorser's residence is established at the time when a note having the usual time of bankable paper to run is discounted, and is at such a distance from the place of payment as to repel the presumption that a removal, (in case it happens before the note falls due,) would come to the knowledge of the holders, and no actual knowledge is brought home to them, a notice of demand and non-payment directed to such place of residence is sufficient, although the indorser has in fact, in the mean time, become a resident of another place. Bank of Utica v. Phillips, 8 Wend. Rep. 408.

See further as to what is sufficient notice of dishonor, Strange v. Price, 2 Per. & Day. 278; Messenger v. Southey, 1 Scott's New Rep. 180; Brush v. Hayes, 1 Irish Law Rep. 327; S. C. 1 Gebb & Sig. 658; Lewis v. Gamperty, 6 Mec. & Wels. 339. Green r. Durling, 15 Maine,

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sary Proceedings thereon.

I. Of Non-his religion to attend to any secular affairs (e). And the time of protesting and giving notice where a bill or note falls due on Good Friday or Christmasday, proclaimed Fast or Thanksgiving-days, is expressly provided for in this country (f). So he is excused if the political state of a country renders it impossible to give *it(g)(1). But the loss or destruction of an accepted bill affords no excuse for the delay in giving notice of non-payment (h). And the misdirection by mistake of a letter giving notice of the dishonour will be no excuse for the consequent delay, unless it were attributable to the default of the drawer or indorser himself (i).

2dly, When Protest for Non-payment necessary or advisable, and mode of Protesting. *455]

As already observed, when treating of the protest for non-acceptance (k), the conduct which the holder must pursue on the dishonour of a foreign bill differs materially from that which he must adopt in the case of an inland bill. Whenever notice of non-payment of a foreign bill is necessary, a protest(1) must also be made, which, though apparently mere matter of form, is, by the custom of merchants, indispensably necessary, and cannot be supplied by witnesses or oath of the party, or in any other way(m), and, as it is said, forms part of the constitution of a foreign bill of exchange; because it is the solemn declaration of a notary, who is a public officer recognised in all parts of Europe, that a due presentment and dishonour have taken place, and all countries give credit to his certificate of the facts; and the mere production of this protest, without further proof of the signature or affixing of the seal (though not so if made here(n)) will, in the case of a bill payable and pro-

(e) Lindo v. Unsworth, 2 Campb. 602, (Ch. j. 824). Notice of the dishonour of a bill was sent to the plaintiff in London, the 8th of October, but he being a Jew, and the 8th of October being the day of the greatest Jewish festival throughout the year, on which all Jews are prohibited from attending to any secular affairs, gave no notice by the post of that day to the defendant, who lived at Lancaster, but sent it to him by the post of the 9th. Lord Ellenborough held, that the plaintiff was excused from giving notice on the Sth, on the ground of his religion, and that the notice sent off on the 9th was sufficient. The plaintiff had a verdict.

(f) 7 & 8 Geo. 4, c. 15; post, Time of giring Notice, &c.

(g) Patience v. Townley, 2 Smith's Rep.

223, (Chit. j. 714.) (h) Poth. pl. 125; Thackray v. Blackett, 3 Campb. 164, (Chit. j. 849); Manning's Index, **6**9.

(i) Esdaile v. Sowerby, 11 East, 114, (Chit. j. 767).

(k) Ante, 332, et seq.

(1) See the form, post, 462. In Scotland, inland as well as foreign bills must be protested, to entitle the holder to recover against the drawer and indorsers, even for the principal sum. Furguson and Co. v. Belsh, 17th June, 1803; Morr. App. to Bills, No. 13; Glen. 2d edit. 189. The Irish act, 9 Geo. 4, c. 24, s. 4, authorizes the protesting of inland bills above

(m) Rogers v. Stephens, 2 T. R. 713, (Chit. j. 446); Gale v. Walsh, 5 T. R. 239, (Chit. j. 506); Orr r. Magennis, 7 East, 359, 360; 2

Smith, 328, (Chit. j. 726); Brough v. Perkins, Ld. Raym. 993; 6 Mod. 80; 1 Salk. 131, (Chit. j. 223, 224); Bul. N. P. 271. A pro-test is the only legal notice in the case of a foreign bill. Per Lord Mansfield in Salomons v. Stavely, 3 Dougl. 298.

Rogers v. Stephens, 2 T. R. 713, (Chit. j. 446). In an action against the drawer of a foreign bill of exchange, it appeared that the bill had been noted for non-acceptance, but there was no protest, and this was pressed as a ground for nonsuit. Lord Kenyon admitted the objection, but upon the other circumstances thought this a case in which a protest was not

necessary.
Gale v. Walsh, 5 T. R. 239, (Chit. j. 506). In an action against the drawer of a foreign bill it was reserved as a point, whether it was necessary to prove a protest for non-payment, and the court thought it is so clear, upon motion to enter a nonsuit, that they suggested to the plaintiff's counsel the expediency of making the rule absolute in the first instance, and upon their acquiescence, it was accordingly done; they afterwards, however, wished to have it opened, upon an idea that the drawer had no effects in the hands of the drawee; but it appearing upon the report that the idea was not well founded, the rule stood. And in Brough v. Perkins, Ld. Raym. 993; 6 Mod. 80; Salk. 131, (Chit. j. 228, 224), Holt, C. J. says, "A protest on a foreign bill is a part of the custom."

(n) Chesmere v. Noyes, 4 Campb. 129, (Chit. j. 929). A notarial protest under seal, is no evidence that a foreign bill has been presented for payment in England, ib. And see

^{(1) {} For instance a war between this country and the one where it is payable. But notice must be given within a reasonable time after peace. Hopkirk v. Page, 2 Brock. 20. >

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tested out of this country, be evidence of the dishonour of the bill(0); and I. Of Nonon the other hand, if made here, all foreign courts give credit to it(p); and payment, it cannot be supplied by mere proof of noting for non-payment(1). A bill and necessary Prodrawn in Ireland upon England, is, we have seen, to be considered as a for-ceedings eign bill, and therefore must be protested for non-payment(q). But proof thereon. that the drawer had no effects in the hands of the drawee at the time of 2dly, drawing the bill, or *at any time afterwards, will in this country excuse the When want of a protest, as well as want of due notice, and prevent the drawer Non-payfrom being discharged (r). So a subsequent promise by drawer to pay the ment nebill may preclude him from availing himself of the want of a protest(s). cessary or However, it is not advisable, in any case, to omit protesting a foreign bill, advisable, and mode because in foreign courts they would probably not be entirely governed by of Protestthe exception allowed by our courts (t). If the drawer or indorser has re-ing. quested that in case of dishonour it shall be returned without protest, then [*456] we have seen that he cannot object to the want of it(u).

With respect to the protest, it should always be made according to the law of the place where the payment ought to have been made, though with regard to the notice of the dishonour it must be given to the drawer within the time, and according to the law of the place where the bill was drawn; and to the indorsers, according to the law of the places where their indorscments were made(x). In France any holder, whether lawfully so or not, may cause a valid protest to be made for non-acceptance, but a valid protest for non-payment can only be made by a lawful holder(y). However, a mere agent, authorised to receive payment, may cause the protest to be made(z).

As the English holder of a bill, drawn or indorsed in France, or other foreign country, may lose his remedy against such foreign drawer or indorser, unless he conforms to the law of the foreign country, it is material to inquire what is the law of that place. Thus, if the English holder neglect to observe the law of France as to the time of protest and notice, and proceed in a French court against the drawer or indorser there, and whose contract was there made, he will (at least in that country) lose his legal remedy against them, although he may have strictly observed all steps required by the law of England(a). On the other hand the French law does not assume to dictate what delay may be allowed in giving notice to and proceeding against

Marin v. Palmer, 6 C. & P. 466, as to necesity of calling subscribing witness to English protest. See further, post, Part II. Ch. V. s. i. Evidence.

(0) Anon. 12 Mod. 345; Dupays r. Shepherd, Holt, 297; Chesmer v. Noyes, 4 Campb. 129, (Chit. j. 929); 2 Roll. Rep. 346; 10 Mod. 66; Peake Evid. 4th edit. 80, 74, in notes.

(p) Molloy, 281; Da Costa v. Cole, Skin.

272, pl. 1, (Chit. j. 179).
(q) Chaters v. Boll, 4 Esp. Rep. 48, (Chit. j. 636); and Mahoney v. Ashlin, 2 B. & Ad. 478; ante, 10.

(r) Orr v. Magennis, 7 East, 359; 2 Smith, 328, (Chit j. 720); Legge v. Thorpe, 2 Campb. 310; 12 East, 171, (Chit. j. 783); Gale v. Walsh, 5 T. R. 239, (Chit. j. 506); Chaters v. Bell, 4 Esp. Rep. 49, (Chit. j. 636).

(s) Patterson v. Becher, 6 Moore 319, (Chit. j. 1126); Gibbon v. Coggon, 2 Campb. 188,

(Chit. j. 774).

(t) Per Lord Ellenborough, in Legge v.
Thorpe, 12 East, 177, 178; 2 Campb. 310, (Chit. j. 783); 4 Pardess. 225, S. P.

(u) Ante, 165.

(x) 4 Pardess. 227, 230; Poth. pl. 155.

(y) 1 Pardess. 444.

(z) Id. 443, 444.

(a) 4 Pardess. 225, 226, 230, 231; 1 Pardess. 453 to 455; ante, 167 to 172, As to the Construction, &c. of Bills.

^{(1) {} Fleming v. M'Clure, 1 Brev. 429. But a protest is unnecessary in the case of an inland bill or note. Evans v. Gordon, 8 Port. 142; Gilman r. Lewis, 15 Maine Rep. 452. Sale v. Branch Bank at Decatur, 1 Ala. Rep. N. S. 425. As to the proof of protest and what it is evidence of, See Halliday v. M Dougall, 20 Wend. 81. Smith v. Janes, Id. 192; Maccoun v. Atchafalaya Bank, 13 Louis. Rep. 342; Homes v. Smith, 16 Maine Rep. 181; Warren v. Warren, Id. 259; Poydras v. Bell, 14 Louis. Rep. 391; Delarigne v. Arnet, Id. 437. }

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and necessary Proceedings thereon.

2dly, When Protest for non-Payment necessary or advisable, and mode *457]

1. Of Non- a person who drew or indorsed a bill in England, or other foreign country, whose liabilities are regulated, and are to be given effect to (even in France), according to the law of England, or the other foreign country where there are conflicting regulations in different countries in regard to commerce(b). And if the French courts mistake the English law relating to an English bill transaction, their erroneous decree will not preclude a correct decision in the English courts, or prevent the holder from recovering here(c).

In France, if the bill has been drawn payable at a different place than the domicile of the drawee, the demand of the protesting officer should be made upon the person, and at the place pointed out by the acceptance. the acceptor of his own accord has accepted the bill payable elsewhere, the of Protest- bill must be there presented accordingly, so as to charge the acceptor and

the indorsers (d).

It is also essential in France, in case of an acceptance for honour, *to present the bill to the original drawee, and also to such acceptor, and to protest for non-payment by each; and if a bill has been addressed to a third person "au besoin," a presentment and protest there also should be made(e).

On the subject of presentment and protest, it is laid dawn in the Code de Commerce, liv. i. tit. viii. s. xii. art. 173, as follows;—" Les protêts faute d'acceptation ou de paiement sont faits par deux notaires ou par un notaire et deux temoins ou par un huissier et deux temoins. Le protêt doit et re fait au domicile de celui sur qui la lettre de change était payable, ou à son dernier domicile connu; au domicile des personnes in diquées par la lettre de change pour la prayer au besoin; au domicile du tiers qui a accepté par intervention. Le tout par un seul et meme acte. En cas de fausse indication de domicile le protet est precédé d'un acte de perquisition (f)." And from the same authority, it appears that the instrument of protest itself must contain an exact copy of the bill, and state whether the drawee was presest or absent, and the reason, if any assigned, for non-payment, and it seems that in all other respects it should resemble an English protest(g).

Modes of Protesting in England.

In this country, when the drawee, on presentment of the foreign bill on the morning of the day when it falls due, refuses or neglects to pay the same, the holder, or some other person if he be ill or absent (h), should cause it to

(b) 1 Pardess. 455; 4 Id. 197 to 235.

(c) Novelli v. Rossi, 2 Bar. & Adol. 757.

(d) 1 Pardess. 447.

(e) 1 Pardess. 447.

(f) Code de Commerce, liv. i. tit. viii. s. xii. art. 173; See Pailliet Man. de Droit Frangais; 1 Pardess. 444.

(g) 1 Pardess. 444. On a recent trial the following evidence was given by a French ad-

vocate of twenty years practice:

"There is no difference as to liability to the holder between the maker of a promissory note and the acceptor of a bill of exchange. The and the acceptor of a bill of exchange. The same law prevails as to both. The holder of the bill and the note have the same formalities to go through. The formality necessary to ena-ble the holder of a promissory note to recover against the maker is the protest, which is signed by a sheriff's officer or a notary, on the propo-sition of the last holder; and the protest must be in writing. A copy of these registers or acts must be kept, under a severe penalty. The protest must be made within twenty-four hours

from the time of the note's becoming due, and it must contain a copy of the instrument. If the maker had become bankrupt, a protest is necessary, to have recourse against the indorser, and ought to be signified to the indorser within a fortnight previous to the protest. Payment of the note must be demanded at the residence of of the maker, or at the place of payment, if any is specified. If the party's residence differ from the place specified for payment, it is absolutely necessary to present it where it purports to be made, whether that is the residence of the maker or not. The protest must contain a statement that that has been done." Trimbey v. Vignier, 6 Car. & P. 25, 26. This case, however, was ultimately decided upon a different point, viz, the insufficiency of the indorsement; and the court expressed no opinion respecting the protest. See I Bing. N. C. 151; 4 Moore & S. 695; ante, 170, note (b), 225, 226, note (a).

(h) Molloy, b. 9, c. 10, s. 17. We have seen, that the absence of the holder from his

PART I

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For this purpose he should carry the bill to a notary(i), who I. Of Nonis to present it again to the drawee, and demand payment, which should, in Payment, case the bill was drawn on or accepted payable at a banker's, be during the sary Prousual hours of business, and in London ought not to be later than five ceedings o'clock (k); and if the drawee again refuse to pay, the notary is thereupon, in thereon. the first instance, to make a minute, consisting of his initials, the month, day 2dly, and year, and the reason, if assigned, for non-payment. The next step When which the notary is to adopt is to draw up the protest(1), which is a *formal Protest for declaration on production of the bill itself, if it can be obtained, or otherwise ment neon a copy(m), that it has been presented for payment, and how, and that cessary or payment was refused, and why, and that the holder intends to recover all advisable, damages and expenses which he or his principal, or any other party to the of Pro-The minute above testing. bill, may sustain on account of the non-payment (n). mentioned, made on the bill itself, is usually termed noting the bill, but this, [*458] Buller, J. observed, is unknown in the law, as distinguished from the protest, and is merely a preliminary step, and though it has grown into practice within these few years, it will not in any case supply the want of a protest(o), the demand of payment is the material thing. In case there be not any public notary at the place where the bill is dishonoured, it is expressly provided as to inland bills, that they may be protested for non-payment by any substantial person of that place, in the presence of two or more witnesses(p). It is said it should be made between sun-rise and sun-set. should in general be made in the place where payment is refused; but where a bill is drawn abroad, directed to the drawce at Southampton, or at any other place, requesting him to pay the bill in London, the protest for nonpayment, it is said, may be made either at Southampton or in London(q); but unless the bill has been specially accepted, payable at a particular place only, and not otherwise or elsewhere, the protest may always be made in the place to which it was addressed (r). We have seen, however, that since the 2 & 3 Will. 4, c. 98, bills made payable at a place other than the residence of the drawee may be protested in that place(s). A copy of the bill should, it is said, be prefixed to all protests, with the indorsements transcribed verbatim, and with an account of the reason given by the party why he does not honour the bill(t). Protests made in this country, must, in order to their being received in evidence, be written on paper stamped with an appropriate stamp (u).

residence or place of business, even on account of dangerous illness of a near relation, has been considered no excuse for delay, and that therefore some person in his absence should make protest, &c. Turner v. Lench, ante, 452, note (q).

(i) See the nature of this office explained in Burn's Eccl. Law, tit. Notary Public; and Brooke's Office of Notary; and see regulations in 41 Geo. 3, c. 79, as altered and amended by 8 & 4 Will. 4, c. 70, (Chit. Stat. 185; Chit. & H. Stat. 699. See also the King v. Scriveners' Company, 10 Bar. & Cress. 511, (Chit. j. 1481).

(k) Parker v. Gordon, 7 East, 385; 3 Smith,

358; 6 Esp. 41, (Chit. j. 727).
(1) Per Holt, C. J. in Buller c. Crips, 6 Mod. 29, (Chit. j. 222); Selw. N. P. 336, 9th

(m) Dehers v. Harriot, 1 Show. 164, (Chit. j. 485).

(n) Poth. pl. 84; Mall. 264; Mar. 16. (o) Per Buller, J. in Leftley v. Mills, 4 T. R. 175, (Chit. j. 473). In the case of inland bills, however, the noting is generally the only ceremony observed, and even this is not necessary. Rogers v. Stephens, 2 T. R. 713, (Chit. 446); Gale v. Walsh, 5 T. R. 239, (Chit. j. 506); Bul. N. P. 271; and see Orr v. Magennis, 7 East, 859; 2 Smith, 328, (Chit. j. 726).

(p) 9 & 10 Will. 3, c. 17, s. i.

(q) Mar. 107; ante, 333.

(r) See Mitchel v. Baring, 10 B. & C. 4; 4 Car. & P. 35; M. & M. 381, (Chit. j. 1454); ante, 347, note (u).

(s) Ante, 349. (t) Poth. pl. 135; 1 Pardess. 444.

(u) See 55 Geo. 3, c. 184, which repeals 44 Geo. 3, c. 98, and 48 Geo. 3, c. 149; post, I. Of Nonpayment. and NecessarvProceedings thereon.

tice, and whether a demand of Payment ry's Clerk will suffice.

In practice, in this country, the holder of bills or notes, whether foreign or inland, himself or by his agent presents the same for payment on the day they fall due, between nine in the morning and five in the evening, and if not paid he then sends all his foreign bills to a regular notary public, who sends one or more of his clerks round with such bills in the evening, to the re-'The Prac- spective drawces' residences, and then produces the bills, and again requires payment, and of the charges for noting, and if not paid he reports to his principal the terms of refusal, and the principal notary afterwards, at his leisure, or as soon as required, draws up his formal protest. There does not by a Nota- appear to be any decision in full court, whether or not such demand by the clerk of the notary is sufficient. Mr. Justice Buller, in the case of Leftley v. Mills(x), appears at least to have doubted whether the notary himself [*459] ought not to make the demand; but it may be observed, *that his observation was a mere dictum, as far as relates to the custom of merchants, or to foreign bills, for the case before the court related only to an inland bill, and to the construction of the statute 9 & 10 Will. 3, c. 17, s. 1. In France, the demand must be made by two notaries, or by one notary or one huissier, in the presence of two witnesses, but that is a mere local regulation, and not part of the general custom of merchants. In a former edition of this work, it was stated, "that the demand must, it is said, in the case of a foreign bill, be made by a notary public himself, to whom credit is given, because he is a public officer, and that it cannot be made by his clerk, and that such doctrine was sanctioned in a late case, in which the court observed, that the rule requiring the attestation of a notary public ought to be strictly observed(y)." But the practice of notaries in London and Liverpool, it appears, is in direct opposition to the supposed necessity for the notary public himself demanding payment. A correspondence took place upon this subject, which is stated in the note(z). It will be observed, that the statute 9

(x) 4 T. R. 175.

(y) Chitty on Bills, 7th edit. 216, 217, referring to Mr. Justice Buller's judgment in Leftley v. Mills, 4 'T. R. 175, (Chit. j. 473); and Ex parte Worsley, 2 II. Bla. 275, but adding a

(z) The correspondence was as follows:-Liverpool, Castle Street, 6th October, 1829.

By the direction of a General Meeting of the Association of Liverpool Notaries, held on the 26th ult. I have the honour of addressing you, for the purpose of most respectfully drawing your attention to an inaccuracy or oversight in your Treatise upon Bills of Exchange, which, in the opinion of the Members of the Association, is calculated to mislead, and to create confusion.

In the 7th edition, p. 217, you state, that the presentment " in case of a foreign bill," must, it is said, be made by a notary public himself, to whom credit is given, because he is a public officer, and "cannot be made by his clerk." In support of this position, an observation is cited of Mr. Justice Buller, in Leftley v. Mills, 4 T. R. 175, (Chit j 473); but strange as it may seem, that case, far from supporting this position, actually arose not upon a foreign but upon an inland bill, and the point to be decided was, not as to the due presentment, but as to whether an inland bill, payable after sight, came within the provisions of the 9 & 10 Wil.

3, c. 17, so as to be entitled to the benefit of a protest; and the observation of Mr. Justice Buller, was a mere general one, that the demand of a foreign bill must be made by a notary, an expression perfectly common, and such as most men would use when not going into detail; but he no where draws the distinction between a presentment by a notary and a notary's clerk; neither does he venture to assert, that it cannot be made by his clerk. You proceed to state, that the doctrine in question was sanctioned by a late case, in which the court observed, that the rule requiring the attestation of a notary ought to be strictly observed, and quote Ex parte Worsley, 2 Hen. Bla. 275; a case which, so far from bearing out this position, arose upon the affidavit of acknowledgment of a warrant of attorney in a recovery, being sworn abroad, and not attested by a notary; and from one end of the case to the other, bills of exchange are neither mentioned nor alluded to

The fact is, that the presentment and protests of foreign bills in this country is entirely regnlated by mercantile custom, there not being any statute upon the subject; and commercial usage fully sanctions the presentment of them by notaries' clerks, both for acceptance and payment, and the protesting them upon such presentment. I can even go further, and observe, not only that by mercantile usage such presentment is correct and regular, and is al11 :

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Geo. 4, c. 24, s. 13, *regulating the protesting of bills of exchange in Ire- 1. Of Nonland, states that the notary may present or cause the bill to be presented, payment,

most invariably adopted, but that as far back as the memory of the oldest notary here can extend, it has always been the custom so to present them. Indeed, one gentleman, now a member of the Association, was, during his clerkship, once subpænaed and attended upon a trial in the King's Bench, at Guildhall, and was allowed by the late Lord C. J. Ellenborough to give evidence of such a presentment by him of

In fact, the commercial business must instantly come to a stand if a different rule prevailed; because it would be just as impossible for all the bills in this country to be presented

in person by notaries as by bankers.

These observations will also apply to the remarks in p. 812, as to inland bills, where it is stated, that it is doubtful whether the clerk of a notary can, under the statute 9 & 10 Will. 3, c. 17, make the demand of payment. On examining the point closely, it will not appear doubtful; because, though that act authorizes the holders of inland bills in certain cases to cause them "to be protested by a notary public," it is completely silent as to the proper person to present them; the act, therefore, left the presentment to be regulated by commercial usage, and most indisputably, by the custom of merchants, it is quite sufficient to effect the presentment (as is almost always done) through the medium of the notary's clerk.

Permit me respectfully to remark, (though not exactly connected with the above points,) with reference to your observation in p. 312, that this act having directed a sum not exceeding sixpence to be charged for the protest, no larger sum can be demanded; that the clause in the act is considered as clearly repealed by the various stamp acts, particularly 55 Geo. 3, c. 184, which impose an ad valorem duty on protests of bills, on which the smallest duty is much

more than sixpence.

I take the liberty of adding, that the Members of the Association are nearly all attornies, as well as notaries, and are desirous, in order to prevent confusion and doubt, that those inaccuracies should be rectified.

I have the honour of respectfully subjoining an extract of the resolutions of the meeting; and in the hope that you will not consider these suggestions as intrusive, and that you will not object to have these inaccuracies rectified in the next edition of the Treatise,

I remain, Sir, very respectfully, Your obedient Servant, RICHARD BROOKE, Secretary to the Association of Liverpool Notaries.

J. Chitty, Esq.

[Extract from the Resolutions of the Meeting of the Association of Liverpool Notarics, held on the 26th September, 1829.]

Resolved,-That it is the opinion of this Meeting, that there is an inaccuracy in that part of Mr. Chitty's Treatise on Bills of exchange which states to the effect, that it is incumbent ceedings upon notaries to present in person foreign bills thereon. of exchange prior to protesting them, and that the presentment by clerks will not suffice, is Corresponunfounded, and at variance with mercantile dence on

Resolved,-That such presentment by nota- of Presentries' clerks is correct, and is sanctioned by ment by a mercantile usage; and that the Secretary be Notary's instructed to adopt such measures, by corres- Clerk. pondence with Mr Chitty, personal interview, or otherwise, as may be deemed advisable, in order respectfully to point out such inaccuracy, and to solicit him to cause it to be rectified.

Mr. Chitty's Answer, 9th Oct. 1829.

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With respect to the supposed inaccuracy in the 7th edition of my Treatise on Bills, you will observe, that in p. 217, I state the position merely as the dictum of Mr. Justice Buller, and add, sed quære, a mode of asserting and supporting a legal proposition, which evidently denotes that the author gives it as the doctrine of others, without adopting it as his own opinion, or stating it as a settled point, so that, unless I am mistaken in assuming that Mr. Justice Buller, in Leftley r. Mills, 4 T. R. 175, so laid down the law, I am not guilty of any error. Now the report of that case states, that the bill was noted by a clerk of Lockart's who was a notary, and that Buller, J. said, "It is material too to consider by whom the demand was made in this case. I am not satisfied that it was a proper demand, for it was only made by the notary's clerk. The demand of a foreign bill must be made ly a notary public, to whom credit is given, because he is a public officer." Now it is clear from these expressions, that Buller, J. meant to say, that in case of a foreign bill, the protest must be made by the notary himself, and not Ly his clerk, and I do not understand how his judgment can be read in any other sense. In Bacon's Ab. tit. " Merchant," vol. iv. 725, 5th ed. by Gwillim, referring to Leftley v. Mills, it is expressly said, "The demand of payment of a bill must be made by a notary himself, and not by his clerk." The case of Ex parte Worsley, 2 Hen. Bla. 275, was mere'y referred to, to shew what credit was given to the formal certificate of a notary public. In the late case of Vanderwall r. Tyrrell, Mood. & Mal. N. P. Rep. 97, it was held, that there must be a protest before one person can pay for the honour of another. The case is very shortly reported, and does not state the facts fully. It appeared on the trial, that an articled clerk of the notary presented the bill in the evening, and demanded payment, and afterwards drew up the protest, and then his principal signed and scaled in the usual form, upon which Lord Tenterden, in strong terms, said, that it was a void protest, that it was a false certificate, that the notary had signed a paper, stating I presented and demanded, &c. when it appeared in evidence, that oniv

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I. Of Non- which would *seem to import that he may send any third person to make presentment; and the recent decision of the Court of Common Pleas in payment, and neces sary Pro. ceedings thereon.

his clerk had presented the bill, and he himself knew nothing of the presentment, and that he had certified a falsity, and the plaintiff was Correspon- nonsuited.

dence on ment by a Notary's Clerk.

It will be found, that in all foreign counthe subject tries the demand and protest must be by the of Present- notary himself, or some public officer, or by two reputable inhabitants. See Forbes on Bills, 116; Code Napolcon, Code de Com-Pailliet Manuel de Droit Français; Com. Dig. Merchant, F. 10; Postlethway's Dict. tit. Notary Public; and see Burn's Eccl. Law, tit. Notary, where it is said, that the certificate of a notary that he has done an act, is equal to the testimony of two witnesses. He is a known public officer, to whose formal protests and acts all countries give credit. In France two notaries must protest, or one notary or one huissier and two witnesses. Now if this formal act can be delegated to a clerk, (who, perhaps, has not been a month in the office of the notary,) all the regularity and security incident to the office of a notary would be defeated. It will not be contended, that if a protest truly stated that the clerk of the notary presented the bill, such protest would be sufficient in any country, and is it to be supposed that it would be tolerated, that a notary shall be allowed falsely to certify a fact? Certainly such a position could not be sustained. If the inconvenience to the notary, by attending in person to demand and make protest, is too great for so small a remuneration, then he must charge more, which he may do in case of foreign bills; and if there are not sufficient notaries to perform the duty, then the number must be increased, but no inconvenience can justify the certificate of a falsehood. It may be very material, especially in the case of foreign bills, (and as to inland a protest is useless,) that the demand, and account of the particulars of the refusal, and reasons assigned for non-payment, should be made by a person of known experience: a proper demand may be essential to obtain payment, and a proper account of the reasons for refusal to accept or pay may be very material to forward to the foreign country, in order that the proper steps may be taken. will be observed, that it by no means follows that all bills must be presented by a notary, for it suffices, in the first instance, for any individual to present bills for acceptance or payment; and all that is requisite is, that the foreign bills which have already been dishonoured, should, on the same day, be again presented by the nctary himself.

As to inland bills, you refer to p. 312, and seem to think that the statute 9 & 10 Will. 3, c. 17, is silent us to who shall present the hill, but you will observe that the statute, after requiring that a notary, or in default of a notary some other substantial person in the place in the presence of two witnesses, shall make protest, prescribes the form of the protest, which runs—"Know all men, that I, A. B. on, &c. at the usual place of abode of the said —, have demanded payment of the bill of which

the above is a copy. &c." Now this very form evidently shews, that the act meant to require the notary himself to go to the residence of the drawee, and there demand payment. This enactment also affords evidence of what the legislature then considered to be the proper course in England of making protest, and may be called in aid in shewing what the common law is as to foreign bills. Upon the whole, therefore, I think it is clear, that strictly the notary himself must, in all cases, make demand of payment before he protests.

I also think it clear, that the positive enactment in the statute of William, that no more shall be taken for the protest than 6d. cannot be violated. As to the amount of stamp duty, that of course may be taken in addition. The stamp was introduced by subsequent acts, and that expense may, I think, impliedly be added. As to foreign bills, as there is no act of parliament regulating the charges, I think any reasonable charge may be made, whether more or less than those named in the Notary's Table of Fees of July, 1797.

J. CHITTY. 9th Oct. 1829.

To Richard Brooke, Esq. Secretary to the Association of Liverpool Notaries, Liverpool.

Change Alley, City. 3d November, 1829.

At a meeting of the Committee of the Society of Public Notaries of London, held, the 29th October, 1829, the Chairman submitted a communication, made by the Secretary of the Association of Liverpool Notaries, of certain resolutions agreed upon at a meeting of that Association, held at Liverpool, the 26th September, 1829, viz.

"Resolved,-That it is the opinion of this Meeting, that there is an inaccuracy in that part of Mr. Chitty's Treatise on Bills of Exchange which states to the effect, that it is incumbent upon notaries to present, in person, foreign bills of exchange prior to protesting them, and that the presentment by clerks will not suffice, is unfounded, and at variance with mercantile us-

age."
"Resolved,—That such presentment by notaries' clerks is correct, and sanctioned by mercantile usage, and that the Secretary be instructed to adopt such measures, by correspondence with Mr. Chitty, personal interview, or otherwise, as may be deemed advisable, in order respecifully to point out such inaccuracy, and to solicit him to cause it to be rectified in the said Treatise, or in any other in which it may appear; and also for that purpose to address the Society of London Notaries, to obtain their cooperation on the subject."

Upon reading the same, it was resolved,— That the opinions expressed in the said two resclutions by the Association of Liverpool Notaries, do in all respects meet the entire concurrence of this Meeting, and that the Secretary be directed respectfully to communicate such concurrence to Joseph Chitty, Esq.

*Poole v. Dicas(a), where it was held, that an entry of the dishonour of a bill I. Of Nonof exchange, made in the usual course of business, at the time of dishonour, payment, in the book of a notary by his clerk, who presented the bill, might be given sary Proin evidence in an action on the bill, upon proof of the death of the clerk who ceedings made the entry, would also imply that it is sufficient for the clerk of the no-thereon. tary to make the presentment; and, indeed, it is expressly said by Tindal, C. 2dly. J. in that case to be the duty of the notary's clerk to make the presentment. When Protest for But, still, in no case does this point appear to have been directly brought Non-paybefore the court; and, therefore, although as a general rule a presentment ment neby the notary himself may be impracticable, owing to the multiplicity of bills advisable, requiring presentment on the same day, yet, in particular cases, where the and mode amount of the bill to be protested is considerable, it may be prudent that the of Protestnotary should himself demand payment, and make his own minute of the an-ing.

In thus following the directions of the Committee, I abstain from any further remark, than that under the existing duties of notaries in London, as regards foreign bills, it is utterly impossible that such bills can be presented by them in person throughout the vast extent of this metropolis and its environs, unaided by their clerks, a fact of which every person acquainted with the routine of merchant's and banker's business is fully aware.

I have the honour to be, Most respectfully, Sir, Your obedient Servant. JAMES COMERFORD, Secretary to the Society of London Notaries,

J. Chitty, Esq.

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After several other letters from the Sacretary of the Society of London Notaries, and my having requested references to certain works and forms, the following letter was received:-

Change Alley, 8th October, 1831.

Having laid before the Committee of the Society of Public Notaries in London (whom it has been difficult to convene at this season of the year) your letter to me of the 12th of August, I am directed by the Committee to reply to its contents as follows:-

The Committee do not possess any of the works alluded to in your said letter.

Their practice may be said to be guided principally by mercantile usage, and by their general experience, aided by the customs which have been handed down to them by their predecessors of upwards of one hundred years, the whole as controlled by acts of the legislature, and the decisions of courts of law, and not governed by foreign writers on bills, or the practice in foreign countries.

The Committee are unable to furnish forms or foreign protests, as such documents very rarely come before them, and in no case is it necessary to take copies of or register them. The foreign protests may, however, be said to agree in substance with the protests of bills of exchange made in London, and in some countries a copy of the protest is left with the drawee, and the noting of a bill is not understood as forming a separate and distinct act from

the protest, inusmuch as it is customary (at least in France) to protest all dishonoured bills, whether inland or foreign, on the day after maturity (days of grace being abolished).

The Committee having long felt that, however the practice of the public notaries of London may be in perfect accordance with the views of the oldest and most respectable merchants on the Royal Exchange, that it would still be desirable that many points should be ex-plicitly defined by an act of parliament, rather than left to the incertitude of doubtful opinions, or of occasional decisions of an apparently conflicting nature; and it was in this view that they looked forward with much anxiety to the proposed bill for defining the liability of parties on bills of exchange, on the subject of which notice had been given in parliament by Mr. Ward, one of the late members for the city, to which measure I have already had occasion to refer, in my letter to you of 4th May, 1830.

I beg further to state, that notwithstanding the recent decision in Mitchel r. Baring, the Committee consider that the only proper place of making a protest for non-payment is in the city or town where a bill is made payable, according to its tenor, and that they consider the court to have been guided in its decision by the peculiar wording of the acceptance by the defendants, who were considered, by such acceptance, to have called upon the plaintiff to protest for non-payment in Liverpool.

In conclusion, I beg to refer you to the 9 Geo. 4, c. 21, as regulating the protesting of bills of exchange in Ireland, in section 13 of which act it will be seen, that the notary " may present, or cause the bill to be presented; these words they consider are not to be construed as conferring a power, but as confirming and referring to a previously existing and recognised daily practice, a fact capable of proof, by reference to notarial registers of one hundred years date.

I have the honour, &c. JAMES COMERFORD,

Secretary to the Committee of the Society of Public Notaries of London. See further, post, 477. (e) 1 Bing. N. C. 619; S. C. I Scott, 600;

1 Hodges, 162; and see Sutton v. Gregory, Peake's Add. Ca. 150.

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payment, eary Proceedings thereon.

I. of Non- swer given by the drawee to him; for supposing that it should hereafter be considered that it was his duty so to have acted, and that in consequence of any omission a drawer or indorser should be discharged, he would be liable to compensate the loss.

> The protest for non-payment of a foreign bill, thus to be made by a notary public, varies in point of form, according to the country in which it is

made: in England the form of it is as follows:-

Form of Protest.

ON THIS DAY, the first of January, in the year of our Lord one thousand eight hundred and forty, at the request of A. B. bearer of the original bill of exchange, whereof a true copy is on the other side written, I, Y. Z., of London, notary public, by royal authority, duly admitted and sworn, did exhibit the said bill.

[Here the presentment is stated, and to whom made, and the reason, if assigned, for

non-payment.]

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest as well against the drawer, acceptor, and indersers of the said bill of exchange, as against all others whom it may concern, for exchange, re-exchange, and all costs, charges, damages, and interest, suffered and to be suffered, for want of payment of the said original bill. Thus done and protested in London aforesaid, in the presence of E. F. (b).

[The expenses of noting and protest are then subscribed, for the amount of which, see

Table of Fees of 1797 in the Appendix.]

*By the former regulation of the 44 Geo. 3, c. 98, Schedule A., a stamp duty of 5s. was imposed on the protest, without reference to the amount of the bill; but by the subsequent acts, 48 Geo. 3, c. 149, and 55 Geo. 3, c. 184, Schedule A. part 1, title Protest, the duties are as follows:—

Protest of any bill of exchange or promissory note for any sum of money (c).

	•			8. d.
Slamp.	Not amounting to 201.			20
	Amounting to 201., and not amounting to 1001.			3 0
	Amounting to 1001., and not amounting to 5001.			50
	Amounting to 500l, or upward.	•	•	10 0

Date.

The protest should not bear date before the bill is duc(d), but as it must, in the case of a foreign bill, be made on the last day of grace(e), it must bear date generally on that day; but an inland bill is not to be protested till the day after the third day of grace (f). When an accepted bill is protested for non-payment, Marius recommends the protest to be sent to the drawer or indorser, and the accepted bill to be kept, unless express orders be given by those parties to the contrary, because the protest for non-payment, with the second accepted bill, will be sufficient proof against the drawer, though not against the acceptor (g)(1). But according to another writer (h), the

(b) It is said to be unnecessary to have an attesting witness, but that the protest must bear the official seal as well as signature of the notary. See Brooke's Office of Notary, p. 73, and see various forms, ib. 218 to 227.

(c) It has been observed, that the ad valorem duty being laid upon the amount of each bill, one protest cannot combine two bills, unless the holder goes to the expense of having a separate stamp impressed in respect of each; and then it would perhaps be found objectionable and inconvenient, and not so well adapted to subsequent proceedings, as adhering to the customary plan of having a separate protest for each bill. Brooke's Office of Notary, p. 78, where see some just remarks upon the amount of duty imposed.

(d) Mar. 103; Campbell v. French, 6 T. R. 212; 2 Hen Bla. 163, (Chit. j. 541).

(e) Leftley v. Mills, 4 T. R. 170, (Chit. j. 473); ante, 458 note (o), et post, 475, 479; Selw. Ni. Pri. 9th edit. 360, note.

(f) Leftley v. Mills, 4 T. R. 170, (Chit. j.

473); post, 475, 479. (g) Mar. 120.

(h) Beawes, pl. 220; Lovelass on Bills, 100; and see observations in Hansard r. Robinson, 7 B. & C. 90; 9 Dow. & Ry. 860, (Chit. j. 1340); ante, 366, note (a), and ante, 353, note (b).

⁽¹⁾ Where one of a set of exchange has been accepted, and protested for non-payment, presenting the protest of the accepted bill together with one of the set, which has neither been ac-

drawer or indorser would not be obliged to pay without having the accepted I. Of Nonbill delivered up to him, as he would otherwise perhaps have no evidence of payment, the acceptance against the acceptor. Where payment of a non-accepted and necessary Probill is refused, it is agreed on all hands that there is no risk in sending back ceedings the bill with the protest(i). Where only part of the money for which the thereon. bill is payable is tendered, that part may be taken, and the bill must be protested for non-payment of the residue(j).

It was formerly doubted whether, if the drawer or indorser were abroad Of sending or out of England, the making the protest alone would be sufficient, or whe- Copy of ther it was not necessary that a copy of it, or some other memorial, should and Notice within a reasonable time be sent with a letter of advice, or notice of the dis-thereof. bonour, to the persons on whom the holder means to call for payment(k); although if the drawer or indorser intended to be proceeded against were in England at the time of the dishonour, it was not essential (though always advisable) that a copy *of the protest should accompany the notice of non- [*464] payment(l). But it is now clearly settled, that in giving notice of non-payment to the drawer of a foreign bill resident abroad, it is sufficient to inform him that the bill has been protested, without sending a copy of the protest(m).

(i) Mar. 121.

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(j) Mar. 68, 85 to 87; Walwyn v. St. Quin-1 Bos. & Pul. 652; 2 Esp. 514, (Chit. j. 578).

(k) Poth. pl. 148; and see Orr v. Magennis, 7 East, 359; 2 Smith, 328, (Chit. j. This seems to have been admitted to be in general necessary, see Robins v. Gibson, 1 Maule & S. 288; 3 Campb. 334, (Chit. j. 885). In America the decisions seem contradictory, whether it is necessary that a copy of protest should accompany the notice of dishonour, Blakeley v. Grant, 6 Mass. R. 386; Bayl. Amer. edit. 176, acc.; Lenox v. Leverett, 10 Mass. R. 1, a subsequent case contra, and that it is not necessary.

(1) Robins v. Gibson, 3 Campb. 334; Cromwell v. Hynson, 2 Esp. Rep. 211, 512, (Chit. j. 571); Pothier Trait: du Contrat de Change, part 1, c. 5, s. 150; Chaters v. Bell, 4 Esp. Rep. 48, (Chit. j. 636); Manning's Ind. 66, acc.; Goostrey v. Mead, Bul. N. P. 271; Gilb. Evid. 79; Lovelass on Bills, 99; Selw. N. P. 9th edit. 360, semb. contra.

Robins v. Gibson, 3 Campb. 334; 1 Maule & S. 88, (Chit. j. 885). In an action against the drawer of a foreign bill of exchange the plaintiff proved, that a protest was regularly drawn up, and also that the drawer had arrived in Enlgand before the bill became due, and that a letter was sent to his house, stating, that the bill was dishonoured, but not communicating the protest or a copy of it, the defendant contended, that the protest should have accompanied the notice. Lord Ellenborough was of opinion, that under the circumstances of the case, enough had, been done, and the plaintiff had a verdict; and upon metion for a new trial, the court being of opinion it was sufficient that

the bill was protested, and that the defendant had notice of the fact of its dishonour, although the protest was not communicated to him, and refused the rule, and Lord Ellenborough said, "It did not appear that the defendant requested to have the protest, and it would be hazarding too much to leave it without some request; he had due notice of the fact of the dishonour of the bill; and as the circumstances of parties alter, the rule respecting notice also changes, according to the convenience of the case. the party is abroad, he cannot know of the fact of the bill's having been protested, except by having notice of the protest itself; but if he be at home, it is easy for him, by making inquiry, to ascertain that fuct." Rule refused.

In Cromwell v. Hynson, 2 Esp. Rep. 511, (Chit. j. 571), though at the time of the dishonour the defendant was not in England, but in Jamaica, where he indersed the bill, yet as his wife resided at his house at Stepney, it was holden sefficient that notice of non-payment was left there, and without any copy of protest. Per Lord Kenyon.

In America, in one of the latest cases it was held, that though a protest must be produced at the trial of an action against the indorser of a foreign bill, it is not necessary that the notice to him should be accompanied by the protest, Lenox v. Leverett, 10 Mass. R. I. But in an earlier decision, Parsons, C. J. said, "As to the notice of the protest of a foreign bill, a copy of the protest should be given or offered to the drawer, or due diligence used to furnish him with this notice before he can be charged, Blakeley r. Grant, 6 Mass. R. 386; Bayl. 176, Amer. edit.

(m) Goodman v. Harvey, 4 Ad. & El. 870; 6 Nev. & Man. 372, S. C; ante, 334.

cepted nor protested, to the indorser, and a demand of payment will be a sufficient notice to charge him. Kenworthy v. Hopkins, 1 John. Ca. 107. And in such case it is not necessary to produce the protested bill at the time of the notice and demand on the indorser. Ibid. And see Lenox v. Leverett, 10 Mass. Rep. 1.

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and necessary Proceedings thereon.

2dly, When Protest for Non-payment necessary or advisable, and mode of Protest-

I. Of Non- Nor is it necessary or advisable, in any case, to send the protested bill(n). payment. But a notice of the dishonour of the bill should in all cases be immediately given (o). It has been held, that the protest for non-acceptance or non-payment may be drawn up at any time before the trial, provided the bill be noted in due time (p)(1).

At common law, no inland bill could be protested for non-payment; *but by the statue 9 & 10 Will. 3, c. 17(q), it was enacted, that all bills of exchange drawn in, or dated at any place in England, for the sum of five pounds or upwards, upon any person in London, or elsewhere in England, in which bills of exchange shall be expressed value received, and payable at a certain number of days, weeks, or months, after the date thereof, after presentation and written acceptance, and after the expiration of the days of grace, the holder, or his agent, may cause the bill to be protested by a notary public, *465] and in default of such notary public, by any other substantial person in the place, in the presence of two witnesses; refusal or neglect being first made of due payment of the same: which protest shall be made and written under a copy of the bill of exchange, in the words or form following:—

"Know all men, that I, A. B., on the day of at the usual place of abode of the said have demanded payment of the bill, of which the above is a copy, which the said did not pay, wherefore I, the said A. B., do hereby protest the said bill. Dated this day of

The act directs that this protest shall, within fourteen days after it is made, be sent, or notice of it given to the party from whom the bill was received, who is, upon producing such protest, to repay the bill, together with all interest and charges from the day such bill was protested; for which protest shall be paid a sum not exceeding the sum of sixpence.

(n) Mar. 68, 86, 87, 120; Lovelass on Bills, 100; ante, 463, note (h).

(0) Id. ibid.; Hart v. King, 12 Mod. 309, (Chit. j. 212); Anon. I Vent. 45; Orr v. Magennis, 7 East, 359; 2 Smith, 328, (Chit. j. 726).

(p) Chaters v. Bell, 4 Esp. Rep. 48; Selw. 9th edit. 360, S. C.; Goostrey v. Mend, Bul. N. P. 272, observed on in Orr v. Magennis, 7 East, 361; 2 Smith, 328, (Chit. j. 726); Rogers v. Stephens, 2 T. R. 714, (Chit. j. 446); Manning's Ind. 66; Robins v. Gibson, 1 Maule

& S. 288; 3 Campb. 334, (Chit. j. 885). Chaters v. Bell, 4 Esp. Rep. 48, (Chit. j. 636). In an action by an indorsee against the indorser of a foreign bill, it appeared that the bill became due on the 24th April, when payment was demanded and refused, and the bill was noted for non-payment. Regular notice of the dishonour given to the defendant, but he refused payment because there was no protest. On the 14th May, the protest was formerly drawn up, and this action was afterwards brought. Lord Kenyon said, "he was of opinion, that if the bill was regularly noted at the time, the protest might be made at a future period." A verdict was found for the plaintiff,

but the point was reserved; and on the case coming on to be tried on a venire de novo, before Lord Ellenborough, his lordship expressed his concurrence with the opinion of Lord Kenyon. But in Selw. 9th edit. 360, it is stated, that a case was reserved in Chaters v. Bell for the opinion of the court, and that the court after argument, conceiving the question to be of great importance, directed it to be turned into a special verdict, but that the sum in dispute being small, and the parties unwilling to incur the expense of a special verdict, the recommendation of the court was not attended to, and the case was not mentioned

This doctrine accords with the practice in other cases. Thus, though convictions by justices must, at the time they are pronounced, be according to law, yet they may be drawn up formally at any time afterwards, when required to be proved, Massey r. Johnson, 12 East, 32; Rex v. Barker, 1 East, 182; Rex v. Picton, 2 East, 198; Still v. Wells, 7 East, 553; 6 Esp. 36; Bridgett v. Coyney, 1 Man. & Ry. Mag. Ca. 1.

(q) And see the Irish Act, 9 Geo. 4, c. 24,

^{(1) \(\}lambda \) As to what is a sufficient notice of protest in point of form, see Shepherd v. Jonte, 14 Louis Rep. 246; Sussex Bank r. Baldwin, 2 Harr. 487. }

Some observations have already been made on this statute (r). It has 1 of Nonbeen decided, that the holder of a bill payable after sight, is not entitled to Phyment. the cumulative remedy given by this statute(s), and that a bill within the sary Promeaning of the act, cannot be noted on protected and market a bill within the sary Promeaning of the act, cannot be noted or protested until the day after the last ceedings day of grace(t). It has also been decided, that as the directions of the stat-thereon. ute are positive that no sum exceeding sixpence shall be taken for the protest, 2dly, no larger sum can legally be denemded, notwithstanding it is customary to When charge more(u). It is doubtful whether the clerk of a notary can, under Non-paythis statute, make the demand of payment, though we have seen that such is ment nethe constant practice(x). 'I he act only gives an additional remedy, and cessary or does not take away the common-law one, and therefore it is not necessary advisable, to protect it below in all amon of interest. It below in all amon of interest it below in all amon of interest. to protest, it being, in all cases of inland bills, sufficient to give notice of of Pronon-payment(y); and the holder is entitled to claim interest from the draw-testing er, although there is no protest(z). In practice, a protest of an *inland bill [*466] for non-payment is seldom made, but it is only noted for non-payment, and which noting is of no utility, except with a view to the evidence, or where any of the parties to the bill are sued abroad, or their property is attached in a foreign country, in respect of the amount owing on the bill, when a protest will be necessary, and must be sent out(a). And we have seen, that a protest made in this country cannot be proved by the mere production of it, as when made or used abroad, but the notary himself must be called to prove the making it(b). The 3 Geo. 2, c. 26, ss. 7, 8, requiring a protest to be made on the non-payment of coal notes given pursuant to that act, is now repealed by the 47 Geo. 3, Sess. 2, c. 68, s. 28.

In all cases, whether or not a protest be necessary, notice must be given adly,

R. 170, (Chit. j. 473).

(s) Id. ibid.; post, 479, note (l).

(t) Id. ibid.

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(u) Id. ibid. See the list of notary's fees in the Appendix. Semble, that the expenses of noting are not recoverable in the case of an inland bill. Kendrick v. Lomax, 2 C. & J. 407.

(x) Ante, 458, 459, note (z).

(y) Brough v. Parkins, 2 Ld Raym. 992, (Chit. j. 222); Harris r. Benson, 2 Stra. 910, (Chit. j. 271); Lumley v. Palmer, 2 Stra. 1000; 7 Mod. 216, (Chit. j 275); 3 & 4 Ann. c. 9, s. 5; 2 Bla. Com. 469. N. B. Harris v. Benson, virtually overruled in Windle v. Andrews; see note (z).

(z) Windle v. Andrews; 2 B. & Ald. 696;

2 Stark 425, (Chit. j. 1062).

Windle v. Andrews, 2 B. & Ald. 696, was an action against the drawer of an inland bill, and a rule nisi was obtained to strike out the interest from the verdict, on the ground that there had been no protest; but upon shewing cause, the court held, that the want of a protest afforded no ground for disallowing interest, where notice of the dishonour of the bill had been duly given; that the object of 9 & 10 Will. 8, and 3 & 4 Ann. c. 9, s. 4, was to give interest, damages, and costs, in cases in which it was supposed that they were not recoverable at common law, not to deprive a plaintiff of them in any case in which the common law would give them; that the 5th section, containing the words of deprivation, was by way of proviso only, to qualify the additional benefit

(r) Ante, 458, 459; Leftley v. Mills, 4 T. that the statutes of Anne and William were Non-paysupposed, for the first time, to give; that the provise in the 8th section contained words to secure to a plaintiff all his common-law rights, and that the right to damages was a common-law right; that it was upon this principle only that the constant allowance of interest, when there has been no protest, could be explained; given. that the 5th section contained words to annul parol acceptances. And in Rex v. Meggott, Eyre, C. J. of the King's Bench held, that they had that effect; that that notice was corrected in Lumley v. Palmer, 2 Stra. 1000, upon the principle now adopted by the court; that the 5th section of the 3 & 4 Ann. c. 9, deprived a party of no remedy he had at common law; that that case must be considered as having virtually over-ruled Harris v. Benson, 2 Stra. 910, (Chit. j. 271), Trinity Term, 5 Geo. 2, and that from that time, from any thing which appeared to the contrary, parol acceptances had been held binding, and interest had been allowed against the drawers and indorsers of all inland bills, though no instance could be shewn in which any such bill had been protested. Bayley on Bills, 5th ed. 263, note 90.

(a) See Brooke's Office of Notary, 76, 77, where a recent instance is given of an attachment laid in the United States of America, on property of the acceptor of several inland bills, upon which judgment was obtained in the foreign court, previously to which it became necessary to send out protests of the bills.

(b) Chesmer v. Noyes, 4 Campb. 129, (Chit.

j. 929); ante, 455, note (n).

Notice of ment will

and necessary Proceedings thereon.

3dly, When a mere Notice of Non-payment will suffice, without Protest, and how it is to be given.

Form of Notice.

LOf Non- of the non-payment of every foreign and inland bill, promissory note, and check, otherwise, for the reasons before stated(c), the drawer of the bill and indersers will be discharged from all liability (1). There is no precise form of words necessary to be used in giving notice of the non-payment of a bill. any act of the holder, distinctly signifying a presentment to and refusal by the drawee, will be a sufficient notice(2). It has indeed been said, that it is not enough to state in the notice that the drawee has refused to honour, but that it must go farther, and express that the holder does not intend to give credit to the drawee(d)(3); but it should seem, that as the only reason why notice is required, is, that the drawer and indorsers may have the earliest opportunity of resorting to the parties liable to them, it is not necessary that their liability should be stated to them, because that is a legal consequence of the dishonour, of which they must necessarily be apprised by mere notice of the fact of non-payment (e) (4). The notice, however, should inform the party to whom it is addressed, either in express terms or by necessary implication, or at all events by reasonable intendment, what the bill or note is, that it has become due, that it has been duly presented to the drawee or maker, and that payment has been refused(f). That the party receiving the notice is entitled to this information, and that it is not enough merely to inform him that he is looked to for payment, seems now to be fully admitted, but whether the form of the notice is such as to convey the requisite information is frequently a question of much doubt and difficulty, and it is certainly not easy to reconcile some of the decisions on this important We will first notice those cases in which the notice has been [*467] held insufficient, *in order at once to introduce the decisions upon which the present doctrine is said to be founded:—thus a letter from an indorsee to a drawer, stating, "I am desired to apply to you for the payment of the sum of 150l., due to myself, on a draft drawn by Mr. Case on Mr. Case, which I hope you will, on receipt, discharge, to prevent the necessity of proceedings, which otherwise will immediately take place," was held insufficient(g). So a letter in the following form—"Gentlemen, A bill for 683l., drawn by

(c) Ante, 433 to 455. (d) Tindall v. Brown, 1 T. R. 167, 199, (Chit. j. 481), per Ashurst, J.; and see per Buller, J. ib. 170.

(e) Shaw r. Croft, coram Lord Kenyon, Sittings after Trinity Term, 1798, MS. and other cases, post, and Selw. 9th ed. 332, 335.

(f) See cases in the following notes.

(g) Hartley v. Case, 4 Bar. & Cres. 339; 6 D. & Ry. 505; 1 Car. & P. 555, (Chit. j. 1263). Abbott, C. J. at the trial, was of opinion, that as this letter did not apprise the party of the fact of dishonour, but contained a mere demand of payment, it was insufficient,

and the plaintiff was nonsuited; and a rule for a new trial having been granted, Abbott, C. J. on discharging the rule said, "There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Here the letter in question did not convey to the defendant any such notice, it does not even say that the bill was ever accepted, we therefore think the notice was insufficient.'

(2) { Thus where the owner of a bill advised of its non-acceptance mentions that fact to the indorsers, and suggests to them to provide for its payment at maturity, it was held that as to form, which is not material, this was a sufficient notice. Higgins v. Morrison's Ex'r, 4 Dana,

(3) The law has prescribed no particular form for such notice. The object of it is merely to inform the indorser of the non-payment by the maker, and that he is held liable for the payment thereof. Bank of Alexandria r. Swann, 9 Peters, 33.

(4) The notice is sufficient if it state the non-payment; and it is not necessary to state expressly, for it is justly implied, that the holder looks to the indorser. 3 Kent's Com. 2d ed. 105. See also Lenox v. Leverett, 10 Mass. Rep. 1. Wallace v. Agry, 4 Mason Rep. 336. Kenworthy r. Hopkins, 1 Johns. Cases, 107.

⁽¹⁾ This is true only where there has been a previous acceptance of a bill; for if the bill has been dishonoured on presentment for acceptance, and due notice thereof given to the other parties, no presentment for payment or notice and protest for non-payment, is in general necessary.

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Mr. Joseph Keats upon Messrs. Daniel Jones and Co., and bearing your I. Of Nonindorsement, has been put into our hands by the assignees of Mr. J. R. Al- payment, zedo, with directions to take legal measures for the recovery thereof, unless sury Proimmediately paid to, Gentlemen, Your's, &c. J. and S. Pearce," was held ceedings And where an indorsee of a promissory note wrote to the thereon. insufficient (h). indorser the following letter,-" The note for 2001. drawn by H. H. dated What not 19th July last, payable three months after date, and indorsed by you, be-sufficient came due yesterday, and is returned to me unpaid, I therefore request you Notice of Dishonour. will let me have the amount forthwith:" it was held not a sufficient notice of The following was also held not a sufficient *notice: [*468] dishonour(i)(1).

(h) Solarte v. Palmer, tried before Lord Tenterden, C. J. to whose direction a bill of exceptions was tendered, and the case brought before the Court of Exchequer Chamber upon a writ of error, 7 Bing. 530; 5 M. & P. 475; 1 C. & J. 417; 1 Tyr. 371; 9 Law J. 121.

Per Tindal, C. J. in delivering the judgment of the court of error, "The question in this case is, whether the direction of Lord Tenterden to the jury, 'That the letter given in evidence at the trial, and set out spon the bill of exceptions, was not sufficient notice of the dishonour and non-payment of the bill, and that apon such evidence the jury ought to find a ver-dict for the defendants,' was a proper direction or not? And we are of opinion that the direction was proper, and that the judgment which has been given for the defendants must be af-

"The notice of dishonour, which is commonly substituted in this country in the place of a formal protest, such formal protest being essential in other countries to enable the plaintiff to recover, (Pothier Traite du Contrat de Change, part i. cap. 5, s. 2, art. i. s. 5.) most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted. But it should at least inform the party to whom it is addressed, either in express terms or by necessary implication that the bill has been dishonoured, and that the holder looks to him for payment of the amount.

"The allegation in the declaration is, that the bill has been presented to the acceptor, who has refused payment, whereof the defendant has had notice; and, consequently, to satisfy this allegation, though no express form of words is necessary, the notice should convey an intimation to the party to whom it is addressed, that the bill is in fact dishonoured. Now, looking at this notice, we think no such intimation is conveyed in terms, or is to be necessarily inferred from its contents.

"Besides, it is perfectly consistent with this notice that the bill has never been presented at all, and that the plaintiff means to rely upon some legal excuse for the non-presentment The present case is stronger against the sufficiency of the notice than that of Hartley v. Case, where there was at least an allegation that the bill had become due, which is not found here. This letter may not improbably have been written with a different intent than that of giving

notice of the dishonour to the indorser, and may have been information that an action was about to be brought by the attorney, taking for granted that the notice of the bill's dishonour had been given in the ordinary way, before the bill was put into his hands for the purpose of suing thereon. At all events, however intended, it appears to us not to amount to such notice. We think therefore the judgment ought to be affirm-Judgment affirmed.

The case was afterwards carried up to the House of Lords, where the judgment was also affirmed, 2 Clark & Finelly, 93; 1 Bing. N. C. 194; 1 Scott, 1

(i) Boulton v. Welsh, 3 Bing. N. C. 688; 4 Scott, 425, S. C.; see Honlditch v. Cauty, 4 Bing. N. C. 411; 6 Scott, 209, S. C. Sed vide Grugeon v. Smith, 6 Ad. & El. 499; 2 Nev. & Per. 303; and Hedger r. Stevenson, 2 M. & W. 799; Edmonds r. Cates, 2 Jurist. 183, cor. Lord Abinger, C. B. post, 468,

note (n).

Per Tindal, C. J. in Boulton r. Welsh, "I am wholly unable to distinguish this case from those which have been referred to, (Hartley r. Case and Solarte v. Palmer,) without having resort to a subtlety and niceness that would entirely destroy the practical utility of the rule those cases have solemnly laid down, viz. that the notice of dishonour must inform the party to whom it is addressed, either in express ferms or by necessary implication, that the bill or note has been dishonoured by the acceptor or maker, and that the holder looks to him for payment. I cannot but regret in the present case the necessity I feel for holding the notice insufficient; but it certainly does not give the de-fendant information whence he is bound to know that payment of the note has been duly demanded of the maker and refused by him. The letter merely states that the note became due on the day preceding, and was returned unpaid: consistently with that notice, there may have been no presentment to the maker of The form of the protest given by the 9 & 10 Will. 3, c. 17, for non-payment of a bill is as follows,—(see form, aute, 465). The two important points upon which the notice must be precise, are, the presentment of the bill or note to the acceptor or maker, and the nonpayment. The letter in the present case is deficient in the former requisite. I therefore think this rule must be made absolute." It was freely admitted by the court that no mercantile or

and neces sary Proceedings thereon.

What not a sufficient Notice of Dishonour.

What sufficient.

[*469]

I. Of Non- "Messrs. Strange and Co. inform Mr. Price that J. B.'s acceptance 875l. is not paid. As indorser, Mr. Price is called upon to pay the money, which will be expected immediately (k)." So a letter stating, "A bill for 30l., dated 18th August, 1837, at three months, drawn and indorsed by R. E., upon and accepted by W. T., and indorsed by you; lies at my office due and unpaid," was held insufficient, and that it would not have been sufficient even though the defendant had himself treated it as a notice of a dishonour(1). And a notice stating the bill to have been drawn by the party, when, in fact, he was not the drawer, but only an indorser, is bad, as mis-stating the facts(m). The following notices have, however, been held sufficient:—"your note has been returned dishonoured(n)." So, "your bill drawn on T. T. and accepted by him, is this day returned, with charges, to which we request your immediate attention(o)(1)." So a letter in these *words;—"Sir, I am desired by Mr. H. to give you notice, that a promissory note, dated August 10th, 1835, made by S. T. for 991. 183. payable to your order two months after date thereof, became due yesterday, and has been returned un-I have to request you will please remit the amount thereof, with 1s. 6d. noting, free of postage, by return of post(p)." So a letter to the payee

> ordinary man could misunderstand the notice in this case.

(k) Strange v. Price, 2 Perry & Dav. 278. Per Denman, C. J. "Some doubt certainly has been thrown on Solarte v. Palmer, (7 Bing. 530, ante, 467, n. (h),) but as observed by my brother Parke in Hedger v. Steavenson (2 M. & W. 799, post, 469, n. (p),) we are bound by it, and I think it governs the present case. The notice there, after describing the bill, stated that legal proceedings would be taken for the recovery thereof. It might have been held, no doubt, on such a notice that the party was fully apprised for the facts of the case, but it is clear that the law now requires express notice of the acceptor having refused payment as well as of the party being called upon to pay."

Littledale, J. "In general, no doubt, such a notice as this would give sufficient information to the parties concerned; but in laying down a general rule, we must take care and prevent its being too wide. Now it certainly is consistent with this notice that the bill was not presented at all, or it might not have been paid through

the laches of the holder."
Patteson, J. "I granted leave to move for a nonsuit in this case, as I thought it might by possibility be distinguished from Solarte v. Palmer, and I was very anxious that it should, but I confess that I am unable to do so. It is said that the defendant is called upon to pay as indorser of the bill, but so he was in Solarte v. Palmer; and again, it is singular that the date of the bill and of the time of its becoming due is not stated in either case. I do not say that it should be stated, but it ought to appear by necessary inference that the bill was due."

Coleridge, J. " The word returned does imply that the bill had been presented and refused payment. So also does the word dishonoured, and so does the notification that the bill has come

back with notarial charges.'

In the course of the argument, Littledale, J. observed, " The word returned implies that the bill has been indorsed over to some person, and has been returned to the holder, but it is not the word technically applicable in the case of dishonour, for suppose the holder presented the bill himself he would not use that word in giving notice."

(1) Phillips v. Gould, 8 C. & P. 355.

(m) Beauchamp v. Cash, Dow. & Ry. Ca. Ni. Pri. 3. But in America, where a notice of dishonour calling the note Jotham Cushings note, instead of Jotham Cushmans, and describing it as due 6th January, when it was due on 3d January, the jury were directed to find for the plaintiff, unless they thought defendant was really misled. Smith v. Whiting, 12 Mass. Rep. 6; Bayl. 162, Amer. edit.

(n) Edmonds v. Cates, 2 Jurist, 183, cor.

Lord Abinger, C. B.

(0) Gurgeon v. Smith, 2 Nev. & Perry, 303; 6 Adol. & Ellis, 499, S. C. Lord Denman, C. J. "In Solarte v. Palmer, (ante, 467, n. (h).) an inference might fairly have been drawn that no presentment to the acceptor had been in fact made. It is impossible to do so here." teson, J. "Solarte v. Palmer is a very different case. The notice there contained nothing relating to dishonour by the acceptor; whereas here there is express notice that the bill is returned with charges; and it is impossible to doubt that this is a statement of its having been returned dishonoured." Littledale and Coleridge, Js. concurred. See the next case; sed vide Boulton v. Welsh, 3 Bing. N. C. 688; ante, 467, n. (i); Houldtich v. Cauty, 4 Bing. N. C. 411, post, 470, note (s).

(p) Hedger v. Steavenson, 2 Mee. & Wels. 799; 5 Dowl. 771, S. C. Per Parke, B. "The first question, which is one of considerable importance, is, whether there is a sufficient notice of dishonour. The law upon this point

and indorser of a note, in these terms,—" Mr. Ellis (the maker) is unable to I. Of Nonpay the note for a few days: he says he shall be ready in a week, which will payment, be in time for us—only form to acquaint you(q)." And where a bill of ex-sary Prochange, indorsed in blank, was left by the indorsee at the office of R., an coodings attorney, to be presented by him, and on being presented by R., was dis-thereon. honoured, whereupon R. wrote to the drawer on the following *day, de- What a scribing the bill, and stating that it was returned dishonoured, and remained sufficient unpaid, and that he was desired to give notice thereof, and subscribed his Notice of Dishonour, name and residence to the letter; this was held a sufficient notice of dishon- [*470] our, though he did not state on whose behalf he applied, or where the bill was lying(r). And in an action by indorsees against an indorser of a bill of exchange, the following letter was addressed by the plaintiffs to the defendant,—" Messrs. H. are surprised to hear that Mrs. G.'s bill was returned to

is established in Solarte v. Palmer, (7 Bing. 530; 1 Bing. N. C. 194; ante, 467, n. (h),) which confirmed that of Hartley v. Case, (4 B. & C. 339; ante, 467, n. (g), against the previous opinion of the profession. It is certain that after the case of Tindal v. Brown, (1 T. R. 167) there was an impression that it was sufficient if the notice conveyed an intimution that the party to whom it was given was looked to for payment of the bill or note. Hartley v. Case first made an alteration in the law, and decided that the view so taken was not correct. The rule there laid down by Lord Tenterden was, that though no precise form of words was necessary to be used in giving notice of dishonour, yet the language employed must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Upon the authority of that case, the Court of Exchequer Chamber and the House of Lords decided Solarte r. Palmer, and held the notice there used insufficient. By that decision we are bound, though I am not prepared to say that I am bound by all the reasoning or language of the learned judges in giving their opinion, and therefore should myself doubt whether we could go so far as to say that it ought to appear upon the face of the instrument, by express terms or necessary implication, that the bill was presented and dishonoured;' it seems to me enough if it appears by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor, and not paid by him. However, supposing that we are bound by the precise expression of Tindal, C. J. in delivering judgment in the Exchequer Chamber, we ought not to put a strict construction on the term 'necessary implication;' for were we to do so, it would be difficult for any mercantile man to conduct business without the constant aid of a solicitor. We must not put such a meaning on that expression, as to say that the language of the instrument must be so precise as to exclude the possibility of any other inference than that the bill has been so presented and returned unpaid. On the subject of the term 'necessary implication' Lord Eldon says, 'Necessary implication means not natural necessity, but so strong a probability that an intention contrary to that which is imputed cannot be supposed.' (Wilkinson v. Adam, 1 Ves. & B. 466). If we adopt such a rule of construc-

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tion in the present case, could any doubt be entertained by any mercantile man who received this notice, that the note had been presented to the maker when due, and was not honoured? Look at the language of the notice, 'I am desired to give you notice that a promissory note made by Samuel Thompson for 991. 18s., payable to your order, became due yesterday, and has been returned unpaid. I have to request you will remit the amount thereof, with 1s. 6d. noting.' It states the time when the note became due, and that it had been returned unpaid. Can any one doubt the use of the term 'returned unpaid?' The word 'returned' is almost a technical term in matters of this nature, and means that the bill has come to maturity, has been presented, and has not been paid. Upon reading this notice I should say, that it appears from it, by necessary implication (in the meaning I attach to the term), that the note has been duly presented and dishonoured. This is the opinion which I should have formed previously to the case of Boulton v. Welsh, (3 Bing. N. C. 688, ante, 467, n. (i),) and we are not called upon to overrule that case without some authority to the contrary. The notice in Grugeon v. Smith, (6 Ad. & El. 499, ante. 468, n. (o),) was in the same terms as the present; and as we must determine to which of the two cases we will subscribe, I must say I think that the one in the Common Pleas was not rightly determined. There is indeed one circumstance mentioned in this notice of dishonour, which does not appear in the notice of Boulton v. Welsh, viz that the bill had been noted: that constitutes a distinction between the two cases; but I disclaim to go on that distinction. In Solarte v. Palmer it was contended that there was no intimation that the bill had been presented for payment, or that it was unpaid, or even that it was due, and the argument for the sufficiency of the notice rested on the authority of Tindal v. Brown, on its containing sufficient information that the party was held liable to the holder. In the present case I think no mercantile man, upon reading the notice, could possibly misunderstand its meaning; and therefore on that ground I think the rule to enter a verdict for the defendant ought to be discharged."

(q) Margeson v. Goble, 2 Chit. Rep. 364. (r) Woodthorpe r. Laws, 2 Mee. & Wels. and necessary Proceedings thereon.

What a sufficient Notice of Dishonour

I. Of Non- the holder unpaid:" on the evening of the same day the defendant called on the plaintiffs, expressed his surprise that the bill had not been paid, and promised to write to the parties in Edinburgh, and that he would see it paid, but made no objection to the sufficiency of the notice he had received: at the trial it was left to the jury to say whether or not the letter and the conversation together amounted to a notice of dishonour, and the jury having found for the plaintiffs, the court refused to disturb their verdict(s). The grounds upon which these several decisions proceeded will be found fully stated in the notes. The difference of opinion which exists among some of the learned judges, with respect to the sufficiency of the notice, is perhaps more to be lamented than the extreme nicety required in framing the notice itself; though it is certainly much to be regretted that learned judges should feel themselves so fettered by authority as to hold that notice insufficient the true import of which, it is admitted, no mercantile or even ordinary person can misunderstand. Some degree of strictness, however, in the form of notice is evidently essential, particularly in the case of an indorser, who is frequently without the means of ascertaining whether a due presentment has been made and payment refused, and who, if he pays the bill in ignorance of the laches of the holder, may lose his remedy over against a prior and solvent party(t).

> (s) Houlditch v. Cauty, 6 Scott, 209; 4 Bing. N. C. 411, S. C. Per Tindul, C. J. "With regard to the second plea, that there was no notice or an insufficient notice of dishonour, we have been strenuously urged, upon the authority of two cases determined in the King's Bench and Exchequer respectively, about the time of and since our late decision in this court of Boulton v. Welsh, viz. Grugeon v. Smith, and Hodges v. Steavenson, to say that the judgment we then pronounced is not warranted by law, or at least if not improper, is one that we ought not to be disposed to carry further. I see no reason, however, for holding Boulton r. Welsh to be a judgment not warrant-ed by law. It certainly went the full length of Solarte r. Palmer, but no further; I should not be slow to recede from an opinion, when properly satisfied that it had been too hastily formed: but I am not satisfied by any thing that was said in Grugeon v. Smith or Hedger v. Steavenson to recall any part of what fell from me in Boulton r. Welsh. In each of those cases there appeared a circumstance that did not exist in Boulton v. Welsh: in the one the party was informed that the bill was 'returned with charges,' in the other a demand was made of 1s. 6d. for 'noting:' which would necessarily convey to the mind of the person addressed that the bill in the one case and the note in the other had been presented for payment and was dishonoured. However I am perfectly ready to reconsider the decision in Beulton v. Welsh, provided I be not called upon to depart from the principle laid down in Solarte v. Palmer. Taking the letter in this case alone, it appears to me that it would fall short of a proper notice; it merely states that the bill 'was returned to the holder unpaid.' That approximates very closely to the notice in Boulton r. Welsh. But upon the same day on which the notice was given, the defendant called at the counting house of the plaintiffs, expressed his surprise and regret that the bill had not been paid, and

promised to write immediately to Edinburgh on the subject and that the bill should be paid. It appears to me, that coupling that conversation with the letter we are bound to hold that the defendant has had a regular and sufficient notice. The parties being thus together, a single word from the defendant intimating dissatisfaction with the form of the notice, would have enabled the plaintiffs to supply the deficiency. The plaintiffs having thus been fulled into a false security, I think we ought to be astute to discover grounds for holding the notice sufficient; and the jury having had all the facts fully before them, and having found their verdict upon the express footing of a valid notice, whether verbal or in writing is perfectly immaterial, I, for one, am not disposed to disturb it."

(t) The following comprehensive form is suggested as expedient to be adopted upon the dishonour of an inland bill, and it may be readily altered and adapted to every particular

case:-

"No. 5, Cornhill, London, "Dated 5th March, A. D. 1840.

"Sir, [or "Gentlemen,"]
"I hereby give you notice, that the bill of exchange, dated 1st January, 1840, last past, drawn by A. B. of —, in the county of —, on and accepted by C. D. of No. —, — Street, London, and whereby the said A. B. requested the said C. D. two months after the date thereof, to pay to the said A. B. or his order 501., and which was indorsed by the said A. B. to E. F. of, &c. and by the said E. F. to G. H. of, &c. and also by the said G. H. to you, and also by you, and whereof I am now the lawful holder, was yesterday, the 4th day of March instant, duly presented to the said C. D. for payment thereof, but was and is unpaid and dishonoured, the said C. D. refusing [or "neglecting"] to pay the same and stating that, &c. [according to the answer given to the notary] and I request you immediately to

*With respect to the mode of giving the notice, personal service is not I. of Nonnecessary, nor is it requisite to leave a written notice at the residence of the payment, party, but it is sufficient to send to, or leave verbal notice at the counting- sary Prohouse or place of abode of the party without leaving notice in writing(u); ceedings and the giving such verbal notice to a servant at his home, the defendant thereon. having left no clerk in his counting-house as it was his duty to do, suf- Mode of fices(x). So where a person, sent by the holder of a dishonoured bill, call-giving Noed at the drawer's house the day after it became due, and there saw his wife, and told her that he had brought *back the bill that had been dishonoured; May be and she said she knew nothing about it, but would tell her husband of it rerbal. when he came home; and the party then went away, not leaving any written [*472] notice; this was held sufficient notice of dishonour (y). And if a witness verbally tell the drawer of a bill of exchange that his bill for 301., drawn on T., has come back dishonoured, and produces the bill, and points out to the drawer the notary's mark upon it, this is a sufficient notice of dishon-And if the drawer has a counting-house where he transacts business, and at which the bill was addressed, it suffices to apply there for the purpose of giving notice, without attempting to give or leave notice at the

pay the amount to me, to prevent the expense of litigation

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"I am, Sir,
"Yours obediently,
"L. M.

"To I. K. merchant, [or, "Messrs. I. K. and Co." according to the fact] at —, in the county of —." county of ---.

Although it is certainly unnecessary, and not the practice to frame the notice thus formally, it may be expedient, when time and circumstances will allow, to state the residence of the drawer and prior indorsers to the party to whom the notice is given, and who may have forgotten the same, so as to enable him immediately to forward the like notice to and sue them. A duplicate of such letter should be kept, and it will be prudent, for fear of the death of one, that at least two competent witnesses should examine the original letter with the duplicate, and both be able to swear that such original letter was put into the proper post, duly directed, and within the proper time; and it will be advisable, in order to avoid the necessity for numerous witnesses and complication of proof, which sometimes creates insurmountable difficulty, to let the very same two persons who saw the holder sign his name to the original and duplicate letter, put the same into the chief or proper post-office, and not to employ any intervening person. See Hetherington v. Kemp, 4 Camp. 193, (Chit. j. 932); and post, Part II. Ch. V. Evidence.

(u) Crosse v. Smith, 1 Maule & S. 545, (Chit. j. 886); Goldsmith v. Bland, Bayl. 5th. ed. 246, et post, 472; and when personal service is not necessary, see Jones r. Marsh, 4 T. R. 465; Brandon v. Brandon, 1 B. & P. 394.

Goldsmith and others v. Bland and others, at Guildhall, cor. Lord Eldon, 1st March, 1800, (Chit. j. 826). The plaintiffs sued the defendants as indorsers of two foreign bills, and to prove notice the plaintiffs shewed that they sent a clerk to the defendant's counting-house near the Exchange, between four and five o'clock in

the afternoon; nobody was in the countinghouse; the clerk saw a servant girl at the house, who said that nobody was in the way, and he returned, having left no message with her. Lord Edon told the jury that if they thought the defendants ought to have had somebody in the counting house at the time, he was of opinion that the plaintiffs had done all that was necessary, by sending their clerk; that the notice was in law sufficient, if the time was regular, whether the defendants were solvent at the time or not. The jury thought that the defendants ought to have had somebody in the counting-house at the time, and that the plaintiffs had done all that was necessary. Verdict for the plaintiffs for 16331. And see Bayl. 5th edit. 246.

Crosse v. Smith, 1 Maule & S. 545, (Chit. j. 886). Notice to the drawers of non-payment of a bill of exchange, by sending to their counting house, during the hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place. Per Lord Ellenborough, "The counting-house is a place where all appointments respecting the business, and all notices, should be addressed. and it is the duty of the merchant to take care that a proper person be in attendance." It has, however, been argued, that notice in writing, lest at the counting-house, or put into the post, was necessary, but the law does not require it, and with whom was it to be left? Putting a letter into the post is only one mode of giving notice, but where both parties are residing in the same town, sending a clerk is a more regular and less exceptionable mode, and see Bancroft v. Hall, Holt, C. N. P. 476, (Chit. j. 968); post, 473, note (g). (x) Id. ibid.

(y) Housego v. Cowne, 2 Mec. & Wels. 848.

(2) Phillips r. Gould, 8 Car. & P. 855.

payment, and necessary Proceedings thereon.

By Post.

I. Of Non- residence of the drawer(a). And it is sufficient, both in the case of a foreign and an inland bill, to send twice during hours of business, and to knock there and wait a short time, and then go away without leaving or sending any written notice (b). So it suffices in all cases to send notice by the post, properly directed(c), (even though the letter should miscarry(d)); for it would be very unreasonable to make it incumbent on the holder to send a giving No- person with the notice, where perhaps the distance may be very great(e); tice. and indeed there is considerable risk in sending notice by a private hand, where there is a regular post, for if the notice arrive a day later by the former than by the latter, the parties may be discharged (f). But it is reported to have been decided, that the holder of a dishonoured bill is not bound to send notice to the drawer by the mail or first conveyance that sets out from [*473] the place where such holder resides, and that it is sufficient, provided *there be no essential delay, if he send notice by a private hand, and although such notice should thereby reach the drawer later in the same day than if it had been sent by the mail, he will not, on that account, be discharged (g). safer course, however, is to send by the regular post.

> (a) Anle, 471, note (u). In America it was held, that if an indorser has shut up his town house, and retired to his house in the country, intended only as a temporary residence, it suffices to put a notice through a keyhole of the town house. Steward v. Eden, 2 Cain. Rep. 121.

(b) Id. ibid.(c) Esdaile v. Sowerby, 11 East, 117, (Chit.

j. 767).

(d) Saunderson v. Judge, 2 Hen. Bla. 509, (Chit. j. 545), infra; Dobree v. Eastwood, 3 Car. & P. 250, (Chit. j. 1370), post, 491, note (s), et seq.

(e) Saunderson v. Judge, 2 H. Bla. 509, (Ch. j. 545); Kufh r. Weston, 3 Esp. R. 54, (Chit. j. 617); Haynes v. Birks, 3 Bos. & Pul. 602, (Chit. j. 690); Parker v. Gordon, 7 East, 385, 386; 3 Smith, 358; 6 Esp. 41, (Chit. j. 727); Pearson v. Cranlan, 2 Smith's Rep. 404, (Chit. j. 715); post, 474, note (0); Langdon v. Hulls, 5 Esp. Rep. 157, (Chit. j. 697), acc.; Dale v. Lubbock, 1 Barnard. B. R. 199; Pothier Traite du Contrat de Change, part 1, ch. 5, sect. 2,

art. 1, 3, 4, semb. contra. Kufh v. Weston, 3 Esp. Rep. 54, (Chit. j. 617). Notice of the non-acceptance or nonpayment of a bill of exchange is sufficiently given by proving that a letter was regularly put into the post, informing the party of the fact. Assumpsit on a foreign bill of exchange drawn by Garde, at Exeter, on Messrs. Guetano and Co. at Genoa. The defendants indorsed the bill to the plaintiffs. The bill was presented for acceptance at Genoa, and the acceptance re-fused. The defence was, that it had not been presented in a reasonable time, nor the protest for non-acceptance sent to this country as soon as it ought to have been, and that therefore the defendants had not had due notice of its being dishonoured. In answer to this it was proved, that the bill had been put into the post-office at London, the third day after it was received from the defendants, which was the first Italian postday after it had been so received. It was further proved, that from the disturbed state of Italy, for some time before, the regular post had

been interrupted, and the bill had not arrived at Genoa till a month after it became due; that it was immediately presented for acceptance, which being refused, it was protested, and the protest sent off immediately by the post to England. Lord Kenyon said, "That the defendants grounded their defence on the supposed laches of the plaintiff, but he was of opinion, that if the plaintiffs had sent the bill by the ordinary course of the post, they had done all they were called upon to do; that they could not foresee that the post would be interrupted, and it could not be expected that they should send the bill by a special messenger, or any extraordinary mode of conveyance." His lordship said, he therefore thought the plaintiffs had been guilty of no laches, and were entitled to recover, and they accordingly had a verdict.

Saunderson v. Judge, 2 Hen. Bla. 509, (Chit. j. 545). The holder of a note wrote to the defendant, who was one of the indorsers, to say it was dishonoured, and put the letter in the post, but there was no evidence that it ever reached the defendant, and the court held, that proof of sending the letter by the post was quite

(f) Darbishire v. Parker, 6 East, 8, 9; 2 Smith, 195, (Chit. j. 707).

(g) Bancroft r. Hall, Holt, C. N. P. 476, (Chit. j. 968). This was an action against the drawer of a bill of exchange, who resided at Liverpool; the bill was accepted by one Hind, payable in London, and indorsed by the defendant to the plaintiff. The bill being dishonoured, notice was given to the plaintiff, who lived at Manchester, on the 24th of May. On that day he sent a letter, by a private hand, to his agent at Liverpool, directing him to give Hall notice of the acceptor's default. On the 25th, in the afternoon, the agent received the letter, and went, about six or seven in the evening, to the counting-house of Hall, but after knocking at the door and ringing a bell, no one came to receive a message. The merchants' counting-houses at Liverpool do not shut up till eight or nine. The 26th was a Sunday, and notice was not in fact given till the morning of the

Notice of the dishonour of a bill sent by the two-penny post is sufficient, I. Of Nonwhere the parties live within its limits, whether near or at a distance from payment, each other, but it must be proved that the letter, conveying the notice, was sary Proput into the receiving-house on the next day at such an hour, that according ceedings to the course of the post, it would be delivered to the party to whom it is thereon. addressed, on the day when he was entitled to receive notice of the dishon- Mode of our(h). But in a country town, where the post does not leave until seven giving Noo'clock in the evening, it should seem sufficient to send notice by such post, although the party to whom it is addressed resides within a few miles of the post town, and the notice will not be received till the following morn-

Where notice is to be sent from London by the general post, it has been held, that the letter, giving such notice, should be put into the general postoffice in St. Martin's le Grand, or at a receiving-house, and that the delivery to a bell-man in the street will not be sufficient(k); and it is obvious that the notice should in all cases be forwarded by some person who will afterwards be competent to prove it, and by a person who saw the holder sign the notice, and who himself put it in the post, so as to avoid multiplicity of proof, which is necessary where there has been the intervention of several

persons(l).

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Where there is no post, it is sufficient to send notice by the ordinary mode of conveyance, though notice by a special messenger might arrive earlier; and therefore in the case of a foreign bill, it is sufficient to send it by the first regular ship bound for the place to which it is to be sent, and it is no [*474] objection, that if sent by a ship bound elsewhere, it would, by accident have arrived sooner, though the holder wrote other letters by that ship to the place to which the notice was to be sent(m). If the deputy post-master,

27th. It was objected for the defendant, that the notice was not in time after the London letter reached Manchester. A mail set out next morning to Liverpool. The plaintiff should have sent the notice by the mail, which reached Liverpool by ten o'clock; if he prefers a private conveyance, or if he attempts to give notice earlier than by law he is bound to do, and fails in giving an effectual notice, he is not therefore exempt from giving proper legal no-

Bayley, J. " Notice must be given in time, but all a man's other business is not to be suspended for the sake of giving the most expeditious notice. He is not bound to write by post as the only conveyance, or to to send a letter by the very first channel which offers. He may write to a frieud, and send by a private conveyance. Here the notice reaches Liver-pool on the 25th. No expedition could have brought it earlier. Between six and seven in the evening of that day, the witness goes to the defendant's counting-house, and it is shut up. A merchant's counting-house or residence of trade, is not like a banker's shop, which closes universally at a known hour. It was the defendant's fault that he did not receive notice on the 25th, which he might have done if he had kept his counting-house open till eight or nine, which are the customary hours of closing them at Liverpool." Verdict for the plaintiff. And see Bayley, 5th edit. 280; but see Beeching v. Gower, Holt, C. N. P. 315, (Chit. j. 966); post, 487, n. (p).

(h) See post, 483, 484; Scott r. Lifford, 1 Campb. 246; 9 East, 347, (Chit. j. 747); Smith v. Mullett, 2 Campb. 208, (Chit. j. 775); Hilton v. Fairclough, 2 Campb. 633, (Chit. j. 826); Dobree v. Eastwood, 3 Car. & P. 250, (Chit. j. 1370); post, 491, note (s), et seq.; 2 Phil. on Evid. 19, 35; Edmonds v. Cates, post, 484, note (u).

(i) Boyd r. Emmerson 4 Nev. & Man. 99;

2 Àd. & El. 184, S. C.

(k) Ante, 237; Hawkins r. Rutt, Peak. R. 186, (Chit. j. 511); Roscoe, 206. Sed quære, if the latter would not be sufficient.

(1) Ante, 471, end of note (1) (m) Muilman r. D'Eguino, 2 Hen. Bla. 565, (Chit. j. 549). To debt on bond conditional to pay certain bills drawn on India, at sixty days sight, in case they should be returned protested, defendant pleaded, that he had not notice so soon as he should have had: it appeared that notice was sent by the first English ships, but that by the accidental conveyance of a foreign ship, not bound for England, and by which the holder wrote to England upon other matters, notice might have been sent sooner, and would have arrived sooner; but Eyre, C. J. told the jury, that notice by the first regular ships bound for England was sufficient, and that it was not necessary to send notice by the chance conveyance of a foreign ship. The jury found for the plaintiff, and the court was satisfied with the verdict, and refused a new trial. See also Darbishire v. Parker, 6 East, 7; 2 Smith, 195, (Chit. j. 707).

and necessary Proceedings thereon.

Mode of giving Notice.

I. Of Non- in a country town, should neglect to deliver the letter in the usual time, but there is nevertheless time to send the notice by a special messenger, it should be done(n). It has been decided, that where it is necessary or more convenient for the holder to send notice by other conveyance than the post, he may send a special messenger, and he may recover the reasonable expences incurred by that mode of giving notice(o).

> When the party entitled to notice is abroad at the time of the dishonour, if he have a place of residence in England, notice should be left there, and a demand of acceptance or payment on his wife or servant there would be re-

gular(p).

If by Post, Letters must be accurately directed.

When the notice is to be sent in a letter by post, care must be observed that the letter be accurately directed, for any mistake occasioning delay, and which might have been avoided by due care, will deprive the holder of all remedy against the party to whom the notice ought to have been given(q). If the party reside in a city or large town, the direction should not be to him at that place generally, but state the particular street or part of the town where he resides, and his trade or occupation, so as to prevent the risk of misdelivery, which might at least occasion delay in the proper person receiving such notice; therefore it has been held, that a notice to an indorser thus, "Mr. Haynes, Bristol," is too general and insufficient, without express evidence that the proper party received it in due time, because the place being so populous, there may be many persons of the same name there (r). But [*475] where the drawer himself chooses to date his bill so generally as *" Manchester(s)," or "London(t)," it implies, that a letter sent to the post-office, and so directed, will find him; and, therefore, a notice thus generally addressed to the drawer will be sufficient; at least, to go to the jury, that he had had due notice of the dishonour; nor will the fact of the acceptor's residence being stated in the acceptance, and of whom inquiries might have been made as to the residence of the drawer, render such notice insufficient(u). Every prudent holder should, however, in all cases, make active inquiries, and write the fullest description on a letter giving notice (v); and it has been suggested, that if it be proved that there was a directory for the place where it is supposed the indorser or drawer resides, then that the adop-

(n) Horden v. Dalton, 1 Car. & P. 181,

(Chit. j. 1204).

found a verdict for the plaintiff for the amount of the bill, and the full charge for the expences; and Lawrence, J. said, "In some parts of Yorkshire, where the manufactures live at a distance from the post towns, the letters may lie for a long time before they are called for, and it may be necessary to send notice by a special mes-senger;" and Lord Ellenborough, C. J. observed, "That it was rightly left to the jury, if it was left for them to say, whether the special messenger was necessary, and also whether the charge was reasonable." Rule nisi refused.

(p) Crouwell v. Hynson, 2 Esp. Rep. 511, (Chit. j 571); ante, 464, note (l); Walwyn v. St. Quintin, 1 B. & Pul. 652; 2 Esp. 514, (Chit. j 578); sed vide 5 Esp. Rep. 175.
(q) Esdaile v. Sowerby, 11 East, 117, (Chit.

j. 767). (r) Walter v. Haynes, Ryan. & Mood. 149, (Chit. j. 1227).

(s) Mann v. Moors, Ryan & Mood. 249,

(Chit. j. 1260), (t) Clarke r. Sharpe, 3 M. & W. 166; 1 Horn & H. 35, S. C.

(u) Id. ibid.

(v) Bayl. 5th edit. 230.

⁽o) Pearson v. Cranlan, 2 Smith's Rep. 404, (Chit. j. 715). Assumpsit on a bill of exchange for 30l., indorsed by the defendant to the plaintiff. The plaintiff demanded the amount of the bill and 2l. 12s. 9d. costs. The defendant tendered 3ll. 11s. 9d., the expence incurred was on account of a messenger employ-ed in giving the notice. The defendant ob-jected that the holder of a bill was not entitled to give notice by a special messenger, but only by the ordinary course of the post. It was agreed, that if a special messenger should be allowed, it was not an unreasonable charge. The 311. 11s. 9d. having been tendered, and that fact pleaded, and this objection being made to the legality of the charge, the defendant's counsel contended, that the plaintiff should be nonsuited, but the learned judge overruled the objection, and expressly left it to the jury to say whether the sending by a special messenger was done wantonly or not; and it appeared that the letter possibly would not have reached the defendant for a fortnight, as he lived out of the usual course of the post, and upon this the jury

tion of the address given in such directory might, perhaps, be held suffi- L Of Noncient(x). It is not usual to advertise the dishonour of a bill or note in the payment. public papers; but where the sum is considerable, and all other inquiries af- and necester an indorser have failed, it might be expedient to adopt that means of giv- ceedings ing notice(1).

(x) Id. 231.

Mode of giving Notice.

(1) The holder is bound to use due diligence to give notice of the non-acceptance, as well as non-payment of a bill to the drawer and inderser, whom he intends to charge. Tunno r. Lague, 2 John. Cas. 1. Berry v. Robinson, 9 John. Rep. 121. Hussey v. Freeman, 10 Mass. Rep. 84. The agent of the holder is not bound to give notice of the dishonor of a bill to the drawer or indorsers, but is only bound to give notice to his principal, and to transmit to him the requisite protests, in order that the holder may give notice to the drawer and indorsers of the dishonour of the bill. Tunno v. Legue. Colt v. Noble, 5 Mass. Rep. 167. And if the egent undertakes to give notice, it will be good, if given as early as it could have been received from the holder r. Lague.

 The liability of the drawer or inderser of a disheneured bill depends not on actual notice. but on reasonable diligence; which is in all cases tantamount to actual notice, whether given or

not. Dickins v. Beal, 10 Peters, 572.

Notice of the dishonour of bills of exchange must be made out in two ways: 1. That the bills have been duly protested for non-acceptance; and due and legal diligence used in giving notice thereof; in which case the legal presumption of its receipt in time would attach. 2. By proof that the notice actually came to hind in proper time; though the letter containing the notice was not properly directed, or sent by the most expeditions or direct route. Hid.

Where a note has been discounted by a brack it sames that it would not be due diligence if the notary inquired only of the directors and onicers of the bank, respecting the residence of the first indorser. Stuckert v. Anderson, 3 Whart 116. Whether or not due diligence was used in making inquiry for the indorser is a mixed question of law and fact. The Court are to give their opinion on the law to the jury, according to the circumstances as they appear. But the jary must decide the fact whether there was due efficience or not. Hild.

And see with respect to sufficiency of notice, and due diligence, the following cases: Catabill Bank v. Stall, 15 Wend 364; Helland v. Turner, 19 Conn. 308; Farmer's Plank v. Duvall, 7

Gill & John. 79. }

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Where the parties reside in the some town or city, the notice of non-acceptance or non-payment must be personal, or left at the dwelling-house or place of business of the party to be charged by the notice. Ireland v. Kip, 10 John. Rep. 410, S. C. 11 John. Rep. 222. Williams v. Bank of the United States, 2 Peters, 96. And where the parties lived in New York, and notice of non-payment of a note was put into the post-once in the city, directed to the indorser, who resided at Kip's Bay, (about three miles and a half from the post-office, and within the city.) but the letter carriers did not carry letters to that distance, it was held, that the notice was insufficient. Ibid. In case of a temporary removal of the inderser from the place where powment is to be made, notice, at his last place of residence there, will be sufficient. Stewart r. Eden, 2 Caines' Rep. 121. But see Blakeley r. Grant, 6 Mass Rep. 256. If the agent of the holder call at the indorser's house, and finding it shut up, and that he had gone out of town, put a letter into the post-office addressed to him, informing him of the non-payment or non-acceptance, it will be sufficient notice. Ogden r. Cowley, 2 John. Rep. 274. Withams r. Bank of the United States, ut supra. Galpin'e, Hard, 3 M'Cord, 394. A bill was drawn and dated at New York, on persons residing there, who accepted it; but the drawers in fact resided at Petersburgh in Virginia. The bill being protested for non-payment, on the same day or the next day, two letters were put into the post-office, giving notice to the drawers, one directed to New York, and the other to Norfolk, the supposed place of their residence. It was held, that as it did not appear that the holder knew where the drawers lived, he had used due diligence, and the notice was good. Chapman v. Libscombe, 1 John. Rep. 291.

A citizen of the United States drew a bill in the East Indies, payable in London which was transmitted by the holder to his agent in London, and being there dishonoured, was returned to the holder in the East Indies, with the protest; it was held, that notice of the dishonour of the bill sent to the United States, to the drawer by the holder after the receiving the protests in the East Indies, was good, and that the holder was not board to have sent notice through his agent direct from London to the United States, ofthough he I vew the den will of the drawer in the

United States. Colt v. Noble, 5 Mass. Rep. 167.

If due diligence he used to give notice to the party to be characed, and he cannot be found, this is equivalent to due notice. Ogden r. Cowley, 2 John. Rep. 274. Blakeley v. Crant, 6 Mass. Rep. 386. But a written notice in such case, left at a former dwelling-house of the party, in which neither he nor his family then resided, is no proof to support an allegation of notice in fact even though it should elsewhere be received by the wife of the party, unless she was constituted his agent. Blakeley v. Grant. Put see Stewart v. Eden, 2 Calors' Rep. 121.

The putting of a letter into the post-office, giving notice of the dishonour of a note or bill, is sufficient notice, although no proof is given of its having been actually received. Munn v. Baid-

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1. Of Nonpayment, and neces sary Proceedings thereon.

The time of making protest, we have seen, is to be regulated by the law of the place where it is made; but the time of giving notice thereof, or of

tice.

General Rule.

win, 6 Mass. Rep. 316. Miller v. Hackley, 5 John. Rep. 375. Bank of Columbia v Lawrence, 1 Peters, 578. And it is a general rule, that if the party to be affected by a notice reside in a different city or place from the holder, the notice may be sent through the post-office to the post-4thly, different city of place from the nonice, the notice may be sent through the place. The Time of making See also Freeman v. Boynton, 7 Mass. Rep. 483. See Bank of Columbia v. Lawrence, ut supra. of making See also Freeman v. Boynton, 7 Mass. Rep. 483. See Bank of Columbia v. Lawrence, ut supra. Protest and Bank of the United States v. Carneal, 2 Peters, 543. Whittier v. Graffam, 3 Greenl. 82. Mead giving No- v. Engs, 5 Cowen, 303.

But it is decided in the cases of Bank of Geneva r. Howlett, 4 Wend 329, and Cuyler r. Nellis, Idem, 398, that it is not indispensable that notice should be sent to the office nearest to the residence of a party, nor even to the town in which he resides; that it is sufficient if it be

sent to the office to which he usually resorts for his letters.

And if an indorser receives notice of the dishonour of a bill or note, he must immediately give notice to all the prior parties whom he intends to charge. Morgan v. Woodworth, 3 John. Cas. 89. Notice of non-payment of a bill or note, must, generally, be given by an indorser to the in-dorser next before him, by the next post, after he himself has received notice of the dishonor; and so on to the drawer. But this rule is not inflexible. Notice may be given by the next practicable post. Reasonable diligence is all that is required. Mead r. Engs, 5 Cowen, 303.

But if business be suspended in a city during two months, by a contagious disorder, it will excuse the want of notice during that period. Tunno v. Lague, 2 John. Cas. 1.

The holder of a bill must use reasonable diligence to ascertain the residence of the drawer for the purpose of giving him notice of its dishonor. It is not sufficient to look for the drawer at the place where the bill is dated, if his residence be elsewhere. Fisher v. Evans, 5 Binney's Rep. 541. Freeman v. Boynton. But notice left with the family of a sea-faring man during his absence, is sufficient. Fisher v. Evans. Blakeley v. Grant, 6 Mass. Rep. 396. Freeman v. Boynton.

In general, if at the time when a note or bill falls due, the indorser or drawer is absent from the state, and has left no known agent to receive notice, there is no necessity to prove a notice in order to charge him upon non-acceptance or non-payment by the maker or drawee. Blakeley v. Grant, 6 Muss. Rep. 388. And when at the maturity of a note, the maker was out of the state, and the holder left a written demand of payment at his dwelling-house, not knowing of his absence, and on the same day gave notice to the indorsers, it was held sufficient to bind the latter. Sanger v. Stimpson, 8 Mass. Rep. 260. And if the maker has absconded before a note becomes due, and this fact is known to the indorser, it has been held that no demand of payment on him is necessary to charge the indorser. Putuan v. Sullivan, 4 Mass. Rep. 45.

Where the holder and indorser of a foreign bill of exchange both reside in the same city, proof of notice to the indorser within three days after advice of the dishonour of the bill is insufficient. Bryden r. Bryden, 11 John Rep. 187. So the neglect to notify to an indorser of the default of payment of a note by the maker, for eight days after its dishonor, the parties living at the time within four miles of each other, is such laches as discharges the indorser. Hussey v. Freeman,

10 Mass. 84.

Where the indorser lives in the same town with the maker, notice ought to be given to him upon the same day on which the demand is made upon the maker. Woodbridge v. Brigham, 12 Mass. Rep. 403. Where the maker of a note appointed a place to notify to him the note's falling due, a notice and demand at such place is sufficient to charge the indorser. State Bank v. Hurd, 12 Mass. Rep. 172. See Brent's Exis. v. Bank of the Metropolis, 1 Peters, 89.

A demand of payment should be made on the last day of grace, and notice of the default of the maker be put into the post-office early enough to be sent by the mail of the succeeding day, where the indorser resides in a different place. Lenox et al. v. Roberts, 2 Wheaton, 877. Townsley et al. v. Springer, 1 Miller's Louis. Rep. 122.

{ Bank of Alexandria v. Swann, 9

Notice to the indorser is in time if put into the post-office on the next day, and if there be two mails a day it is not necessary that it should be put in in time for the first mail. Whitwell v. Johnson, 17 Mass. 449.

The holder of an inland bill or note is not obliged to send notice of non-payment until the next

day after its dishonor. Hartford Bank r. Stedman, 3 Conn. Rep. 489.

Where the parties to a note or bill reside in different towns notice may be sent by mail. Hart-

ford Bank v. Stedman, 3 Conn. Rep. 489.

When the third day of grace falls on Saturday the notice of non-payment need not be given until the next Monday. Williams v. Matthews, 3 Conn. 252.

Where the indorser lives in another town notice put into the post-office is sufficient, although never received. Shed v. Bret, 1 Pick. 401. And if the indorser does not live in a post-town sending the notice to the nearest post-town is perhaps sufficient. Ibid. Bussard v. Levering, 6 Wheat. 102.

Where notice to the indorser of a promissory note of which a bank is holder, is given according to the usage of the bank, it is sufficient to charge the indorser. Bank of United States v. Norwood, C. C. U. S. 1 Harr. & Johns. 423. Brent's Exrs. v. Bank of the Metropolis, ut supra.

When a note is payable at a bank, it is not necessary to make any personal demand upon the

the non-payment, is to be regulated by the law of the place where the draw-I. Of Noner or indorsers respectively resided at the time when the bill was drawn or payment,

and necessary Proeeedings

maker elsewhere. Bank of the United States v. Carneal, 2 Peters, 543. As to the rules to be cheered in giving notice of non-payment when a note is payable at a bank, see Bank of Columbia v. Lawrence, 1 Peters, 578. Brent's Exrs. v Bank of the Metropolis, ut supra. Fullerton 4thly, v. Bank of the United States, 1 Peters, 604. A note being dated at a particular place, does not The Time render it payable at that place alone; and if the maker is not to be found at that place, the holdof making er is not excused from inquiring elsewhere. Galpin v. Hard, 3 M'Cord, 394. Protest.

Although notice of the non-payment of a note be not left at the proper place, but in fact is reand giving ceived by the inderser, and is so proved, or from the evidence, can be fairly inferred by the jury, Notice. it is sufficient to charge the indorser. Bank of the United States v. Corcoran, 2 Peters, 121.

Notice of dishonor sent by mail is sufficient and proper between places where post-offices are established, but where the indorser lives in the country and not on a post road, a special messenger ought to be employed or other means used to convey the notice with the same certainty and dispatch. Bank of Logan v. Butler, 3 Litt. 493. See Bank of Columbia v. Lawrence, 1 Peters, 578. Notice sent by a notary public and by mail to the indorser is sufficient. Crissen v. Williams, 1 Marsh. 456.

Notice of the non-acceptance of a foreign bill must be given to the indorser in due and convenient time of which the court are to judge. Phillips v. M'Curdy, 1 Har. & Johns. 187. It seems now to be well settled, that when the facts are ascertained, what shall constitute due diligence, is a question of law to be determined by the court. Bank of Columbia v. Lawrence, 1 Peters, 578. See Bank of the United States v. Corcornn, 2 Peters, 121. | Nash v. Harrington, 2 Ai-But see Braban v. Raglanet, 1 Minor, S5, where it is held to be a question for the

jury. }
The law does not require of the holder of a note or bill that he shall give the earliest possible.

Bank of Utica v. Smith, 18 Johns. 230.

Where the makers of a negotiable note resided in New York, the holders at Elizabethtown, and the indorser in the neighborhood of Rahway, and the notary who protested the note in New York transmitted notice of protest by the next insil to the holder at Elizabethtown who sent the notice by the next mail to the indorser, it was held that the notice to the indorser was in time.

State Bank v. Ayres, 2 Hals. 130. A promissory note was made negotiable and payable at the Newbern branch of the State Bank of North Carolina, and fell due on the 11th December, the indurser lived in Newbern near to the bank. Notice of non-payment was not given to him until the 17th of December. Held that he was discharged by this laches. State Bank v. Smith, 2 Munf. 70.

Notice of protest must go by the first mail after the protest. Dodge r. Bank of Kentucky, 2

Marsh. 615.

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After a refusal by the maker of a promissory note to pay, on demand, made on the day when the note fell due, the note is dishonored and notice may be immediately given to the indorser. Shed r. Bret, 1 Pick. 401.

Though a demand on the drawer of a bill cannot be made, yet the law will not dispense with notice to the indorser: And the circumstances which prevent the demand must be stated. Price v. Young, 1 M'Cord, 339. And such notice should be given in as short a period after ascertaining that demand cannot be made, as if demand had been made, and the bill dishonored, viz. as soon as may be conveniently practicable. Id.

Where an indorser resided in one town, within two and a half miles of a post-office, and carried on business in another town where there was also a post-office at the distance of four and a half miles from his residence, and he received letters and kept a postage account at the latter office, it was held, that notice of the protest of a note might be sent to either place. Bank of Geneva r. Howlett, 4 Wend. Rep. 328.

The holder of negotiable paper seeking to charge indorsers is bound to make inquiries as to the proper office to which notice must be sent. Cayler v. Nellis, 4 Wend. Rep. 398.

Where the notary public called at the boarding house where the indorser lodged, and inquired of a fellow boarder for him, and, being informed he was not within, left with the fellow boarder a notice directed to him of the non-payment of a note of which he was indorser, requesting him to deliver it; it was held that the notice was sufficient to make the indorser liable for the payment of the bill. Bank of the United States r. Hatch, 6 Peters' Rep. 250

The rule respecting notice to indorsers, varies with the pursuits of the parties. The same strictness is not required between farmers, resident in the country, as between merchants, resident in the towns. In the first case, what is due diligence must be left to the jury under the direction of the Court. Brittain Ex'r. r. Johnson, 1 Dave. Rep. 293.

The indersee of a negotiable note, to fix the liability of an inderser, must use such diligence as in all reasonable probability will bring home to the indorser notice of the non-payment thereof. Barker v. Hall, 1 Martin & Yerger's Rep. 183.

To place a notice of non-payment in the post-office at Nashville, directed to the indorser, living 71 miles from Nashville, in the same county, and no post-office nearer such indorser and he but seldom visiting Nashville, is insufficient. A private messenger should have been sent with notice, the indorsec's agent living in Nashville, and knowing where the indorser resided. 1b.

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and necessary Proceedings thereon. 4thly,

I. of Non- indersed (y). In France a bill cannot be protested till the day after it falls In England(a), Scotland, and America, it must, at least, be noted on due(z). the day it falls due. In France, at least, five days are allowed for giving notice to the French drawer and indorser of the dishonour, and two months when disbonoured in England. But in England the notice must be actually given or forwarded, when by general post, the day after the dishonour, and each indors-The Time er must successively give or forward the notice to his immediate indorser on of making the day after notice was received by him. The holder of a foreign bill must giving No- keep in view the foreign law as well as that of his own country, and in case of inland bills and notes he must carefully observe the local law, or he may lose all his remedies. In all countries a premature protest or notice, i. e. one made or given before the bill was dishonoured, would be invalid(b); but in England it should seem, that when on the last day of grace there has, early in the morning, been a demand and positive refusal to pay, an immediate notice of non-payment may be given on that day(c). In all cases, although the law allows a day to each party, yet it is advisable to give it as soon as practicable. We will now more particularly examine the important rules on this subject.

In France.

In France a protest for non-payment must not be made until the day after the day when the bill became due, that entire day being allowed by law to the drawee to prepare for and make payment; but it is otherwise with respect to bills payable at sight, when the terms of the bill denote that the party is to pay upon demand; and therefore the protest may in that case be *476] made on the very day of presentment(d). *If the day for making the pro-

(y) Ante, 456; 4 Pardess, 227, 230; Poth. 871); ante, 327, note (o), and post, 481, n.

pl. 155.

(2) 1 Pardess. 441, 446, 454. (a) Leftley v. Mids, 4 T. R. 174, (Chit. j 473); ante, 463, note (e); and see ante, 397.

(b) 1 Pardess. 452.

(c) Ex parte Moline, 19 Ves. 216, (Chit. j.

(g).

(d) 1 Pardess. 446. Le prot t faute de paiement ne doit être fait que le lendemain du jour de l'echance, ce jour-l'a etant en entier accorde pour faire les demarches necessaries à l'effect d'obtenir le paiement à l'amiable. La

An indersee, to fix the inderser, must present the note for payment at the time it falls due, and must give notice to the indorser of non-payment within a reasonable time, which, according to the general rule, if he resides in the same place, must be on the same day, or at farthest by the next day, or if in a different place, by the next post. Whittlesey et al. v. Dean, 2 Aiken's Rep.

Notice from the indersee to the inderser of non-payment by the maker, is necessary to enable the indorsee to maintain an action against the indorser. Nash v. Harrington, 1 Aiken's Rep. 39. And due ditigence must be used by the inclorace in giving such notice; but what is due dili-

gence, is partly a question of law, and partly a question of fact, in deciding which, the period the note has been payable before the indorsement, the insolvency of the maker, the improbabilitv of his paving or growing worse by delay, the relative distance of the indorser, indorsee and maker, and the fact this of communication between them are all to be considered. Ibid.

Where the law in England requires demand by the indersee, and notice back to the inderser on the same day, to charge him, if the facilities of demand and notice are the same here, the rule of law is the same. Nash r. Harrington, 2 Aiken's Rep. 9.

As to what is or is not a sufficient notice, or due diligence, see also the following cases: Reston liank v. Ucdges, 9 Pick. 420; Church v. Barlow, Idem, 547; Talbot v. Clark, 8 Pick. 51; Nashville Bank r. Bennett, ! Yerg 166; Flack v. Green, 3 Gill. & John. 474; Paterson Bank r. Butler, 7 Helst. 268; Butler v. Duval, 4 Yerg. 265; Sewall v. Russell, 3 Wend. 276; Ogden v. Debbin, 2 Hull, 112; Walker v. Tunstall, 3 How, 209; Whittemere v. Leake, 14 Louis, Rep. 392; Thorn v. Rice, 15 Maine Rep. 263; Lord v. Appleton, Id. 270; Thompson v. Eank of the State, 3 Hill, 77; Marsh v. Ban, 1 Meigs, 68; Downer v. Remer, 21 Wend, 10; Bank of Utica v. Bender, Id. 643; Fitler v. Morris, 6 Whart, 406; Rugles v. Jackson, 19 Wend, 383; McClair v. Waters, 9 Dana, 55, 6; Wilcox v. M'Nutt, 2 How, 776; Bank of Louis, v. Watson, 15 Louis, Rep. 28; Jones v. Mausker, Id. 51; Comm. Bank v. Gove, Id. 113; Bank of Louis v. Mausker, Id. 115; Union Bank v. Grimshaw, Id. 321; Coulon v. Champlin. Id. 541; Foreman v. Wickoff, 16 Louis. Rep. 20; Harrison v. Bowen, Id. 232; Nott v. Beard. 1d, 203. >

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test should fall on a Sunday, or legalized holiday, then the protest is to be I. Of Nonmade on the day after it(e); and if the distance of parties or other circum-payment, stances occasion delay, a reasonable further time on making the protest will sary Pronot prejudice (f). A premature protest no doubt would be unavailing (g). ceedings In France also, the time within which the notice of dishonour must be given, thereon. differs materially from that required in England, and affords more indulgence 4thly, Thus it there suffices if the protest be notified within five of making days, reckoned from the date of the protest, when the drawer or indorser Protest resides within fifteen miles (h); and if the party to whom the notice is to be and giving given resides more than fifteen miles from the place where the bill was pay- Notice. able, the time is increased in proportion, and according to such increased in France. distance; but if the last of the five days be a Sunday, the notice must arrive the day before. When the bill drawn in France falls due in a foreign country (as in England), the drawer and indorsers resident in France must have notice within two months after the date of the protest, and when the bill is payable in other countries more or less prescribed time is allowed(i); and if the English holder neglect to observe the law of France as to the time of protest, and notice and proceeding in France, he will lose his remedy against the French drawer and indorsers (k). The French law does not assume to determine what delay may be allowed in giving notice to and proceeding against the drawer and indorsers residing in a foreign country. general they are regulated and are to be given effect to in France according to the law of such foreign country, where there are conflicting regulations in the different countries in regard to commerce (l).

In France, also, the formalities to be observed after the protest has been made are two—the notice of the protest, and the citation in justice. The first is independent of the second, which is only a consequence, and is not necessary, unless the notice of protest is not followed by payment, therefore one does not supply the place of the other. The time within which the notice ought to be given is impliedly limited to that of the citation, because that mode of pursuit ought to take place on default of payment within the prescribed space of time, which commences the day after the protest (m). copy of the protest, and of all it ought to contain, should be given at the head of the summons, so that each party interested may know all that relates to the process directed against him(n). In France it appears that both these steps, viz. notice of protest, and proceeding in a court by summons, &c. are essential, unless upon a friendly notice of protest a drawer or indorser promise to pay, accompanied with a request not to take proceedings, which promise, if complied with, is not barred *by the five years limitation usually [*477] affecting bills(o). In that country, if a party incautiously pay upon notice of protest, he cannot, although he may have lost his remedy against the prior indorsers, recover back from the holder the money, on ascertaining that his

nature des choses indique cependant une exception relativement aux lettres à rue. La demande en acceptation et en paiement se confondant pour ces sortes de lettres, on ne peut constater le refus de les accepter sans constater celui de las payer. Si le jour auquel tombe le protet est un Dimanche ou une fete autorisee legalement dans de le lieu, il doit etre fait le jour suivant. Nous disons dans le lieu, parce qu'en principe general le protet devant être fait suivant les lois du pays on la lettre est payable, les reglemens de l'autorite competente qui autorisent certaines fetes, quoique non celebrees

partout, doivent etre observes

(e) 1 Pardess. 446.

(f) Id. 447, 448.

(g) Id. 452; Marius, 103; Campbell v. French, 6 T. R. 212, S. P.; 2 Hen. Bla. 163, (Chit. j. 341). (h) 1 Pardess. 453, 456.

(i) Id. 454. (k) 4 Pardess. 225, 226, 230, 231; 1 Par-

dess. 453 to 455.

(1) 1 Pardess. 455; 4 Pardess. 197 to 235; ante, 170, 171.

(m) 1 Pardess. 456

(n) Id. ibid.

(o) Pardess. 457, 459.

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sary Proceedings thereon. of making Notice.

I of Non- conduct has been informal in the protest, or otherwise, unless in case of depayment, ceit or fraud, &c.(p).

In Scotland the notary should, as in England, demand payment on the last day of grace, when the bill falls due. But it is not necessary there to draw up the formal protest on that day; it suffices to note it then, and to The Time give notice of the dishonour in due course, and draw up the formal protest afterwards(q). But then it must appear that the extended protest was ultiand giving mately perfected from authentic evidence, for otherwise it would be invalid(r); and in one of the best Scotch Treatises on Bills, it is observed, "It seems to be now held in Scotland and England, that noting is a kind of incipient protest, which will be considered as sufficient in the mean time, provided the instrument of protest is regularly extended afterwards(s)."

In England.

In Scotland.

It was said by Buller, J. with reference to protesting foreign bills in England, " all the books agree that the protest must be made on the last day of grace(t)," and within the usual hours of business(u): but modern decisions explain this expression only to mean that the substantial demand of payment must be made by a notary on that day, and not that the formal protest, which is a mere statement of such demand and of the result, shall be extended or completed on that day(x). The established custom of merchants requires that a formal demand of payment shall be made on that day by a notary, being a known public officer of experience, and sworn to perform his duty so as to prevent any irregularity or uncertainty in the sufficiency of the demand; and that such notary's solemn declaration of what has passed may afterwards be resorted to in evidence of the transaction. But it may now be considered as settled in England, as well as Scotland and in America, that it is sufficient to note a foreign bill for non-payment on the day of refusal, and that the protest may be formally drawn up and signed, or, as it is technically termed, extended by the notary, and truly ante-dated at any time after (y); but it is said it should be made before the commencement of the suit(z). It is imprudent, however, to delay the completion of the formal protest; for if the notary himself should die, or be absent, perhaps no sufficient protest could be afterwards obtained; and with reference to a decision in Scotland, though it in general suffices to draw up a protest at any time, yet the ultimate protest must be completed from authentic evidence, and not [*478] by extracts from a previous defective protest, without *such adequate evidence(a). We have seen(b) that since the 6 & 7 Will. 4, c. 58, it is not necessary in the case of an acceptor for honour, or referee in case of need, to present the bill, or to forward the same for presentment to such acceptor or referee till the day following the day on which it becomes due; and, therefore, the time for protesting a bill on the default of an acceptor for honour, or referee in case of need, will be extended accordingly.

(p) Id. 458.

(q) Brown v. Hutchinson, Mor. App. to Bills, No. 21; Glen. 194, 2d edit.

(r) Barbour v. Newall, 23d May, 1828, 11 Shaw Rep. 328; Glen. 195, 2d edit.

(s) Thompson on Bills, 477.
(t) Per Buller, J. in Leftley v. Mills, 4 T.
R. 174, (Chit. j. 473); Tassel v. Lewis, Ld.
Raym. 743, (Chit. j. 192); Anon. Lord Raym.
743, (Chit. j. 216); Coleman v. Sayer, 2 Stra. 829, (Chit. j. 267); Marius, 97; Bayl. 5th

(u) Marius, 112.(x) Bul. N. P. 272; Chaters v. Bell, 4 Esp.

R. 48, (Chit. j. 686); Selw. N. P. 9th edit. 360; ante, 464, note (p)

(y) See Chaters v. Bell, 4 Esp. R. 48, (Chit. 636), and other cases, ante, 464, note (p). Same law in Scotland, Brown v. Hutchinson, 8th December, 1807, Mor. App. to Bills, 21; Glen. 194, 2d edit; Thompson on Bills, 477, supra, note (s). Same rule in America, see Lennox v. Leverett, 10 Mass. Rep. 1; but see Blakeley v. Grant, 6 id. 386; ante, 464.

(2) Bayl. 5th edit. 266, 267.

(a) Barbour v. Newall, 23d May, 1823, 11 Shaw, Rep. 328; Glen. 195, 2d edit.

(b) Ante, 351.

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After the noting or protest, notice of the dishonour of a foreign bill must I. Of Nonbe given to all the parties against whom the holder means to proceed for payment, payment, within a reasonable time after the dishonour of the bill(c); we have sary Proseen, however, that in giving notice to the drawer or indorser of a foreign ceedings bill, resident abread, it is not necessary that a copy of the protest should ac-thereon. company such notice(d). Much discussion has taken place upon the ques- General tion whether the court or the jury are to determine in each case, whether or Rule, Notice to be not more than a reasonable time has been suffered to clapse(r); but it seems given withnow to be settled, that what is a reasonable time for giving notice, is in new in a reascases, where no precise rule applicable to the case has been previously laid onable Time, and down, partly a question of fact and partly of law; the jury are to find the how confacts, such as the distance at which the persons live from each other, the strued. course of the post, and all other circumstances applicable to the case; but when these facts have been ascertained, the reasonableness of the time becomes a question of law, and consequently to be determined by the court. and not the jury (f).

If notice of the non-payment of a foreign bill is to be given to a person Notice of in this country, the time of giving it would, it should seem, be governed by Non-paythe rules and practice applicable to inland bills and notes(g). But if the
Foreign notice is to be forwarded to a drawer or indorser abroad, then it will be Bill most safest if it be sent by the very next regular post or ordinary conveyance. be forIt has indeed been said, that notice *ought to be forwarded on the very day next Post of refusal, if any post or ordinary conveyance sets out on that day(h); and or regular if not, then by the next earliest ordinary conveyance(i). And unquestiona- Conveybly if such expedition can be effected, it is advisable to send off notice by ance. the foreign post of the same day, especially if there should be no foreign post to the same place for some considerable time afterwards. But if the reasoning in some of the cases on inland bills be not inapplicable, it should seem that there is no legal necessity for a holder omissis omnibus aliis negotiis, to

(c) Darbishire v. Parker, 6 East, 8, 14, 16; 2 Smith, 195, (Chit. j. 707); Haynes v. Birks,

3 Bos. & P. 601, (Chit. j. 690). (d) Goodman v. Harvey, 4 Ad. & El. 870;

6 Nev. & Man. 372; anle, 464, note (m). (e) Tindal v. Brown, 1 T. R. 168, (Chit. j.

431). (f) Ante, 837, 879. Fer Ld. Mansfield, C. J. and Boller, J. in Tindal v. Brown, 1 T. R. 168, (Chit. j. 431); Darbishire v. Parker, 6 East, 3, 9, 10, 12; 2 Smith, 195, (Chit. j. 707); post, 485, note (k): Haynes v. Birks, 8 B. & P. 599, (Chit. j. 690); post, 488, note (r); Browning r. Kinnear, Gow, N. P. Rep. 81, (Chit j. 1054); acc. ante, 454, note (a).
Bateman v. Joseph, 12 East, 433, (Chit. j.
S01); 2 Campb, 461, S. C.; ante, 327, n. (s); see also per Groso, J. in Scott v. Lifford, 9 East, 847; 1 Campb. 246, (Chit. j. 747, 749); Sturges v. Derrick, Wightw. 76, (Chit. j. 800). In America also, the same general rule, in dif-ferent terms, has been laid down. The question of reasonable notice is a compound of law and fact, to be submitted to a jury;" per Kent, C. J. in Taylor v. Bryden, 8 Johns. R. 138. "What is a reasonable notice is a question of law, to be decided by the court as econ as the facts necessary to the decision are ascertained;"

per Sewell, J. in Hussey v. Freeman, 10 Mass. R. 84; and see Huddock v. Murray, 1 N. Hamp. Rep. 140; Whitwell v. Johnson, 17 Mass. R. 453. "What is reasonable is a mixed question of law and fact, but when the facts are ascertained, it becomes purely a question of law;" Spencer, J., Bryden r. Bryden, 11 Johns. R. 137. In some other cases it was considered a question of fact; Bayl. 144, Amer. edit. And in Russell v. Langstaffe, Dough. 514, 515, (Chit. j. 415), it was admitted by counsel, that what shall be deemed reasonable notice ought properly to be decided by the jury.

(g) In Rothschild v. Barnes, 2 Jurist, 1084, Q. B., it was doubted at what time notice of dishonour should be given to an English indorser of a bill drawn upon and dishonoured by a party in Paris; and also whether a custom could be established to vary the time for giving notice of dishonour in such a case from both the English rule and the French law.

(h) Leftley v. Mills, 4 T. R. 174, (Chit. j. 473); Anon. Ld. Raym. 743, (Chit. j. 216); Coleman v. Sayer, 2 Stra. 829, (Chit. j. 267); Mar. 97.

(i) Muilman v. D'Eguino, 2 Hen. Bla. 565, (Chit. j. 549); Williams v. Smith, 2 Bar. & Ald. 496, (Chit. j. 1055).

and necessary Proceedings thereon.

Time of protesting Inland Bills.

I. (X Non- devote himself in such hurry to the causing protest to be made, and forwarding notice by post of the same day in every case (k).

> We have seen, that by the express terms of the statute 9 & 10 Will. 3, c. 17, no inland bill can be protested until the expiration of the days of grace, and of course neither the protest can be made, or notice thereof given, until the day after it falls dae(l). If such a protest be made, though unnecessarly so, the same, with notice thereof, is by the 2d section of the same act, to be forwarded, within fourteen days after it was made, to the parties for whom it is intended.

. When to where a Inland Bill or Note due on Good Friday, &c.

The 7 & 8 Geo. 4, c. 15, provides, that when a bill or note would be protest and give Notice payable, under the 39 & 40 Geo. 3, c. 42, or otherwise on the day preceding Good Friday or Christmas-day, it shall not be necessary to give notice Foreign or of the dishonour thereof, until the day after such Good Friday or Christmasday, and that when Christmas-day falls on a Monday, it shall not be neceswould oth-sary to give notice of the dishonour of a bill due on the preceding Saturday, erwise fall before the Tuesday following such Christmas-day; and that when bills or notes shall fall due upon days appointed by proclamation for solemn fasts or days of thanksgiving, or upon the day next preceding the same, the bills shall be payable the day before such proclaimed day, and may, in case of nonpayment, be noted and protested on such preceding day; and that it shall not [*480] be necessary to give notice of the dishonour until the day after such *proclaimed day, and that Good Friday and Christmas-day, and every such Fast or Thanksgiving-day shall, as relates to bills and notes, be considered as a Sunday(m). But these regulations do not extend to Scotland(n). The Irish Act 9 Geo. 4, c. 24, however, contains similar provisions(0).

Time when Notice of Non-pay-Inland Bill or Note may and must cessaryEv-

We will now consider the time when notice of the non-payment of an inland bill, check, promissory note, or cash note, may and must be given. It must be kept in view, that it is incumbent on the holder to prove distinctly ment of an and by positive evidence, that due notice of the non-payment was given to the party sued, and that it cannot be left to inference or presumption(p).

be given, 246, (Chit. j 747, 749); Geill v. Jeremy, and the ne- Mood. & M. 61, (Chit. j. 1335). (1) The words of the statute 9 & 10 Will. idence of 3, c. 17, s. 1, which enable holders to make the fact to protest of bills are, "after the expiration of the be secured. days of grace: see ante, 465; and see Leftley
v. Mills, 4 T. R. 170, (Chit. j. 473). An inland bill for 201. 7s., payable fourteen days after sight, became due the 24th of April, 1790. A banker's clerk called with it for payment in the morning, and the acceptor not being at home, left word where it lay. After six, another of the clerks, who was a notary, noted it, and between seven and eight the first clerk went with it again; the acceptor tendered him the amount of the bill and sixpence over, but he insisted on 2s. 6d. for the noting, and that sum not being paid, an action was brought against the acceptor, who pleaded the tender. Lord Kenyon thought the tender of the amount of the bill at any time of the day it was payable was sufficient, upon which the jury found a verdict for the defendant. A rule to show cause why there should not be a new trial was afterwards granted, and upon cause

(k) Scott v. Lifford, 9 East, 347; 1 Campb.

shewn, Lord Kenyon thought the acceptor had till the last minute of the day of grace to pay the bill, and that it could not be noted or protested till the following day. Buller, J. thought they were payable at any time of the last day of grace upon demand, so as such demand was made within reasonable hours, and that they might be protested on that day. Grose, J. declined giving any opinion upon these points, but the whole court concurred that the bill in question could not be noted, because it was payable within a limited time after sight, and the stat-nte authorises the noting of such inland bills only as are payable after date. Lord Kenyon also thought the sixpence tendered was sufficient for the noting, and the rule was discharged. Semble, that the expenses of noting an inland bill are not recoverable; Kendrick v. Lomax, 2 C. & J. 407. Lord Tenterden invariably refused to allow them.

(m) 7 & S Geo. 4, c. 15, ss. 1, 2, 3.

(n) Id. s. 4.

(o) 9 Geo. 4, c. 24, ss. 9, 10, 11.

(p) Lawson and another, assignees of Schiffper r. Sherwood, I Stark. Rep. 314, (Chit. j. 959). In an action by indorsee against indors-

So the party who puts a letter, giving notice of the dishonour of a bill, into L Of Nonthe post-office, must be able to swear with certainty that he put the letter in payment, himself, and not that he was doubtful whether he did not deliver it to another sary Proclerk to put it in(q); but if a porter be called, and he says, that although he ceedings has no recollection of the letter in question, yet that he invariably carried to thereon. the post-office all the letters found on his master's table, and another witness prove that a particular letter, giving notice, was so left, that may suffice (r). So with respect to the time of the day when a letter forwarding notice is put into the post-office, if the witness be doubtful whether it was in before or after five o'clock, when it is material that it was before that hour, the jury will probably find against the plaintiff(s). We have suggested the expediency of giving the notice in such a manner as to prevent any multiplicity of witnesses or proof(t). If the notice of dishonour sent to the drawer of a bill arrives too late through misdirection, it is for the jury to say whether the holder used due diligence to find the drawer's address (u). And where notice reaches the drawer of a bill too late, having first by mistake been sent to a wrong person, and such mistake arises from the indistinctness of the drawer's writing on the bill, he is not discharged (x). And a letter written by the drawer to the holder of a bill, six days after the day on which the drawer should have received notice of dishonour, and containing ambiguous expressions respecting the non-payment of the bill, was held to be properly left to the jury as evidence from which they might or might not infer that notice had been given on the proper day (y).

It was once thought, that it would be sufficient to charge the *drawer if Progress of notice of the dishonour of a bill were given to him even at the end of two the general months, unless he had in the interim sustained some actual damage by the the Time But such a delay has long been considered inexcusable; and a of giving general rule was laid down, as in the case of foreign bills, that the notice Notice of must be given within a reasonable time(u). However, courts and juries, in Bill or the application of that general rule, gave very contradictory verdicts and Note. decisions, and until recently there was much uncertainty in the result; but [*481] now precise rules have been fixed, which will probably govern in every case that can arise.

Rules as to Inland Bills

may be

It seems, that a prospective notice that a bill or note will not be paid, re-Present

er, a witness stated that either two or three days after the dishonour of the bill, notice was given by letter to the defendant, notice in two days being in time, but notice on the third too late; and it was held, that it cannot be left as a question for the jury whether notice was given in time, although the defendant has had notice to produce the letter which would ascertain the time. Per Lord Ellenborough: "The witness says two or three days, but the third day would be too late. It lies upon the plaintiff to shew that notice was given in due time, and I cannot go upon probable evidence without positive proof of the fact, nor can I infer due no-tice from the non-production of the letter, the only consequence is, that you may give parol evidence of it. The onus probandi lies upon the plaintiff, and since he has not proved due notice, he must be called." Plaintiffs nonsuited.

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(q) Hawkes v. Salter, 4 Bing. Rep. 715; 1 Moore & P. 750, (Chit. j. 1387).

(r) Hetherington r. Kemp, 4 Campb. 192, and Notes. (Chit. j. 932); see further, post, Part II. Ch. Notice V. Evidence.

(s) Dobree v. Eastwood, 3 Car. & P. 250, given on Chit i. 1370); post, 491, note (s), et seq. Day when (Chit. j. 1370); post, 491, note (s), et seq.

Bill or Note (t) Ante, 471, end of note (t). (u) Siggers r. Brown, 1 Mood. & Rob. 520; due, but see ante, 474, as to the manner of directing a not before. letter containing notice of dishonour.

(x) Hewitt v. Thompson, 1 Mood. & Rob.

(y) Booth r. Jacobs, 3 Nev. & Man. 351. (z) Butler v Play, ! Mod. 27, (Chit. j. 161); Sharfield r. Witherby, Comb. 152, (Chit. j. 171); Mogadara v. Holt, 1 Show. \$18; 12 Mod. 15, (Chit. j. 182).

(a) See ante, 478; and Darbishire r. Parker, 6 East, 5; 2 Smith, 195, (Chit. j. 707); post, 485, note (k); Baldwin v. Richardson, 1 Bar. & Cres. 247; 2 D. & R. 285, (Chit. j.

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payment, and necessary Proceedings thereon.

1. Of Non ceived before it falls due, will not, in general, suffice, because by application and pressure of payment, it is possible that payment might, notwithstanding such previous intimation, be obtained, and this is one reason why the circumstance of an acceptor having, before a bill became due, informed the drawer of his insolvency and inability to pay, affords no excuse for want of regular notice, unless the drawer has expressly dispensed with the necessity for giving notice(b); and this although the drawer, being informed the day before the bill fell due, that the acceptor would not pay, promised to see what he could do, and endeavour to provide effects(c). However, where the drawer of a bill became bankrupt, and subsequently to the act of bankruptcy, and before it fell due, the drawer, on being asked if the bill would be paid, answered, "No; that it would come back;" it was held that this was sufficient to supply the want of notice(d). So if an indorser, the day the bill falls due, call on the holder and tell him that he knows the bill will not be paid, that it is no use sending him a two-penny post letter the next day to give him notice, as it is not worth the money, and that he will send the holder money in part payment of the bill on a future day, this will dispense with notice(e).

It has been doubted, whether in the case of an inland bill or promissory note payable after date or sight, or on a particular event, the holder can legally give notice of the non-payment on the day when it falls due, or whether the drawee or maker is not entitled to the whole of that day to pay it in, without any reference to banking hours; and whether it can be considered as But though in dishonoured until the whole of that day has elapsed (f)(1). general, when a payment is to be made on a day certain, the party is not in default until the expiration of it, the law-merchant considers the contract of an acceptor of a bill or maker of a note to have been to pay on demand, at any part of that day, and therefore it seems clear, that notice of non-payment may be given on the last day of grace, whenever after due presentment and demand, the drawee makes an unqualified refusal to pay at all (g). [*482] *in a more recent case it was held, that notice of dishonour may be given on the same day that the bill falls due, although there may not have been an absolute refusal, but a mere neglect to pay on presentment(h). If the house at which the bill is made payable be shut up, and no one there, it is the same It should seem, that in these cases of notice of dishonour

given on the day on which the bill is payable, the notice will be good or bad as the acceptor may or may not afterwards pay the bill: if he does not after-

(b) Staples v. Okines, 1 Esp. Rep. 332, (Chit. j. 544); Prideaux v. Collier, 2 Stark. Rep. 37, (Chit. j. 989)

as a refusal(i).

(c) Prideaux v. Collier, 2 Stark Rep. 57, (Chit. j. 989.)

(d) Brett v. Levett, 13 East, 213, (Chit j.

(e) Burgh v. Legge, 5 M. & W. 418; and see other cases, ante, 451. But in these cases of dispensation with notice care must be taken in pleading to state specially the facts relied upon as shewing such dispensation, and a general allegation of notice will not suffice. Id. ib. See post, Part II. Ch. II. Declaration.

(f) Leftley v. Mills, 4 T. R. 170, (Chit. j.

473); ante, 465; Haynes v. Birks, 3 Bos. & P. 602, (Chit. j. 690); Colket v. Freeman, 2 T. R. 59, (Chit. j. 441); Hartley v. Case, 1 Car. & P. 555; 4 B. & C. 339; 6 Dowl. & Ry. 505, (Chit. j. 1268).

(g) Burbridge v. Manners, 3 Campb. 195, (Chit. j. 855); Ex parte Moline, 19 Ves. 216; 1 Rose, 303, (Chit. j. 871); ante, 397, n. (o); Hartley v. Case, 1 Car. & P. 556; and other cuses, ante, 467.

(h) Clowes v. Chaldecott, 7 Law J. 147, K. B. H. T. 1839.

(i) Hine v. Allely, 4 Bar. & Adol. 624; 1 Nev. & Man. 433, S. C.

^{(1) {} In the case of Haslett v. Ehrick, 1 Nott & M'Cord, 116, it was held that a notice on the third day of grace, after bank hours, was not too early. >

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wards pay it, the notice is good; and if he does, it of course comes to noth- I. Of Non-A premature notice, we have seen, would be inoperative(1).

and Necessary Pro-

It is settled, that it is never necessary to give or forward notice of the non-ceedings payment on the same day when a bill or note falls due(m)(1), whether the thereon. instrument was circulated only in London or in the country, and whether or But it is nonot the drawer or indorsers reside in the same town where the dishonour sery to fortook place, and this without regard to the nearness of residence, or whether ward Noor not the holder might readily have given the notice, or put a letter in the tice on post on that day, or whether or not a post goes out from the place of dis- Bill or honour on the same day, or not until or after the third day (n). In all these Note falls cases, it suffices to cause notice to be received on the next day, by the pre- due, and ceding indorser, when resident in or near the same place; and where the par-But it must ties do not reside in or near the place of the dishonour, it suffices to forward be given or notice by the general post that goes out on the day after the refusal, or if forwarded there be no post on that day, then on the third day, though thereby the On next drawer or indorser may not, in fact, receive notice till the third day, or sometimes, according to the course of the post, not until the fourth or even sub-The reason why it has been decided that it shall in no case be necessary to give notice on the day of the dishonour, or on the same day when an indorser receives notice, although the indorser may even live in the same street as the holder, and although the post may go out on the same day, and not on the next, is to prevent nice and difficult inquiries whether or not in this or that particular case, the holder could conveniently have given notice on the same day, or whether the pressure of other business did not prevent him from so doing, the affirmative or negative of which might be in the knowledge only of the holder himself, or might become a very critical inquiry, and be very difficult and uncertain in legal proof. Another reason is, that the holder ought not to be required omissis omnibus aliis negotiis to occupy himself immediately in forwarding notice to the prior parties, when by delaying that step till the next morning, he would, after the press of other business had subsided, have in the evening, or early the next morning before his general business commences, time to look into his accounts with the other parties, and to consider his best steps to obtain payment from them, and to ascertain their precise residences, and to prepare and forward, either

Corp v. M'Comb, 1 John. Ca. 328.

Where a dishonored note was left with the inderser, who was an attorney, to collect the same, this was held not to be a sufficient notice to charge him as indorser. Agan v. M'Manus, 11 John.

⁽k) See per Abbot, C. J. in Hartley v. Case, 1 Car. & P. 556.

⁽¹⁾ Ante, 475. (m) Darbishire v. Parker, 6 East, 8, 9, 10; 28mith, 195, (Chit. j. 707); Tindall v. Brown, 1 T. R. 168, 169, (Chit. j. 431); Russell v. j. 1335); post, 486, note (l).

Langstaffe, Dougl. 515, (Chit. j 415); Muilman r. D'Eguino, 2 Hen. Bla. 565, (Chit. j. 540; Burbridge r. Manners, 8 Campb. 198, (Chit. j. 859); anle, 481, note (g).
(n) Geill r. Jeremy, Mood. & M 61, (Chit.

⁽¹⁾ But it has been held in Mussachusetts that where the indorser lives in the same town with the promissor, he ought to have notice on the same day on which there is a demand and refusal of payment. Woodbright v. Brigham, 12 Mass. Rep. 403. But see Langdale v. Trimmer, 15 East, 291. Bennett c. Raugh, 2 Taunt Rep. 387. And it is certain that if default be made in the payment of a note the day on which it becomes due, a notice to, and demand on, the indorsers afterwards on the same day is not too early. Widgery v. Munroe, 6 Mass. Rep. 449.

Rep. 180.

The holder of an inland bill or note is not obliged to send notice of non-payment until the next.

The holder of an inland bill or note is not obliged to send notice of non-payment until the next.

Steadman 3 Conn. Rep. 489; but if demand has been dny after its dishonor. Hartford Bank r. Stedman, 8 Conn. Rep. 489; but if demand has been made on the maker of a note on the third day of grace, notice to the indorser may be given on that day, and is sufficient. Lindenberger c. Beall, 6 Wheat. 104.

and necessary Pro-

ceedings thereon.

But the Holder must give or forward Notice the Day after the Disbonour.

I. Of Non- by hand or by *such next day's post, a proper notice to all the parties against whom he means to proceed to enforce payment(o)(1).

> But the rule is now well settled, that the holder must, in order to subject all the parties to actions at his suit, give or forward all his notices to every one of the indorsers, and to the drawer, whose residences he can ascertain on the day after the bill or note was dishonoured; and if he omit to give or forward such direct and distinct notice to each, he may be deprived of all remedy against the omitted party (p)(2), unless some other party to the bill has given him notice of the dishonour in due time, in which case the latter notice will enure to the benefit of any holder (q). Formerly, indeed, it seems, that when notice was to be given by the general post, it was considered that a party ought to forward it on the same day he had received it, if there was a reasonable time, as a few hours, between the receipt of the notice and the going out of the post from the same place; thus, Mr. Justice Lawrence said. "The general rule as collected from the cases seems to be, with respect to persons living in the same town, that the notice shall be given by the next day; and with regard to such as live at different places, that it should be sent by the next post (i. e. the post on the very day of receiving it); but that if in any particular place, the post should go out so early after the receipt of the intelligence, as that it would be inconvenient to require a strict adherence to such general rule, then with respect to a case so circumstanced, it would not be reasonable to require the notice to be sent till the second post(r)." But the inquiry into circumstances whether or not the notice might readily have been forwarded by the post of the same day having been found inconvenient, the rule was afterwards settled so as always to exclude the necessity of forwarding notice until the day after a party has himself received notice(s); and therefore Lord Tenterden, long after the above dictum of Lawrence, J. said, "The time within which notice of the dishonour of a bill must be given, I have always understood to be the departure of the post on the day following that in which the party receives the intelligence of the dishonour(t)."

Distinction whether Parties reside in or near same Place or not.

But there is a very material distinction in the time of giving or forwarding notice in cases where the parties reside in or near the same town, and when notice may be readily given on the day after the dishonour or notice of it, either verbally or by special messenger, or by local post, and cases where the parties reside at a distance, and when the ordinary mode of communication is by general post.

(o) See the reasons assigned in Smith v. Mullett, 2 Campb. 208, (Chit. j. 775); post, 484, note (u), and 490, note (o); Scott v. Lifford, 9 East, 347; 1 Campb. 246, (Chit. j. 747); Williams v. Smith, 2 Bar. & Ald. 496, (Chit. 1055); Geill v. Jeremy, Mood. & M 61, (Chit. j. 1835); post, 486, note (l).
(p) Dobree v. Eastwood, 3 Car. & P. 250,

(Chit. j. 1370).

(q) Post, 493 to 496.

(r) Per Lawrence, J. in Darbishire v. Park-

er, 6 East, 3; 3 Smith, 195, (Chit. j. 707).
(2) Geill v. Jeremy, MS. and Mood. & M. 61, (Chit. j. 1335); post, 486, note (1). (t) Id. ibid. Per Abbott, C. J. in Williams

v. Smith, 2 Barn. & Ald. 500, (Chit. j. 1055); and Bray v. Hadwen, 5 Maule & S. 68, (Chit. j. 957).

of business. Bank of Alexandria v. Swann, 9 Peters' Rep. 33.
(2) { Lenox v. Roberts, 2 Wheat. 377; Bank of Alexandria v. Swann, 9 Peters, 33; TownsJey v. Springer, 1 Miller's Louis. Rep. 122. }

⁽¹⁾ The law does not require the utmost possible diligence in the holder in giving notice of the dishonor of the note; all that is required is ordinary diligence; and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience, and the usual course

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Thus, when the parties reside in the same town, the holder or other per- I. Of Nonson to give the notice must, on the day after the dishonour, or on the day payment, after he received the notice, cause notice to be actually forwarded by the sary Propost or otherwise, to his next immediate indorser, sufficiently early in the ceedings day that the latter may actually receive the same(u) *before the expiration thereon. of that day; and therefore in London, if a letter containing such notice be Where the put into the post-office after six o'clock in the afternoon of the second day, Parties reand in consequence thereof it is not received till the morning of the third day, near the the party who ought to have actually received the notice on the second day same will be discharged (v). But where a bill fell due on Saturday, and was pre-Town. sented by a notary, and dishonoured; and on Monday morning notice of the [*484] dishonour was given by the notary to the holder (the first indorsee), who, on the evening of the same day gave notice to the drawer by a letter put into the two-penny post so late that it did not reach its destination till the Tuesday morning, all the parties being resident in London, it was held that the notice was in time (x). In London, letters put into the local post (usually termed the two-penny post) are delivered in the metropolis six times within the same day that they were put in, viz. at ten, twelve, two, four, six, and eight o'clock; and, therefore, letters put into the post-office or a receivinghouse, any hour before six o'clock in the evening, ought regularly to be delivered on the same day; but letters not put into the post-office until after six o'clock in the evening, will not be delivered until eight o'clock on the following morning: when out of the metropolis, and within twelve miles, there are only four deliveries in each day to and from the metropolis, viz. at eight, twelve, two, and six o'clock, and a letter put into any proper office in London before two(y) o'clock in the afternoon, will be delivered on the same day, at any place within such distance of twelve miles; and a letter put into a country office within that distance before two o'clock, ought properly to be delivered in London on the same day. The holder or party forwarding the notice may give it verbally, or he may put a letter into the two-penny post, directed even to an indorser who resides in the same street(z). If he send notice by a private hand, it must be given or left at

(u) Smith v. Mullett, 2 Campb. 208, (Chit. j. 775); post, 490, note (o); Dobree v. Eastwood, 3 Car. & P. 250, (Chit. j. 1370); post, 491, note (s), et seq. How letter to be addressed, anie, 474; and see anie, 480.

Smith v. Mullett. Per Lord Ellenborough: " It is of great importance that there should be an established rule on this subject, and I think there can be none more convenient than that, where the parties reside in London, each party should have a day to give notice. I have said before, that the holder of a bill of exchange is not, omissis omnibus aliis negotiis, to devote himself to giving notice of its dishonour. It is enough if this be done with reasonable expedition. If you limit a man to a fractional part of a day, it will come to a question how swiftly the notice can be conveyed; a man and horse must be employed, and you will have a race against time. But here a day has been lost. The plaintiff had notice himself on the Monday, and does not give notice to his indorser till the Wednesday. If the party has an entire day, he must send off his letter, conveying the notice, within post time of that day." The plaintiff was nonsuited. See the case, post, 490, n. (o).

Edmonds v. Cates, cor. Lord Abinger, C. B., 2 Jurist, 515. Plaintiff, the indorsee of a pro-

missory note, the day after it has been dishonoured writes to the defendant, the payee and indorser, who lives in the same city, a letter containing a notice of dishonour, which letter is put into the two-penny post before 8 P. M. on that day, but is not delivered till the day after, of which it bears the post-mark, 8 A. M.; this notice is not in time.

(v) Id. ibid.; Bayl. 5th edit. 268; Smith v. Mullett, post, 490, note (o). See as to country post, Boyd r. Emmerson, 4 Nev. & Man. 99;

2 Ad. & El. 184, S. C.; ante, 473, note (i). (x) Poole r. Dicas, 1 Scott, 600; 1 Bing. N. C. 649; 1 Hodges, 162, S. C. Semble, that it would have sufficed to have put the letter into the post on Tuesday in time to be received on that day. See post, 490.

(y) Or if put into the principal office, then before three o'clock.

(z) Scott v. Lifford, 9 East, 347; 1 Campb. 249, (Chit. j. 747), S. C.; Smith v. Mullett, 2 Campb. 208, (Chit. j. 775); Marsh v. Maxwell, 2 Campb. 210, (Chit. j. 776); Jameson r. Swinton, 2 Campb. 374, (Chit. j. 782); Hilton v. Fairclough, 2 Campb. 633, (Chit. j. 826); Haynes r. Birks, 3 Bos. & Pul. 599, (Chit. j. 690); Williams v. Smith, 2 Bar. & Ald. 500, (Chit. j. 1055).

and necessary Proceedings thereon. [*495]

I. Of Non- the indorser's residence before the expiration of that day(a); if to a banker, payment, during the hours of business; but to any other person the hour is not material(b). If by an irregularity in the post-office, a letter put in *in due time be not delivered till the third day, it should seem that such laches will not prejudice(c).

Hour of the Notice to be given.

As the giving notice of non-payment is not a mere form or ceremony, like Day when that of protest, it ought obviously, if practicable, to be so given as to be actually received; and though, when considering the mode of giving notice, we have seen that it is not absolutely necessary to leave a written notice, and that it suffices to make a verbal application during the usual hours of business(d); yet it is recommended to leave a written notice when an actual notice cannot be personally communicated to the party himself. cases, where the indorser's residence is unknown, but he is known to resort, during certain hours, to a particular place, as to the Royal Exchange, the Bank of England, Corn Exchange, or any public office, the notice ought to be given during those hours(e); and to bankers who are known to shut up their place of business at a certain hour, notice ought to be given there before that hour, though if a person be stationed there to transact business after that time, notice to him would suffice (f)(1). In other cases notice, or application to give notice, at any reasonable time, (not during the hours of rest), as between eight and nine in the evening, would suffice (g). Sending notice by a messenger, instead of the post, although he do not arrive quite so early as the post, will not prejudice, provided he deliver the notice on the same day as that on which it would have arrived by the post(h).

Where the Parties do not reside in or near the same Town.

When the parties do not reside in the same place, and the notice is to be sent by the general post, then the holder or party to give the notice must take care to forward notice by the post of the next day after the dishonour, or after he received notice of such dishonour, whether that post sets off from the place where he is early or late(i); and if there be no post on such next day, then he must send off notice by the very next post that occurs after that [*486] day(k); but he is not legally bound, on *account of there being no post on

(a) Bancroft v. Hall, Holt, C. N. P. 476, (Chit. j. 968).

(b) Jameson v. Swinton, 2 Taunt. 224; 2 Campb. 373, (Chit. j. 782); Bancroft v. Hall, Holt, C. N. P. 476, (Chit. j. 968).

(c) Dobrec v. Eastwood, 3 Car. & P. 250, (Chit. j. 1370); post, 491, note (s), et seq.

(d) Ante, 471, 472; Crosse v. Smith, 1 Maule & S. 545, (Chit. j. 886).

(e) Semble, with analogy to the cases as to the time of presentment, ante, 387; and see Bancroft v. Hall, Holt, C. N. P. 476, (Chit. j. 968); ante, 473, note (g).

(f) Semble, from analogy to cases of presentment for payment, ante 387; Parker v. Gordon, 7 East, 385; 3 Smith, 358; 6 Esp. 41, (Chit. j. 727); Garnet v. Woodcock, 1 Stark. Rep. 475; 6 Maule & S. 44, (Chit. j. 979, 981); ante, 387, note (m).

(g) Jameson v. Swinton, 2 Taunt. 224,

(Chit. j. 782); Bancroft v. Hall, Holt, C. N. P. 476, (Chit. j. 968); ante; 473, note (g). See also the cases of presentment for payment, ante, 387, 388; Barclay v. Bailey, 2 Campb. 527, (Chit. j. 818); Morgan v. Davison, 1 Stark. Rep. 114.

(h) Bancroft v. Hall, Holt, C. N. P. 476, (Chit. j. 968); ante, 473, note (g). Aliter if a day be lost. See Darbishire v. Parker, 6 East, 8, 9; 2 Smith, 195, S. C.; Bayl. 5th edit. 230.

(i) Darbishire v. Parker, 6 East, 3; Bray v. Hadwen, 5 Maule & S. 68, (Chit. j. 957); Williams v. Smith, 2 B. & Al. 496, (Chit. j. 1055)

(k) Darbishire v. Parker, 6 East, 8; 2 Smith, 195, (Chit. j. 707); and see Boyd v. Emmerson, 4 N. & M. 99; 2 Ad. & El. 184, S. C.; ante, 473, note (i). Caution required in directing letter, ante, 474; and see ante, 480.

⁽¹⁾ The law generally speaking does not regard the fractions of a day; and although the demand of payment of a promissory note at the bank is required to be made during banking hours, it would be unreasonable to require notice of non-payment to be sent to the indorser on the same day. Bank of Alexandria v. Swann, 9 Peters, 33.

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the day after he receives notice, to forward it on the very day he receives I. Of Nonit(l).

s I. Of Nonpayment, and necessary Proceedings thereon.

Where notice of the dishonour of a bill of exchange by the acceptor, in London, was sent by the post to the holder in Manchester, where the letter was delivered out between eight and nine o'clock' in the morning, and the post went out for Liverpool, where the drawer lived, between twelve at noon and one, and the holder did not send notice to the drawer by the post either of the same day or next, but sent it in a letter by a private person on the latter day, who did not deliver it to the drawer till two hours after the post delivery, and only about one hour before the post left Liverpool for London, whereby the drawer was so agitated that he could not write in time for that day's post to London; it was holden, that at all events the holder had made the bill his own by his laches; for whether reasonable notice be a question of law or of fact, or whether the general rule of law require notice of the dishonour of a bill to be sent to a party living at another place by the next post after it is received, (by which must be understood the next practicable post in point of time and distance,) and whether four hours between the coming in and going out of the post be a sufficient interval in point of practical convenience to receive the notice, and to prepare a letter of advice to the drawer, at all events the holder ought to have written by the post of the next day after notice received by him, and ought not to have delayed the receipt of notice by the drawer until after the arrival of the next post, by sending the letter by a private hand. Darbishire v. Parker, 6 East, 3.

Where the parties do not reside in the same place, and the notice is sent by the post, the rule is, that it is sufficient to send it by the post of the day after that on which the party for-warding it receives the notice of dishonour, although the post may leave on the day upon which he receives it, in sufficient time to afford him an opportunity of sending the notice by that post. Thus, where the indorsee of a bill, payable at a banker's in London, deposited it with his bankers in the country, who caused it to be presented for payment on the 14th, when it was dishonoured, and notice sent by post to the country bankers on the 15th, which reached them on the morning of the 17th, (Sunday,) and they on the next day sent notice by the post to the plaintiffs, but not before twelve at noon, at which hour a post set out for the place where the indersee lived, which would have brought the notice a day earlier, it was held that this notice was within time. Per Lord Ellenborough, "It has been laid down, I believe, since the case of Darbishire v. Parker, 6 East, 3, as a rule of practice, that each party into whose hands a dishonoured bill may pass should be allowed one entire day for the purpose of giving notice; a different rule would subject every party to the inconvenience of giving an account of all his other engagements, in order to prove that he could not reasonably be expected to send notice by the same day's post which brought it. The rule is, I believe, in conformity with what

Murins states upon the subject of notice, and it ceedings has been uniformly acted upon at Guildhall by thereon, this court for some time. It has, moreover, this advantage, that it excludes all discussion as to the particular occupation of the party on that day." Bray v. Hadwen, 5 Maule & S. 68, (Chit. j. 957).

Where the defendant being indebted to plaintiff, paid him the debt in country bank notes on a Friday, several hours before the post went out, and the plaintiff transmitted them partly by a couch on Saturday, and partly by Sunday night's post, and both parts arrived in London on Monday, and were presented for payment and dishonoured on Tuesday, it was held that the plaintiff had not been guilty of laches in not transmitting the notes by the post of Friday. Per Abbott, C. J. "It is of the greatest importance to commerce, that some plain and precise rule should be laid down to guide persons in all cases as to the time within which notices of the dishonour of bills must be given. That time I have always understood to be the departure of the post on the day following that in which the party receives the intelligence of the dishonour. If, instead of that rule, we were to say that the party must give notice by the next practicable post, we should raise in many cases difficult questions of fact, and should, according to the peculiar local situations of parties, give them more or less facility in complying with the rule. But no dispute can arise from adopting the rule which I have stated." Williams v. Smith, 2 Bar. & Ald. 496, (Chit. j. 1055).

Where notice of dishonour of a bill was received by plaintiff by letter on the 6th April, being a Sunday, and on the Tuesday evening he sent notice by the post to the defendant, the court held that the plaintiff was not bound to open the letter till the Monday morning, and that taking him to have received notice of the dishonour at that time, he had done quite sufficient in transmitting it to the defendant by the next day's post. Wright v. Shaweross, 2 B. & Ald. 501, note, (Chit. j. 1057); and see Langdale v. Trimmer, 15 East, 293, (Chit. j. 837); Malynes, B. 3, c. 6, s. 1, 1st edit. 265; Mar. 2d edit. 24; Bayl. 5th ed. 268.

(1) Geill v. Jeremy, Mood. & M. 61, (Chit. j. 1335).

Geill r. Jeremy and Blagg, Guildhall, Sittings after Hilary Term, 1827, before Abbott, C. J. MS. Assumpsit on a bill for 491. 6s. 10d. at four months, drawn by defendants on Shepherd, indorsed by defendants to plaintiff, at Lowe Mills, near Chorley, Lancashire, who indorsed the said bill to Messrs. Clayton and Co., Bankers, at Pieston, who indorsed the same to Messrs. Glynn and Co., Bankers, in London. On Saturday, the 26th August, 1826, the bill was presented for payment by Glynn and Co. at Shepherds, in Great Surry Street, Blackfriars Road, and dishonoured. On Monday, the 28th, Glynn and Co. sent the bill by post to Clayton and Co. at Preston; it arrived there on Wednes-

I. Of Nonpayment, and necessary Proceedings thereon.

tice by a Messenger sufficient.

*We have seen, when considering the modes of giving notice, that it may be given either by the post, or by a special messenger or private hand(m); but if, when there is a regular post, and the notice be nevertheless sent by a private conveyance, care must be observed that it arrive as soon, or at least on the same day that a notice by the post would have arrived(n). When No- be no post for a considerable time after a party receives notice, it may then be incumbent on him to forward notice to his immediate indorser by the next ordinary conveyance, or even by a special messenger, as in some parts of Yorkshire, where the manufacturers reside at a distance from the post town, and the letters might, if not so forwarded, lie for a long time before they are called for, in which case it may be necessary to send notice by a special messenger, and the expense of which would then be recoverable(o). notice be unnecessarily forwarded by a private hand or unusual conveyance, and miscarry, or be delayed a day beyond the usual time, the party giving the notice may thereby lose his remedies (p).

We have seen, that with respect to country bankers' notes, if they be delivered and received under ignorance of the banker having previously stopped payment, the holder must nevertheless, on the day after he receives them, either put them in circulation, or present them for payment, or return or offer to return them, or must, on the third day, forward notice of the non-

day. On the same day Clayton sent the bill in a letter by post to plaintiff, who resided at Lowe Mills, within about half a mile of Whittle-le-Woods, being a distance of two miles and a quarter from Chorley, the latter being the post town. Such letter arrived in Chorley at six o'clock on the morning of the following Thursday, the 31st August, and was thence transmitted by a foot-post (the usual conveyance between Chorley and Whittle-le-Woods, and which foot-post leaves Chorley at eight o'clock) to the residence of the plaintiff, who received such letter on Thursday aforesaid, about nine o'clock in the morning of that day; and it was admitted that he might have written and sent a letter by the return of the foot-postman on that day, he not leaving Whittle-le-Woods till six o'clock in the evening, or he might have sent a letter to the post-office, in Chorley aforesaid, on that day, which is open for the reception of letters until nine o'clock at night. And in case a letter had been written and so sent, such letter would have left the Chorley post-office by the mail on the Friday morning, between five and six o'clock, and would have arrived and been delivered in London on the morning of the following day, Saturday; but that no letter-bag is made up at Chorley on Fridays, so that if the plaintiff had written and sent such letter on the Friday, it could not, by the ordinary course of the post, have arrived and been delivered in London before Monday. On Saturday, the 2d September, the plaintiff wrote by the post to his agent in London, inclosing the bill, and such letter arrived on Monday morning, and the plaintiff's agent, on the same day, gave notice of the dishonour to the defendants

Mr. Storks, for the defendant, contended, that under these circumstances the defendants were discharged; but per
Abbott, C. J. "I consider the rule to be too

well settled to be disturbed, viz. That a party who receives notice of the dishonour of a bill is not bound, under any circumstances, to forward notice to the prior party on the same day, but may wait till the next day; and if no post proceeds from the adjacent town or village on such next day, it then suffices if he puts a letter in the post on any following day, so that it be forwarded by the next practicable post; and it sufficed in this case, that the plaintiff had put the letter in the post on the Saturday; for if he had done so on the Friday, it would not have been forwarded till the Saturday night, and it was immaterial whether the letter laid in the post-office or remained in the plaintiff's hands till the Saturday. In these cases it is of great importance to have a fixed rule, and not to resort to nice questions of the sufficiency in each particular case of a certain number of hours or The general rule is, that the party minutes. need not write on the very day that he receives the notice. If there be no post on the following day, it makes no difference. The next post after the day on which he receives the no-tice is soon enough." The plaintiff obtained a verdict. See the printed report of this case in Mood. & M. 61; see also Hawkes v. Safter, 4 Bing. 715; 1 M. & P. 750, (Chit. j. 1387).

(m) Ante, 471 to 475. (n) Darbishire v. Parker, 6 East, 8, 9; 2 Smith, 195, (Chit. j. 707); ante, 485, note (k); Bancroft v. Hall, Holt, C. N. P. 476, (Chit. j. 968); ante, 473, note (g); and see Boyd v. Emmerson, 4 Nev. & Man. 99; 2 Ad. & El. 184; anle, 473, note (i).

(o) Pearson v. Cranlan, 2 Smith's Rep. 404, (Chit. j. 715); ante, 474, note (o); Holdern v. Dalton, 1 Car. & P. 181, (Chit. j. 1204).

(p) Id. ibid. and ante, 472, note (f), 473, note (g); Beeching v. Gower, Holt, C. N. P. 315, (Chit. j. 966).

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payment, or he will be deprived of all remedy, except against the bankers I. Of Nonor their estate(a). and neces-

sary Pro-When notice of a bill having been dishonoured is received on a Sunday, ceedings it is to be considered as not received until the following Monday, and the thereon. party receiving it is not bound to open or attend to the letter giving him the Sunday is notice till the Monday; and although a post may go out on the latter day, he for receivis not legally bound to forward notice until the following Tuesday (r). There-ing or forfore, where a bill became due on "Saturday at Norwich, and was dishonour-warding ed, and the defendant, the drawer, lived near North Walsham, fourteen Notice, and is strictly miles from Norwich, and the post lest Norwich for North Walsham at half- Dies non

past nine in the morning, it was considered sufficient to put a letter into the [*488] nost-office at Norwich before the mail started on the Tuesday morning(s). And where the bankers of the holder of a bill received on a Sunday morning notice of its dishonour, which they wrote to apprize the holder of on Monday, but put the letter into the post after twelve o'clock at noon, at which time the mail started, so that it did not go till the next day, it was holden, that they were not obliged to open the letter on the Sunday, nor to attend to it, and that they had all Monday to write; and that as far as they were concerned, there had been no improper delay(t). The same point was decided in a subsequent case (u). We have also seen, that the statute 7 & 8 Geo. 4. c. 15, precludes the Good Frincecessity for giving notice of non-payment on Good Friday, Christmas-day, mas-day,

and Fast and Thanksgiving-days(x). And at common law, and independ- Fust and ently of that statute, if a notice be received on a Good Friday or Christmas- Thanksday, it is not to be considered as received until the next day, and notice days, Jewneed not be forwarded by the party who actually received it on one of those ish Festidays, until the third day afterwards (y). And in the spirit of toleration it has vals. &c.

(q) Camidge v. Allenby, 6 B. & C. 373; 9 Dowl. & Ryl. 391, (Chit. j. 1319); and Henderson v. Appleton, ante, 356, 357.

(r) Hawkes r. Salter, 4 Bing. 715; 1 Mon. & P. 750, (Chit. j. 1387); Wright r. Shaw-cross, 2 B. & Ald. 501, n.; Langdale r. Trimmer, 15 East, 293, (Chit. j. \$57); Haynes v. Birks, 3 B. & P. 599; and see Poole v. Dicas, 1 Scott, 600, ante, 484, n. (y).

Haynes v. Birks, 3 B. & P. 599, (Chit. j. A bill, indorsed in blank, was deposited by the holder with his bankers. It became due on Saturday, and was presented for payment about two o'clock on that day, and payment being refused, the bill was noted, and again presented between nine and ten in the evening by a notary, and on Monday the bankers informed the holder that the bill was dishonoured, who, on Monday, about moon, gave notice by the post to the indurser; and it appearing that the holder lived at Knightsbridge, and the indorser in Tottenham Court Road, it was holden that this notice was sufficient to entitle the holder to recover against the indorser; and Lord Alvanley, C. J. observed, that as soon as a banker is informed of the non-payment of a bill, it becomes his business to acquaint his principal of that circumstance; and that if a bill be returned to a banker, he is bound to give notice to his principal that very day, if he oan do so by using ordinary diligence (not so now); but that in the last-mentioned case it was impossible for the bankers on Saturday night to give notice to the plaintiff, since the bill was not presented by the notury till between nine and ten o'clock. On Sunday, of course, they were not bound to do so; and on Monday they did apprize the plaintiff of the non-payment; but it did not appear at what time on Monday the plaintiff received the no-tice. The plaintiff was not bound to be at home the whole of the day; and supposing him to have returned home late on that day, he was not bound to send a special messenger to the defendant. If he informed the defendant by the course of the post, it was sufficient. Certainly he was bound to write by the twopenny post on Monday (not so now); and supposing him to have done so, the defendant would only receive his letter on Tuesday. It appeared that on Tuesday he did receive the notice. The court could not so nicely measure the minutes as to consider whether the precise time of the receipt corresponds with the time at which a letter sent by the post on Monday night would arrive.

(s) Hawkes r. Salter, 4 Bing. 715.

(1) Bray v. Hadwen, 5 Maule & S. 63, (Chit. j. 957).
(u) Wright v. Shawerosa, 2 B. & Al. 501.

(x) Ante, 877, 378, 479

(y) Tassell v. Lewis, Lord Raym. 748,

ceedings thereon.

to a bill or Note has till the next day after he received Notice to give No-[*489]

I. Of Non- been held, that a Jew is not obliged to forward notice on the day of a great payment, Jewish festival, during which it is unlawful for any persons of that persuasary Pro- sion to attend to any sort of business(z).

It is usual for the holder only to give notice to the person from *whom Each Party he immediately received the bill or note, especially if he is ignorant of the residence of the other parties, and if so, his neglect to give notice to the other prior indorsers, and to the drawer, cannot, on any sound principle, deprive either of the indorsers of the right to proceed against the person who indorsed to him, and all prior parties, provided he in his turn has duly for-The rule is therefore clearly settled, that each party to a warded notice. bill or note, whether by indorsement or mere delivery, has in all cases, until the day after he has received notice, to give or forward notice to his prior indorser, and so on till the notice has reached the drawer(a)(1). rule is so strongly fixed, that a party receiving notice of the dishonour of a bill, need not give or forward notice to the party immediately before him, till the next post after the day on which he himself received notice, although he might easily have forwarded it on that day, and although there is no post on the day following (b). The reasons on which this rule is founded, are the same as those applicable to the first notice of dishonour(c). where a bill of exchange passed through the hands of five persons, all of whom lived in London or the neighbourhood, and the bill, when due, being dishonoured, the holder gave notice on the same day to the fifth indorser, and he, on the next day, to the fourth, and he, on the next day, to the third, and he, on the next day to the second, and he, on the same day to the first, the court were of opinion, on a case finding these facts, that due diligence had been used (d), indeed, both the first and last notices were given a day sooner than was requisite. The usual expression, is "each indorser has a day," and this is strictly correct when all the parties live in London; but

> (Chit. j. 192); Wright v. Shawcross, 2 Bar. & Ald. 501, (Chit. j. 1057, note); ante, 377, 378; Scott v. Lifford, 9 East, 347; 1 Campb. 246, (Chit. j. 747).

> (z) Lindo v. Unsworth, 2 Campb. 602, (Chit. j. 824); ante, 454, note (e). Per Lord Ellenborough: "The law required him to give notice with reasonable diligence, and I think he did so, if he sent off the letter as soon as he could after the determination of the festival, during which he was absolutely forbid to attend to secular affairs The law-merchant respects the religion of different people. For this reason we are not obliged to give notice of the dis

honour of a bill on our Sunday."

(a) Darbishire v. Parker, 6 East, 3; 2 Smith, 195, (Chit. j. 707); ante, 485, note (k); Smith v. Mullett, 2 Campb. 208, (Chit. j. 775); post, 490, note (o); Jameson v. Swinton, 2 Campb. 374, (Chit. j. 782); 2 Taunt 224, S. C.; post, 495, note (u); Bayl. 5th ed. 268.

(b) Geill v. Jeremy, Mood. & M. 61, (Chit.

j. 1335); ante, 486, note (l).

(c) Ante, 483, et seq. (d) Hilton v. Shepherd, 6 East, 14, (Chit. j. 710); Smith v. Mullett, 2 Campb. 208, (Chit. j. 775); and see Jameson v. Swinton, 2 Campb. 374; 2 Taunt. 224, (Chit. j. 782).

⁽¹⁾ Brown et al. v. Ferguson, 4 Leigh's Rep. 37. But the over diligence of one party to a bill, shall not supply the under diligence of others; and though the drawer or indorser sought to be charged, in fact receive notice as early as he would have been regularly entitled to it, yet the holder, in order to charge him is bound to show due diligence in each and every party through whose hands the bill has passed, the onus probandi, in such case, lying on the plaintiff to prove due diligence, not on the defendant, to prove negligence. Ib.

[{] Where all the parties reside in the same town this is a reasonable usage; but the holder of a note or bill who deposites it in a bank for collection is not entitled to regard the bank as holder, and to claim an additional day to give notice to the indorser, or drawer, except where it is the usage of the bank to give notice to the holder alone. Where it is the usage of the bank to give notice to all the indorsers, &c., the bank cannot be regarded otherwise than as the mere agent of the holder throughout; and the latter is bound to give netice, at farthest, on the last day of grace. Johnson v. Harth, 1 Bai. 482. >

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where they reside in different parts of the country, then, according to the I. Of Noncourse of the post, frequently several days may intervene between each.

A banker, and perhaps other agents, holding or transferring a bill, note, ceedings or check, to obtain payment, when not acting as a mere servant, is considered, as respects this rule, as a distinct holder or party to the instrument, A Banker and he is also allowed a day to give notice to his customer or employer as Agent, if he had himself been a holder in his own right(e). *This has been frequent- when conly decided as to town bankers (f), and extends to country bankers (g), and sidered as to bankers acting as agents for other bankers abroad, who themselves were Holder agents, and vice $vers\hat{a}(h)$; but in such case the agency must not, it seems, be within that unnecessarily exercised by returning the bill back again to the first holder Rule. for him to give notice, when the party residing abroad happens to be in Eng- [*490] land, and could himself have given direct notice to the prior indorser without the second intervention of the London banker(i). The rule also extends as well to bills and notes as to checks deposited in the hands of a banker to receive payment, instead of the party himself receiving payment, although in consequence of such deposit the notice of dishonour is postponed a day(k). Therefore in these cases, when a bill, note, or check, in the hands of a banker on behalf of his customer, falls due on a Saturday, he need not give notice of the dishonour to his customer till the Monday following, nor the latter till the Tuesday (1). And where a difficulty had arisen in finding out the residence of an indorser, and an attorney was employed to find him out, and he at length ascertained it, the court held, that with reference to this rule, he might take the next day to inform and consult with his client, the holder, and that it sufficed to forward notice to the discovered indorser on the third day(m).

and necessary Pro-

In the succession of notices between the holder and the drawer of a bill, Conseor first indorser of a note, where there are several intervening parties, a Day havwhether by indorsement or transfer by mere delivery, as each party thus has ing been

(e) Haynes v. Birks, 3 Bos. & Pul. 599, (Chit. j. 690); Scott v. Lifford, 9 East, 847; 1 Campb. 246, (Chit. j. 747); Langdale v. Trimmer, 15 East, 291, (Chit. j. 857); Bray v. Hadwen, 5 M. & Sel. 68, (Chit. j. 957); Daly v. Slatter, 4 Car. & P. 200, (Chit. j. 1487); Robson v. Bennett, 2 Taunt. 388, (Chit. j. 794); Firth r. Thrush, 8 Bar. & C. 387; 2 M. & Ry.

359; Dans. & L. 151, (Chit. j. 1398).
Robson v. Bennett, 2 Taunt. 388, it was held, that a person receiving a check on a banker is equally authorised in lodging it with his own banker to obtain payment, as he would be in paying it away in the course of trade, although, in consequence thereof, the notice of dishonour is postponed a day, one day being allowed for notice from the payee to the drawer, after the day on which notice is given by the bankers to the payee, and the bankers are to be considered as distinct holders.

Scott v. Lifford, 9 East, 347; 1 Campb. 249, (Chit. j. 747), where the indorsee of a bill of exchange lodged it with his bankers, who presented it for payment on the fourth, when it was dishonoured, and on the fifth they returned it to the indorsee, who gave notice of the dishonour on the sixth by the twopenny poet; it was held that such notice was reasonable. And Lord Ellenborough, C. J. said, "I cannot say that the holder, on the return of the bill dishonoured to him, is bound omissis omnibus aliis negotiis to post off immediately with notice; if reasonable diligence has been used it is sufficient."

(f) Langdale v. Trimmer, 15 East, 291, (Chit. j. 857); Haynes v. Birks, 3 Bos. & Pul. 599, (Chit. j. 690); Scott r. Lifford, 9 East,

347; 1 Campb. 249, (Chit. j. 747).
(g) Bray v. Hadwen, 5 Maule & S. 68, (Ch. j. 957); ante, 486, note (k)

(h) Daly v. Slatter, 4 Car. & P. 200, (Chit. j. 1487); but a case was reserved.

(i) Id. ibid.

(k) Robson r. Bennett, 2 Taunt. 388, (Chit. j. 794); ante, 489, note (e).

(1) See the cases, ante, 482, et seq.; Poole v. Dicas, 1 Scott, 600; ante, 484, note(y). Note, Lord Alvanley in Haynes v. Birks, 3 Bos. & Pul. 599, (Chit. j. 690); ante, 488, note(r), said, " It is the duty of bankers to give notice on the same day to their customer when they can." But it is now quite out of the course of business to do so, unless the customer calls and

inquires on the day when the bill falls due.
(m) Firth v. Thrush, 8 B. & C. 387; 2 M. & Ry. 859; Dans. & Ll. 151, (Chit. j. 1398).

sary l'roceedings thereon. Consequences of a Day having been lost.

1. Of Non- a day, and by the course of the post sometimes more time is occupied, sereral days may be and frequently are legally occupied without laches, and this even where all or many of the respective parties may reside in the same town, and some of them even in the same street(n). But if any one party miss a day in duly giving or forwarding notice, without legal excuse, a link in the chain of regular notice is broken, and all the prior parties are primâ facie discharged from liability to be sued(o); nor can any party who has been discharged by *such laches safely pay, for he has no right to waive the objection and pay in his own wrong, and thereby charge prior parties (p). [*491] And where there have been several indorsers or transferrers by mere delivery, it is not enough that the drawer or indorsers have received notice in

> (n) Smith v. Mullett, 2 Campb. 208; Scott v. Lifford, 9 East, 347; 1 Campb. 249, (Chit. j.

(0) Smith v. Mullett, 2 Campb. 208, 374; Marsh v. Maxwell, id. 210, (Chit. j. 776); Turner v. Leach, 4 Bar. & Ald 451, (Chit. j.

Smith v. Mullett, 2 Campb 200, 374, (Chit. j. 775), which was an action by the fourth against the first indorsee, all the parties to which resided in London; it appeared that the plaintiff received notice of the dishonour of the bill from his indorsee on the 20th of the month, and gave notice to his immediate indorser, by a letter put into the twopenny post-office, on the evening of the 21st, but so late that it was not delivered out till the morning of the 22d: it was held, that by this neglect the plaintiff had discharged all the prior indorsers, although in the course of the 22d, notice of the dishonour was given both to the second indorsee and to the defendants. And Lord Ellenborough in this case said, " It is of great importance that there should be an established rule upon this subject; and I think that there can be none more convenient than that, where the parties reside in London, each party shall have a day to give notice. I have before said the holder of a bill of exchange is not, omissis omnibus allis negotis, to devote himself to give notice of its dishonour. It is enough if this be done with reasonable expedition. If you limit a man to the fractional part of a day, it will come to a question how swiftly the notice can be conveyed. A man and a horse must be employed, and you will have a race against time. But and you will have a race against time. But here a day has been lost. The plaintiff had notice himself on Monday, and does not give notice to his indorser till Wednesday. If a party has an entire day, he must send off his letter conveying the notice within post-time of that day. The plaintiff only wrote the letter to

Aylett on the Tuesday; it might as well have continued in his writing-desk on the Tuesday night as lie at the post-office. He has clearly been guilty of laches, by which the defendant is discharged(1)."

In Marsh v. Maxwell, 2 Campb. 210, (Chit. 776), Lord Ellenborough ruled, that upon the dishonour of a bill, it is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsers, unless it is shewn that each indorsee gave notice within a day after receiving it; and that if any one has been beyond the day, the drawer and prior

indorsers are discharged. Turner v. Leach, 4 Barn. & Ald. 451, (Chit. j. 1108). The plaintiff was the eleventh indorser of a bill, the defendant the eighth. The plaintiff had indorsed to Bennett, Bennett to Fletcher, Fletcher to Hordem, and Hordem to The bill was dishonoured on Satur-Sansom. day, the 30th of August, and on Monday, 1st of September, Sansom gave notice to Hordem. This reached Hordem the 2d, on which day he gave notice to Fletcher. Fletcher gave notice to Bennett on the 3d, which reached Bennett on the 4th, but Bennett did nothing till the Sth, when he gave notice to the plaintiff, who paid the bill. It was argued, that if notice had been given to each successive indorser in the regular course, the defendant would not have received it at an earlier period; but the court held, that the plaintiff had been discharged by the laches of Bennett, and that he could not, by paying the bill, place the prior indorsers in a worse situation than that in which they would otherwise have been.

(p) Turner v. Leach, 4 Bar. & Ald. 451, supra. The same law prevails in France; 1 Pardess 455. What not a payment in party's own wrong; Huntley v. Sanderson, 1 C. & M. 467; 3 Tyr. 469, S. C.; ante, 331, n. (2).

do, 5 Manf. 252.

⁽¹⁾ It is a settled rule that notice is necessary from the last indorser to every prior indorser, whom he means to charge, immediately after he himself receives notice of the dishonor. Morgan v. Woodworth, 3 John. Ca. 89. And generally, notice of non-payment of a bill, must be given by an indorser to the indorser next before him, by the next post, after he himself has received notice of the dishonor; but this rule is not inflexible. It is understood to mean the next convenient and practicable post. Leiber v. Goodrich, 5 Cowen, 186. And it is said that the last indorser ought in such case immediately to take up the note, and become himself the real holder. Ibid. And see Morgan v. Van Ingen, 2 John. Rep. 204. And notice to an indorser before a demand on the maker is a nulity. Griffin v. Goff, 12 John. Rep. 423.

The first indorser in point of time is not of course first responsible. Chalmers et al. v. M'Mur-

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as many days as there were subsequent indorsees, unless it appear that each I. Of Nonindorsee gave or duly forwarded notice to his immediate indorser (or trans- payment, ferrer by delivery) in due time after he has received notice, for if any one sary Prohas delayed beyond his day, the drawer and prior indorsers are discharge ceedings ed(q); and it is no answer that if notice had been given to each successive thereon. indorser in the regular course, the defendant would not have received it at an earlier period; for if any one or more of the indorsers give notice more expeditiously than he need have done, all the prior parties are entitled to the benefit thereof, and neither is entitled on that account to excuse his own delay, or occupy more than the day allowed to him(r). So if there are several indorsers of a bill, and the last indorsee and holder resorts, in the first instance, to the first of such indorsers, he is not entitled to as many days as there are indorsers to give notice of the dishonour to him, but must give it in the same time as he would have been obliged to have done if he had resorted at first to his own immediate indorser(s).

*However, a notice from any party to a bill, though not from the plaintiff, But a Notice in due

Time from any Party *492]

(q) Per Lord Ellenborough in Marsh v. Maxwell, 2 Campb. 210, (Chit. j. 776); Turner v. Leach, 4 B. & Ald. 451, supra; Dobree v. Eastwood, 3 Car. & P. 250; infra, n. (s); Bayl. 5th ed. 275.

(r) Id ibid.

(s) Dobree v. Eastwood, 3 Car. & P. 250, (Chit. j. 1370). Assumpsit on a bill of exchange for 1001., drawn by the defendant and indorsed by him to Lawford, by Lawford to Pope, by Pope to Parker, and by Parker to the plaintiff. According to the evidence at the trial, it appeared that the bill became due and was dishonoured on the 27th October, 1826. A witness proved, that on the 28th, which was a Saturday, he put, on the part of the plaintiffs, a notice of the dishonour into the twopenny post, in Berner's Street, Oxford Street, directed to the defendant at Belvidere Wharf, on the Lamboth side of Westminster Bridge. He stated that he put it in the post about fire or six o'clock in the evening. One of the post-marks on the letter was of the date of the 30th.

Wilde, Serjeant, for the defendant, contended that the notice was not sufficient; it ought to have been so given as to reach the party to whom it was addressed on the 28th, and the post-mark of the 30th shews that it was not delivered till that day. The principle is this, that a party in a case like the present, where the residence of the drawer is so near, may either send a special messenger or use the twopenny post; but if he chooses to use the post instead of the special messenger, he must take care so to use it that the party to whom he is sending may not be delayed by it. He cited Smith v. Mullett, 2 Campb. 208, (Chit. j. 775); and Lawson and another v. Sherwood, I Stark. 814, (Chit. j. 959).

Burrough, J .- " Supposing the letter to have been put into the post on the 28th, early enough to be delivered on that day in the ordinary course of business, but from some delay in the office it was not delivered till the 30th. I apprehend that the fault of the post-office is not to prejudice the plaintiff.

Wilde, Serjeant.—" It is to be presumed

that the post-office does its duty regularly as a to the Inpublic office, and it is upon this supposition that strument the sending a letter by the post is evidence of suffices. notice at all."

E. Lawes, Serjeant, and Curwood, for the plaintiff:—"The notice was clearly in time on the 30th. The defendant was fourth indorsee, reckoning from the plaintiff, the holder. He was entitled to time for inquiring as to the residence of a person who was not his immediate indorsee." They cited Scott v. Lifford, 1 Cumpb. 246; 9 East, 847, (Chit. j. 747).

Wilde, Serjeant .- "The case of Scott v. Lifford is mentioned in the case I cited, and

ruled not to apply.

The witness was then called up again, and said that he put the letter into the post before five o'clock. Burrough, J .- " I will leave it to the jury to say whether the letter was put in early enough to reach the defendant on the 28th."

Burrough, J .- "The holder of a bill may. when it has been dishonoured, either resort to his immediate indorser, and then he must give him notice within the proper time, or he may resort to the drawer, and then he must give him notice within the same time. It is not that the holder of the bill has as many days as there are indorsers, but that each indorser has his own day. If the letter was put into the postoffice at such an hour on the 28th as that it could be delivered in the course of that day, then the notice will be sufficient, otherwise it

His lordship then left the question to the jury, who stated it as their opinion, that if the letter was put in on the 28th, it was not put in in time to reach the defendant that night, and found their verdict for defendant. In Marsh v. Maxwell, mentioned in a note in page 210 of 2 Campb. Lord Ellenborough held, that upon the dishonour of a bill, it is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsees, unless it is shown that each indorsec gave notice within a day after receiving it.

and necessary Proceedings thereon.

I. Of Non- will, if received in due time, without a day having been lost by any one in payment, the due succession of the several notices, enure to the benefit of the holder and of plaintiff, though he have not himself given the defendant any notice(t).

What exdiate No-

We have seen what circumstances, such as the want of effects, will excuse cuses De-lay in givthe total omission to give notice of non-payment(u). A delay in giving the ing imme- notice within the time usually required, may also be excused by some circumstances, such as the hindrance of superior force (x), sudden illness of the holder (y), the not going out of a post till the third day after the dishonour (z), a delay or irregularity in the post-office (a), or other circumstances (b), some of which have been already noticed (c). But the circumstances of a party having lost or been robbed of a bill does not, we have seen, dispense with the necessity for regularly demanding payment, and giving due notice of the non-payment(d). We have also seen, that the holder will be excused in the delay of giving notice in the usual time, by the day on which he should regularly have given notice being a day on which he is strictly forbidden by his religion to attend to any secular affairs (e), or by the absconding of the drawer or indorser (f).

Ignorance

If the residence of the party to whom the notice ought to be given be or remain in a state of passive dence, &c. not known to the holder, he must nevertheless not remain in a state of passive and contented ignorance, but must use due diligence to discover his resi-[*493] dence(g), and if he do, then the indorser remains liable, *though a month or more may have elapsed before actual notice be given; and if he, before the bill becomes due, apply to one of the parties to ascertain the residence of the indorser, and he decline giving him any information, the holder need not, after the bill becomes due, renew his inquiries of that party (h); but in general the holder should not only immediately apply to all the parties to the bill for information, but also make inquiries and send notice to the place where it may reasonably be supposed the party resides, and if he has employed an attorney, who at length discovers the residence, we have seen that it will suffice if the attorney on the next day consults with his client, and the latter, on the third day, forwards the notice to the discovered indorser, though, in general, notice ought to be given on the next day(i). letter from the holder, giving notice of the dishonour, containing this passage, "I did not know where, till within these few days, you were to be found," is not to be taken as proving that the notice was not given on the next day after the residence of the party was discovered (k). Where the traveller of a tradesman received in the course of business a promissory note, which was delivered to him for the use of his principal, without indorsing it, and the note having been returned to the principal dishonoured, and the latter, not knowing the address of the next preceding indorser, wrote to his traveller,

> (t) Post, 493 to 496, By whom notice must be given; Bray v. Hadwen, 5 Maule & S. 68, (Chit. j. 957); ante, 486, note (1).

(u) Ante, 436 to 448. (x) 1 Pardess. 451. (y) Ante, 452, note (o).

(z) Geill v. Jeremy, Mood. & M. 61, (Chit. j. 1335); anle, 486, note (l).
(a) Dobree v. Eastwood, 3 Car. & P. 250,

(Chit. j. 1870); ante, 491, note (s).
(b) Poth. pl. 144.

(c) Anie, 452 to 454.

(d) Anie, 455.

(e) Ante, 454.

(f) Sturges v. Derrick, Wightw. 76, (Chit. j. 800).

(g) Per Lord Ellenborough in Bateman v. Joseph, 2 Campb. 461; 12 East, 433, (Chit. j.

801); ante, 478, note (f).
(h) Per Bayley, J. in Firth v. Thrush, 8 B. & Cress. 387, 398; 2 M. & Ry. 359; Dans.

& L. 151, (Chit. j. 1398).
(i) Id. ibid.; ante, 490, note (m).

(k) Kerby v. England, 2 Car. & P. 300, (Chit. j. 1303).

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who was then absent from home, to inquire respecting it, it was held, L Of Nonthat such principal was not guilty of laches, although it was urged that the Payment, traveller ought to have stated the residence when he remitted the notes, and and necessary Prothough several days clapsed before he received an answer, and thereupon he eeedings gave notice to the next party, as he had used due diligence in ascertaining thereon.

So if the indorser has himself occasioned or assented to the delay, he may be precluded from complaining of the absence of the earlier notice, as in the case before noticed of a transfer upon or after the day of payment, rendering it impracticable to present or give notice in the ordinary time; but this estoppel is confined to that particular indorser, and will not preclude prior indorsers from availing themselves of the irregularity (m).

We have seen, that the notoriety of the insolvency of the drawee, as in the 5thly, By case of bankruptcy, constitutes no excuse for the neglect of the holder to whom Nogive notice of non-acceptance and non-payment to the drawer and in-given. dorsers(n); and it appears to have been considered, that such notice must come from the holder(o), and that it will not suffice if it come *from any [*494] other party, because notice is required, not merely that the parties may immediately call on those who are liable to them for an indemnity, but it must import that the holder intends to stand on his legal rights, and to resort to them for payment(p); and therefore, where the drawer having notice before the bill was due, that the acceptor had failed, gave another person money to pay the bill, and the holder neglected to give notice of the dishonour, it was holden that the drawer was discharged (q). And in a subsequent case it was held, that notice of the dishonour of a bill of exchange must be given to the drawer and indorsers by the holder himself, or some person authorised by him, or at least not by a mere stranger (r)(1). We have seen, that a valid pro-

(1) Baldwin v. Richardson and another, 1 B. & C. 245; 2 Dowl. & Ry. 285, (Chit. j. 1169).

(m) Ante, 389; 1 Pardess. 451. (n) Ante, 449; Esdaile v. Sowerby, 11 East,

117, (Chit. j. 767).

(o) Tindal v. Brown, 1 T. R. 170, (Chit. j. 431); Ex parte Barclay, 7 Ves. 597, 598, (Chit. j. 656); Staples v. Okines, 1 Esp. Rep. 833, (Chit. j. 544); ante, 444, note (0); Kyd, 125; but see post, 494.

Tindal v. Brown, 1 T. R. 167, 186, (Chit. Per Ashurst, J .- "Notice means something more than knowledge, because it is competent to the holder to give credit to the maker. It is not enough to say that the maker of a note does not intend to pay, but that the holder does not intend to give credit to such maker; the party ought to know whether the holder intends to give credit to the maker, or to resort to him." Per Buller, J.—"The notice ought to purport that the holder looks to the party for payment, and a notice from another person cannot be sufficient, it must come from the holder.'

Ex parte Barclay, 7 Ves. 597, (Chit. j. 66). Barclay was indorsee and holder of two bills drawn by Kemp upon Denrlow, and indorsed by Clay to Barclay. These bills were dishonoured, of which Clay gave notice to

Kemp, and on petition by Barclay to be allowed to prove these bills under a commission of bankrupt issued against Kemp, one question was, whether this notice from Clay, and no from Barclay, the holder, was sufficient. And Lord Eldon, after referring to Tindal v. Brown, held that the notice ought to have come from the holder, and dismissed the petition. he said, "The settled doctrine is, according to the language of Mr. Justice Buller in Tindal v. Brown, and there is great reason in it, for the ground of discharging the drawee is, that the holder gives credit to some persons liable as between him and the drawee. Notice from any other person that the bill is not paid, is not notice that the holder does not give credit to a third person. The doctrine has been acted upon very often since." In Selw. N. P. 9th edit. 332, it is observed, that in this case the attention of the court was not directed to Lord Kenyon's opinion in Shaw v. Croft, infra note (u). But see infra, note (u).

(p) Id. ibid.

(q) Nicholson v. Gouthit, 2 Hen. Bla. 612, (Chit. j. 556); ante, 441, note (u); Whitfield v. Savage, 2 B. & Pul. 277, (Chit. j. 630); and see Esdaile v. Sowerby, 11 East, 114, 117, (Chit. j. 767).

(r) Stewart v. Kennett, 2 Campb. 177, (Ch.

⁽¹⁾ The holder of a promissory note, who receives and indorses it for the sake of collection only, although a mere agent, is to be considered as the real holder, for the purpose of receiving and transmitting notices. Ogden et al. v. Dobbin & Evans, 2 Hall's Rep. 112.

ceedings thereon.

1. Of Non- test for non-acceptance and notice thereof, may be made and given by any holder, whether legally so or not; but it is said, that a valid protest for nonpayment can only be made by a lawful holder entitled to demand and receive payment(s). Where the drawee having effects of the drawer in his hands, represented to the drawer at the time the bill was drawn, that he should not be able to provide for it, and the drawer thereby understood that he should have to provide for it, this nevertheless was considered not to excuse the want of notice of non-payment from the holder(t).

Notice from any Parly to the Bill or Note sufficient.

However, according to the more recent decisions, it is not absolutely necessary that the notice should come from the person who holds the bill when it has been dishonoured, and it suffices if it be given after the bill was dishonoured, by any person who is a party to the bill, or who would, on the same being returned to him, and after paying it be entitled to require reimbursement, and such notice will, in general, enure to the benefit of all the antecedent parties, and render a further notice from any of those parties unnecessary, because it makes no difference who gives the information, since the object of the notice is, that the parties may have recourse to the acceptor(u); if it were otherwise, *the holder might secure his own right against

[*495]

j. 772). The notice of non-payment had been given by Cutler, who had been employed by the original parties to the bill to get it discounted, but it did not appear that he had any authority or direction from any party to the bill to give notice of the dishonour. Per Lord Ellenborough.-" If you could make Cutler the agent of the holder of the bill, the notice would be sufficient; but in reality he was a mere stranger. The bill, when dishonoured, lay at the bankers of Abbott, with whom Cutler had no sort of connection. But the notice must come from the person who can give the drawer or indorsee his immediate remedy upon the bill, otherwise it is merely an historical fact. this case Cutler was not possessed of the bill, and had no controul over it. The defendant, therefore, is not proved to have had any legal notice of the dishonour of the bill, and is discharged from the liability he contracted by indorsing it." Plaintiff nonsuited.

(s) 1 Partess. 443, 444; ante, 456.

(t) Staples v. Okines, 1 Esp. Rep. 332, (Ch.

j 544).

(u) Bayl. 5th ed. 254, Kyd, 126; Selw. 9th edit. 332; Shaw v. Croft, MS.; Jameson v. Swinton, 2 Campb. 373; 2 Taunt. 224, (Chit. j. 782); Wilson r. Swabey, 1 Stark. Rep. 34, (Chit. j. 934); Newen r. Gill, 8 C. & P. 367; Chapman r. Keane, 3 Ad. & Ell. 193, post, 495, note (z).

Shaw r. Croft, cor. Lord Kenyon, Sittings after Trin. Term, 1798, MS; and see Selw. N. P. 9th ed. 882. Assumpsit by the holder of a bill against the drawer. Defence; no regular notice of dishonour; but it being proved that a message had been left at the drawer's house by the acceptor, stating that the bill had been dishonoured, Lord Kenyon said, "that it made no difference who apprised the drawer, since the object of the notice was, that the drawer might have recourse to the acceptor.'

Jameson v. Swinton, 2 Campb. 873; 2 Taunt. 224, (Chit. j. 782). Action by the second indersee of a bill of exchange drawn

by the defendant, payable to his own order, and indorsed by him to G. Elsom. The bill became due on Saturday the Sth of July, when it was in the hands of the plaintiff's bankers. On Monday, the 10th, they returned it dishonoured to the plaintiffs, who, in the evening of that day, gave notice of the dishonour to Elsom, their indorser. Elsom, between eight and nine o'clock in the evening of the following day, gave a like notice to the defendant. The plaintiffs and Elsom resided in London, the defendant at Islington. For the defendant, it was insisted that the plaintiffs were bound to give notice themselves to the drawer, and all the indorsers against whom they meant to have any remedy. They could not avail themselves of a notice given by a third person. Per Law-rence, J.—" I do not remember to have heard the first point made before, but I am of opinion that the drawer or indorser is liable to all subsequent indorsees, if he had due notice of the dishonour of the bill from any person who is a party to it. Such a notice must serve all the purposes for which the giving of notice is required. The drawer or indorser is authoritatively informed that the bill is dishonoured; he is enabled to take it up if he pleases, and he may immediately proceed against the acceptor or prior indorser, and it does seem to me that the defendant in this case had due notice of the dishonour of the bill from Elsom. This is allowing only one day to each party, which, when the parties all reside in the same town, seems now to be the established rule." Verdict for the plaintiff.

Wilson r. Swabey, 1 Stark. Rep. 31, (Chit. j. 934). Assumpsit by the indorsee against the drawer of a bill of exchange. The bill became due on Thursday, the 2d of March; notice of the dishonour was communicated to Lewis, an indorser, on the Friday, and by him to the defendant on the Saturday. For the defendant, it was objected, that the notice had not been given by the party who sued upon the bill, but Lord Ellenborough said, "That notice from any his immediate indorser by regular notice, while the latter, and every other I. Of Nonparty to the bill, would be deprived of all remedy against prior indorsers and payment, the drawer, unless each of those parties should in succession take up the bill sury Proimmediately on receiving notice of dishonour, a supposition which cannot ceedings reasonably be made (x). And therefore it has been held, that if the drawer thereon. or indorser of a bill of exchange receive due notice of its dishonour from any 5thly, By person who is a party to it, he is directly liable upon it to a subsequent in- whom Nodorser, from whom he had no notice of the dishonour(y). So, an indorsee, given. who has indorsed over, and is not the holder at the time of maturity and disbonour, may give notice at such time to an earlier party, and afterwards taking up the bill and suing such party may avail himself of such notice (z). And it has been decided, in an action by the indorsee against the drawer, that it is sufficient if the drawer had notice of the dishonour even from the And where a party to a bill gave notice of dishonour in *the [*496] name of an indorsee, without any authority from him, to an indorser, it was held that this was a sufficient notice (b). It is, however, advisable for each party, immediately upon receipt of notice, to give a fresh notice to each of the parties who would thereupon be liable over to him, and against whom he must prove notice(c)(1). As already observed, the notice should be given by some agent or servant who will be competent to prove it, and not by the holder in person, in the absence of a competent witness(2).

person who was a party to the bill was sufficient." Verdict for the plaintiff.

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(x) Per curiam, in Keane v. Chapman, 3 Ad. & El. 193, infra, note (z).

(y) Jameson r. Swinton, 2 Campb. 273; 2 Taunt. 224, (Chit. j. 782); Wilson v. Swabey, 1 Stark. Rep. 34; supra, note (u).

(z) Chapman v. Keane, 3 Ad. & Ell. 193; 4 Nev. & Man. 607; 1 Har. & Wol. 165, S. C., expressly overruling Tindal r. Brown, 1 T. R. 167; 2 T. R. 186, as to this point.

In an action by the indorsee against the drawer of a bill of exchange, the declaration stated the dishonour of the bill (in the usual form), "of which the defendant then had no-tice." Plea, that the defendant "had not notice from the plaintiff of the non-payment of the said bill of exchange." It was proved that the indorsee received notice of the dishonour from the plaintiff, and that the indorser's clerk, and not the plaintiff, gave notice to the defendant; this was held sufficient; Newen v. Gill, 8 Car. & P. 367.

(a) Rosher v. Kieran, 4 Campb. 87, (Chit. j. 919). This was an action by the plaintiffs, as indorsees, against the defendant as drawer of a bill of exchange for 1000l., dated Dundalk,

28th of February, 1814, payable to the order of the drawer at ninety days after date, and accepted by Thomas Rowcroft, at Smith's, Payne, and Smith's, bankers, in London. The question was, whether the defendant had received due notice of the dishonour of the bill. The bill became due on the 30th of May, when it was presented for payment and dishonoured. On the same day the acceptor wrote a letter to the drawer, stating that he had not been able to pay it, and that it was then in the hands of the plaintiffs. Lord Ellenborough held this notice from the acceptor sufficient, and the plaintiffs had a verdict And see Stewart v. Kennett, 2 Campb. 177, (Chit. j. 772); Shaw v. Croft, ante, 494, note (u). In Bayl. 5th ed. 254, it is thus observed upon the case of Rosher r. Kieran, "but that might, perhaps, have been on the ground that the acceptor wrote for the plaintiff, and as his agent." In America it has been held, that notice to the drawer from a drawee, who refuses acceptance, is not sufficient; Stanton v. Blossom, 12 Mass. 116; Bayl. 163, Amer. edit.

(b) Regerson v. Hare, 1 Jurist, 71.

(c) Bayl. 5th edit. 255, 256; Kyd, 126,

(1) { In Peyroux v. Dubertrand, 11 Curry's Louis, 82, held necessary. }

(2) If an indorser receive notice of the dishonor of a bill or note, he must immediately take it up and give notice to all the antecedent parties, whom he means to charge, otherwise they will not be holden. Morgan v. Woodworth, 3 John. Cas. 89.

A bill was drawn by the defendant, at New Orleans, on Philadelphia, in favor of the plaintiff, and was by him indorsed, in full, to a third person, and regularly protested for non acceptance, and was by him indorsed, in full, to a tilitude person, and regarders protested for non acceptance, and non-payment; but no notice of the dishonor of the bill was proved to have been given to the drawer. The indorsement being in full, cannot be stricken out at the time of trial; the want of notice destroys the plaintiff's right to recover from the defendant. Craig r. Brown, 1 Peters' Rep. 171.

In an action against the first indorser of a note by a subsequent indorser, it is sufficient if it appear that notice of non-payment was given to the defendant by the holder, and the right of action of the plaintiff is not affected by a delay for more than a year to take up the note and bring sary Proceedings

6thly, To whom Notice must be given.

thereon.

I. Of Non- holder became bankrupt it is the duty of the official assignee to give notice payment, of dishonour(d).

The notice of non-payment, when necessary, must be given to all the parties to whom the holder of the bill means to resort for payment, and though proof that the drawer had no effects in the hands of the acceptor will be an excuse for want of notice with respect to him, it will not have that operation with respect to any of the indorsers; for they have nothing to do with the accounts between the drawer and the drawee(e); and an indorser is entitled to notice, although the drawer and acceptor were fictitious (f); and though if the drawer and drawee be the same person, no notice of non-acceptance need be given to the former(g), it would be otherwise as regards an indors-If the party entitled to notice be a bankrupt, notice should be given to him before the choice of assignees, and after such choice, to them(h); and if notice has been given to to the bankrupt, before the choice of assignees, it is not necessary to give another notice to the assignees when they have been chosen, the former sufficing, because the bankrupt represents his estate till assignees have been chosen(i); but if the bankrupt has absconded, and a messenger be in possession, notice should be given to him and to the petitioning creditor; and if assignees have been appointed, then to them, or the parties will be discharged, and the bill not proveable under the commission (k). [*497] If the party be dead, notice should be given *to his executor or administrator(l), and it is expedient, though not in general absolutely necessary, to give

(d) See Rule of the Court of Review, dated February 15th, 1932, to this effect; post, Appendix.

(e) See Brown v. Maffey, 15 East, 216, (Chit. j. 852); Goodall v. Dolley, 1 T. R. 712, (Chit. j. 440); Wilkes v. Jacks, Penke's Rep. 202; Walwyn v. St. Quintin, 1 Bos. & Pul. 216; 2 Esp. R. 515, (Chit. j. 578); ante, 439, note (h).

(f) Ante, 339, note (q). (g) Roach v. Ostler, 1 Man. & Ry. 120, (Chit. j. 1359); ante, 339, note (r); and it was further held, that a letter written by A. B. the drawer to the payee of a bill, expressing his apprehension that it would be dishonoured, coupled with the fact that the place to which the bill is directed, is the usual residence of A. B. the drawer, when in England, is evidence from which a jury may infer the identity of the drawer and drawee.

drawer and drawee.

(h) See Ex parte Moline, 19 Ves. 216, (Chit. j. 871); Rhode v. Proctor, 4 Bar. & Cres. 517; 6 Dow. & Ry. 610, (Chit. j. 1269); Camidge v. Allenby, 6 Bar. & Cres. 373; 9 Dow. & Ry. 391, (Chit. j. 1319); Ex parte Johnston, 1 Mont. & Ayr. 622; 3 Dea. & Chit. 433, S. C.; Ex parte Chappel, 3 Mont.

& Ayr. 490; 3 Dea. 218, S. C. In Thompson's Law of Bills, 535, it is laid down, in case of the bankruptcy of the drawer, or of an indorser, notice must be given to the bankrupt, or to the trustee vested with his estates for the behoof of his creditors.

(i) Per Lord Eldon, C. J. in Ex parte Moline, 19 Ves. 216, (Chit. j. 871). The drawer of a bill became bankrupt; the bill was dishonoured the day of the second meeting under the commission, and notice was given to him before the choice of assignees; and Lord Eldon held this sufficient, and that it was not necessary also to give notice to his assignees.

(k) Rhode v. Proctor, 4 Bar. & Cres. 517; 6 Dow. & Ry. 610, (Chit. j. 1269). Bills drawn by Rains on Lachlan, became due in June, 1818. The former absconded, and on the 20th a commission issued against him, and defendants were his assignees. On the 23d of April, 1818, Lachlan also became bankrupt. No notice was given to Rains' assignees, or to the messenger; and it was held, that the bills were not proveable for want of notice. And see Ex parte Johnston, 1 Mont. & Ayr. 622; Ex parte Chappel, 3 Mont. & Ayr. 490.

(1) There are no English decisions to this

his action against the defendant. Stafford v. Yates, 18 John. 328. One to whom a bill or note has been indersed, merely as agent to collect (e. g. a bunk) is considered as a holder for the purpose of giving and receiving notice of non-payment; and he is not bound to give notice of nonpayment directly to all prior parties; but may notice his next immediate indorser, who is bound to notice his indorser, &c. in the same manner as if the bill or note had been negotiated in the usual course of business for valuable consideration. Mead v. Engs, 5 Cowen, 303.

If an indorser receive notice from any one who is a party, he is liable to any subsequent in-dorser, though he may have received no notice from him. Id.

{ Proof of notice of protest to the indorsers results from the certificate of the notary, duly made according to law. Peyroux v. Dubertrand, ubi supra. }

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notice to a person who has guaranteed the payment of the bill(m). When I. Of Nonthe party entitled to notice is abroad at the time of the dishonour, if he have payment, a place of residence in England, it will be sufficient to leave notice of non- sary Propayment at that place, and a demand of payment from his wife or servant ceedings will in such case be regular(n)(1); and Lord Tenterden inclined to think, thereon. that where a bill had been indorsed by a person as agent, it might suffice to 6thly, give him notice of the dishonour(o); but notice to the general attorney of a whom Noparty is insufficient (p).

Where a bill or note is transferrable by mere delivery, without indorsement, a person who so delivers it seems to be considered a party to the instrument for the purpose of notice(q); but where a person has merely guaranteed the payment, &c., it is generally laid down, that as he is no party to the instrument, he is not, by the custom of merchants, so absolutely entitled to notice of the dishonour as to be necessarily discharged from liability by the omission to give him notice; but that if he can shew, that for want of regular notice he has sustained actual damage, he will have a defence at

least pro tanto(r).

It was once thought, that notice of non-payment must in all cases be giv- Notice is en to the drawer of the bill(s), and demand of payment made of him, or that tial to be in default thereof, the indorsers would be discharged, notwithstanding they given to had regular notice, because, for want of notice to the drawer, the indorsers the Party were without remedy against him, after they had successively taken up the intended to be proceed-This opinion, however, so far as it related to foreign bills, was over- ed against ruled in the case of Bromly v. Frazier(1); and in its relation to inland bille, by Holder. in the case of Heylin and others against Adamson(u), and as to checks on bankers, in Rickford v. Ridge(v), on the principle, that to require a de-

be given.

effect. In America it has been so decided; and that if there are no personal representatives at the time, a notice sent to the residence of the deceased party's family is sufficient, and that it is not necessary to give notice afterwards to executors or administrators, subsequently becoming such. Merchants' Bank r. Birch, 17 Johns. Rep. 25; Bayl. 418, Amer. edit.; ante, 339.

(m) Ante, 326, 339. When notice need not be given of a substituted bill, see Bishop v. Rowe, 3 Maule & S. 362; Hickling v. Hardy, 7 Taunt. 312; 1 Moore, 61, S. C.

(n) Cromwell v. Hynson, 2 Esp. Rep. 511, 512, (Chit. j. 571); Wulwyn v. St. Quintin, 1 B. & P. 652; 2 Esp. Rep. 515, (Chit. j. 578); but see 5 Esp. Rep. 175.

(o) Firth v. Thrush, 8 Bar. & Cres. 387; 2 Man. & Ry. 359; Dans. & L. 151, (Chit. j. 1398); but semble, that if a party be merely authorised in a particular instance to indorse, and be not a general agent, then notice to him would not be a sufficient notice to his principal.

(p) See the judgment in Cross v. Smith, 1 Maule & S. 545, (Chit. j. 886).

(q) See Camidge v. Allenby, 6 Bar. & Cres. 373; 9 Dow. & Ry. 391, (Chit. j 1319); ante, 356, note (s); see also ante, 441, 443.

(r) See ante, 441 to 443; Bayl. 5th edit. 286 to 288.

(s) According to the Anonymous report in 1 Salk. 126, and S. C. reported as Lambert v. Oaks, Holt's Rep. 117, it was so held in an action on a bill of exchange. But it appears from the report of the same case in 1 Ld. Raym. 443, and the note in 1 Salk. 126, that the action and judgment related to a promissory note, and the word drawer was there used to describe the person primarily liable on the note, viz. the maker; and in this view of the case the decision was correct; and see Lord Mansheld's observations in Hevlin v. Adamson, 2 Burr. 669; and 2 Kenyon's Rep. 379, upon the mistakes of the reporters, which being explained, reconcile most of the cases.

(1) Bromley v. Frazier, 1 Stra. 441; Selw. 9th edit. 334.

(u) Heylin r. Adamson, 2 Burr. 669, (Chit. j. 349); Pardo v. Fuller, Com. Rep. 579, (Ch. j. 286); Bromley r. Frazier, 1 Stra. 441; Selw. 9th edit. 336.

(r) Rickford v. Ridge, 2 Campb. 539, (Chit. 819). Per Lord Ellenborough, "The hold-

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⁽¹⁾ Where, previous to a note falling due, the indorser had died at sea, but the fact was not known to the holder, and no administration was granted for several months after the note fell due, it was held, that notice left at the last place of residence of the indorser in New York, and another sent to the residence of his family in the country, through the post-office, was sufficient, although no notice had been given to the defendants, the executors of the indorsers. Merchant's Bank v. Birch, 17 Johns. 25.

sary Proceedings thercon.

whom Notice mast be given.

I. Of Non- mand of the drawer, or *prior indorser, would be laying such a clog upon payment, bills, as would deter every person from taking them; besides, the acceptor is primarily liable, and as the act of indorsing a bill is equivalent to drawing a new bill, every indorser thereby separately undertakes as well as the drawer that the drawee shall honour the bill, and the holder may consequently imme-6thly, To diately resort to him, without calling on any of the other parties(1); and it is the business of the indorser, as soon as he has received notice himself, to forward the like notice to the drawer, and all persons to whom he means to re-[*498] sort(x). However, it is advisable for the holder to give notice to every party as soon as he can ascertain his residence, for otherwise he will be without remedy against him, unless some other party to the bill has given

him notice, in which case such notice may enure to his use (y).

With respect to inland bills protested for non-payment, the 9 & 10 Will. 3, c. 17, s. 2, directs the protest or notice thereof to be given to the person from whom the bill was received (z). The preceding observations relative to notice from the holder enuring to the benefit of the antecedent party here apply (a). Notice to one of the several partners, joint indorsers, is considered as equivalent to notice to all(2), and if one of several drawers be also the acceptor, and there be no fraud in the transaction, no notice in fact is necessary to the other drawers (b), and as we have already seen, a mere guarantee, whose name is not on the bill or note, is not in general entitled to notice(c). Nor, as we have seen, is it necessary to give notice to a party who has by his conduct dispensed with it, as by engaging to call on the holder, and ascertain whether the acceptor had paid the bill, or the like (d); and where a bill has been accepted payable at a particular place, it is no

er of a check is not bound to give notice of its dishonour to the drawer for the purpose of charging the person from whom he received it. He does enough if he presents it with due diligence to the banker on whom it is drawn, and gives due notice of its dishonour to those only against whom he seeks his remedy.'

(x) See same cases and observations in Edwards v. Dick, 4 Bar. & Ald. 212, (Chit. j.

1079).

(y) Ante, 494, 495. (z) Et vide Heylin r. Adamson, 1 Burr. 674, (Chit. j. 349).

(a) Ante, 494, 495. (b) Porthouse v. Parker, 1 Campb S2, (Ch. j. 741); Alderson v. Pope, 1 Campb. 404, (Ch. 755); and see Jacaud v. French, 12 East, j. 755); and see Jacand v. French, 12 Edw., \$17, 322, 323, (Chit. j. 789); and per Lord Ellenborough, in Bignold v. Waterhouse, 1 Maule & S. 259.

Porthouse v. Parker, 1 Campb. 82, (Chit. j. 741). This was an action against the drawees of a bill of exchange for 4611. 3s. at the suit of the payee. The bill purported to be drawn by one Wood, as the agent of George, James, and John Parker. There was no proof that Wood had authority from the defendants to draw the bill, but a witness swore that he, as the agent of John Parker, the drawee, and one of the defendants had accepted it on his account. Lord Ellenborough held, that the bill having

been accepted by order of one of the defendants, this was sufficient evidence of its having been regularly drawn; and further, that the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove that the defendants had received express notice of the dishonour of the bill, as this must necessarily bave been known to one of them, and the knowledge of the one was the knowledge of all. Verdict for the plaintiff.

In Bignold v. Waterhouse, 1 Maule & S. 259, Lord Ellenborough said, "It is a general rule, indeed, that where several are concerned together in partnership, notice to one is equivalent to notice to all, but that rule presumes that the transaction is bond fide. Here, however, the case is different, the agreement is made with one of the defendants for his individual benefit alone, and the others are not parties concerned, not being made privy to the agreement. It was incumbent, therefore, on the plaintiffs, to shew that notice was given to the other part-

See Dwight v. Schovill, 2 Conn. R. 654; Bayl. 5th edit. 159. But if the parties are not partners, the acknowledgment by one of having received notice will not affect the other. Shepherd v. Hawkey, 1 Conn Rep. 368; Bayl. Amer. edit. 183

(c) Ante, 442.

(d) Ante, 451, et seq. 481.

 ^{(1) {} Peyroux v. Dubertrand, 11 Louis. 32. }
 (2) If reasonable notice of dishonour is given to one of several joint indorsers, all are bound by it. Dodge v. Bank of Kentucky, 2 Marsh. 616.
 { Higgins v. Morrison's Ex'r.. 4 Dana, 105; Mages v. Dunbar, 10 Louis. 546.

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defence in an action against the drawer, that notice of the non-payment was I. Of Non-And where the drawee has accepted a bill payment, not given to the acceptor(e). payable at a banker's, he is not in general entitled to notice of non-payment, sary Probecause such an acceptance constitutes the bankers his agents, and he must ceedings see that his agents do their duty, especially where his effects in the *hands of thereon. the bankers are so small, that he could not reasonably expect they would [*499] pay it, nor does it make any legal difference that they had more than sufficient in their hands, for the terms of acceptance are not equivalent to a check upon the bankers (f). And the circumstance of the bankers having failed, with assets of the acceptor in their hands, makes no difference (g). acceptance were special, and qualified, pursuant to the 1 & 2 Geo. 4, c. 78, the acceptor might be discharged by the omission to demand payment at maturity, though not by the neglect to give him notice of the dishonour(h). And, for the same reasons, if a note be made payable in the body of it at a banker's, the maker is not entitled to notice of the non-payment there(i). In America it was decided, that where a note has been indorsed by two persons not in partnership, the written acknowledgment of one, that he had received due notice, is not sufficient to charge them both (i).

It seems that the drawer and indorser have not, as formerly supposed, a 7thly, Liareasonable time allowed them to pay the bill, after notice of the dishonour, Drawer but that they are bound to pay immediately on receiving notice of dishonour, and IDin the same manner as an acceptor is bound to pay on the presentment of dorsers on the bill, and consequently cannot plead a tender where payment is not offer-Non-payed till the following day(k). But the drawer and indorsers may, it should ment seem, like the acceptor of a bill, insist on the production of the bill before they pay (l), and require the bill to be delivered to them, unless an action be depending against another party to the bill, in which case the holder may have a right to retain the bill until paid his costs.

With respect to the amount of the sum which the drawer and indorsers are bound to pay, they are liable, when a bill has been protested, not only to the payment of the principal sum, but to damages, interest, &c.(m). This subject will be more fully discussed when we come to treat of the sum recoverable in an action upon a bill or note (n).

If the holder of a bill neglect to present it for payment when necessary, or to give notice of non-payment to those persons entitled to object to the want of it, such conduct, we have seen, discharges them from all their respective liabilities(o).

The consequences, however, of a neglect to give notice of non-payment of 8thly, How a bill or note, or to protest a foreign bill, may be waired by the person enti- the Consetled to take advantage of them. Thus it has been decided, that a payment a Neglect

to give Nobe waived.

(e) Edwards v. Dick, 4 Bar. & Ald. 212, (Chit. j. 1079); see ante, 359, as to how far acceptor is discharged by not presenting at a particular place.

(f) Smith v. Thatcher, 4 Bar. & Ald. 200, (Chit. j. 1100); Treacher v. Hinton, 4 Bar. & Ald. 413, (Chit. j. 1107); Edwards v. Dick, 4 Bar. & Ald. 212, (Chit. j. 1079).

(g) Sebage v. Abitbol, 4 Maule & S. 462; 1 Stark. R. 79, (Chit. j. 942, 947); Rhodes v. Gent, 5 Bar. & Ald. 244, (Chit. j. 1124); Jenner v. Haydon, 4 Bar. & Cres. 1; 6 Dow. & Ry. 7, S. C

(h) Ante, 152, 153; and Roscoe on Bills,

(i) Pearse v. Pembertly, 8 Campb. 261, (Ch. tice may j. 870).

(j) Shepherd v. Hawkey, 1 Conn. R. 868; &c.(p). Bayl. Amer. edit. 193; ante, 498, note (b).

(k) See ante, 341; Siggers v. Lewis, 1 C., M. & R. 370; 2 Dowl. 681, S. C.

(1) Ante, 353; Hansard v. Robinson, 7 Bar. & Cres. 90; 9 Dow. & Ry. 860, (Chit. j. 1840).

(m) 9 & 10 Will. 3, c. 17, and 8 & 4 Anne, c. 9; ante, 465.

(n) See post, Part II. Ch. VI. (o) Ante, 389, 890, 483, 484.

(p) When notice dispensed with, ante, 451, el seq. 481.

payment, sary Proceedings thereon.

Notice.

I. Of Non of a part (q), or a promise to pay the whole or *part (r), or to "see it paid (s)," Payment, or an acknowledgment that "it must be paid (t)(1)," or a promise that "he

(q) Vaughan v. Fuller, 2 Stra. 1246, (Chit. j. 318), was an action against the indorser of a note, and it being proved that the defendant Waiver of had paid part, Lee, C. J. held that that made the proof of demand upon the maker unneces-

> Holford v. Wilson, 1 Taunt. 12, (Chit. j. Action by indorsee against drawer of a bill, dishonoured by acceptor. The defendant had paid part of the money due upon the bill without making objection for want of notice of the dishonour, and the court held, upon a motion for a new trial, that from this the jury were warranted in presuming that due notice had been given.

> (r) Selw. N. P. 9th edit. 57; Haddock v. Bury, Mich. Term, 3 Geo. 2, MS. Burnet, J. 7 East, 236, n. (α), (Chit. j. 724). Per Lord Raymond, C. J. "If an indorsee has neglected to demand of the maker of the note in duc time, a subsequent promise to pay by the indorser will cure this laches."

> Whitaker v. Morris, Worcester, Lent Ass. 1756, MS.; 1 Esp. Rep. 58; Select Ca. 171, (Chit. j. 338). Plaintiff received a note of Yardley, payable to defendant. When it was due plaintiff sent the note to demand the money, but not finding Yardley, he kept the note for seventeen or eighteen days, during which time it was proved that he used due diligence to find him; he then wrote to his agent to inform the defendant, who returned no answer. About ten days after the agent went to defendant, who acknowledged receipt of the letter, and said, the reason why he had not sent an answer was, that Yardley had promised to order payment in London, and as it was not paid, "that he would certainly pay it the day after." The defendant's witnesses proved that Yardley was solvent when the note became due, and for some time after, but then was insolvent. Per Wilmot, J. " Holding the note for so long a time was unreasonable, and would have discharged the defendant, if, when he received the first notice, he had disclaimed the having any thing to do with it, but by his conduct, he has waived the neglect and acquitted the plaintiff;" however, he left it to the jury, who found for the defendant.

Lundie v. Robertson, 7 East, 231; 3 Smith Rep. 225, (Chit. j. 724). Indorsee against indorser of a bill; no evidence was given of presentment or notice, but it was proved, that upon being called upon by the plaintiff's clerk some months after the bill was due, the defendant said " he had not the cash by him, but if the clerk would call in a day or two and bring the account (meaning of the expences) he would pay it." The bill was shewn to him at the time; on the second application, he offered a bill on London for the debt and expences, which was refused; he then said that " he had not had regular notice, but as the debt was justly due, he would pay it." Chambre, J. thought this sufficient, and verdict for the plain-

tiff. On a rule nisi for a new trial, and cause shewn, Lord Ellenborough said, " The case admits of no doubt; it was to be presumed prima facie from the promise to pay, that the bill had been presented in time, and that due notice had been given, that no objection could be made to payment, and that every thing had been rightly done: this superseded the necessity of the ordinary proof; the other conversation does not vary the case, for though the defendant said he had not had notice, he waived that objection. See Croxon v. Worthen, 5 M. & W. 5; post, 502, note (e); and see Gibbon r. Coggon, 2 Campb. 188, (Chit. j. 774); post, 501, n. (a), where, from the drawer's promising to pay a bill, Lord Ellenborough directed the jury to presume that it had been duly protested. See also Taylor r. Jones, 2 Campb. 105, (Chit. j. 781) 771); post, 505, n. (a); and the observations of Park, J. in Houlditch v. Cauty, 6 Scott, 208, 228 to 230; 4 Bing. N. C. 411, S. C.; and of Tindal, C. J. in Hicks r. Duke of Beaufort, 5 Scott, 598, 604; 4 Bing. N. C. 229, 232, S. C.; post, 505, note (x).

(s) Hopes v. Alder, 6 East, 16, (Chit. j. 711). Action against drawer, to whom no notice of non-payment had been given. It was proved, that upon a meeting some time after, but before the action brought between the plaintiff and defendant, the latter said, "I will see it paid." It was urged for the plaintiff, that this subsequent promise, for which there was certainly an equitable consideration, subjected the defendant to liability. This was admitted by the defendant's counsel, and Lord Kenyon, C. J. said, "This subsequent promise was decisive."

(t) Rogers v. Stephens, 2 T. R. 713, (Chit. 446). In an action against the drawer of a foreign bill, an objection was taken that there was no protest, but it appearing that the defendant had no effects in the hands of the drawces when the bills were drawn, or afterwards, and that on being pressed for payment by the plaintiff's agent after the bill was dishonoured, he had said "it must be paid;" Lord Kenyon thought a protest or notice unnecessary, and directed the jury to find for the plaintiff, which they did. A rule was afterwards granted to shew cause why there should not be a new trial, and it was stated then, and upon shewing cause, that the defendant had really been prejudiced by want of notice to the amount of the bill: that he had advanced money to one Calvert to the amount before the bill was drawn; that Calvert desired him to draw on the drawees as Calvert's agents; that he did so on a supposition that Calvert had effects in their hands; that he afterwards settled with Calvert, and upon a reliance that the bill was paid, delivered him up effects to more than the value of the bill, and that Calvert was since insolvent; that the defendant was prepared with evidence to this effect, but that Lord Kenyon delivered it as his opinion that it did not make

^{(1) {} Reynolds c. Douglass, 12 Peters, 497. }

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will set the matter to rights (u)," or a *qualified promise (r)(1) or a mere 1. Of Nonunaccepted offer of composition (10), made by the person insisting on the want Payment. of notice (after he was aware of the laches) to the holder of a bill, amounts sary Proto a waiver of the consequence of the laches of the holder, and admits his ceedings right of action. Where there has not been an express waiver of notice of thereon. dishonour, facts implying a waiver must be left to the jury; thus where the Wairer of plaintiff, in an action against the drawer of a bill of exchange, does not prove Notice. express notice, given in due time, of the dishonour of the bill, but relies upon certain facts in the defendant's own conduct, subsequently, as shewing that he had notice, and knew that he was liable to pay, those facts must be left to the jury, and the judge at Nisi Prius will not pronounce upon their legal effect, without submitting the case to the jury (x).

In some of the cases upon this subject the effect of such partial payment, Promise to or promise to pay, has been carried still further, and been considered not sufficient. merely as a waiver of the right to object to the laches, but even as an admission that the bill or note had in fact been regularly presented and protested, and that due notice of dishonour had been given; and this even in cases where the party who paid or promised, afterwards stated, that in fact he had not had due notice, &c.; because it is to be inferred, that the part-payment or promise to pay would not have been made, unless all the circumstances had concurred to subject the party to liability, and induce him to make such payment or promise (y). Thus, where an indorsee, three months after a bill became due, demanded payment of the indorser, who first promised to pay it if he would call again with the account, and afterwards said that he had not had regular notice, but as the debt was justly due he would pay it; it

was held, that the first conversation being an absolute promise to pay the bill,

was prima facie an admission that the bill had been presented to the accept-

a protest or notice necessary. Lord Kenyon see also Wilkes v. Jacks, Peake, 202. did not recollect that this evidence was offered, but he and all the court thought it answered by the defendant's admission that "the bill must be paid," because that was an admission that the plaintiff had a right to resort to him upon the bill, and that be had received no damage by the want of notice, and was a promise to pay.

(u) Anson v. Bayley, Bul. N. P. 276. The indorsee of a note presented it for payment, but the maker pretended that the payee had promised not to indorse it over without acquainting him, and so put off the indorsee from time to time for three weeks; at the end of that period the indorsee wrote twice to the payee stating what he had done, and the maker's excuse; the payee answered, that "when he came to town he would set the matter right;" and upon an action by the indorsee against the payee, the jury found for the plaintiff, though the maker became bankrupt before the second letter was written, and though he continued solvent for three weeks after the note was due;

(v) Semble; Fletcher v. Froggatt, Guildhall, 8d March, 1827, MS., and 2 Car. & P. 569,

S. C.; post, 506, note (f).
(w) Margetson v. Aitken, 3 Car. & P. 338; Dans. & L. 157, (Chit. j. 1408); Dixon r. Elliott, 5 C. & P. 437; but see Standage r. Creighton, ib. 706, and other cases, post, 506.
(x) Rickett r. Toulmin, 7 Law J. 108, K.
B. M. T. 1828.

(y) Lundie v. Robertson, 7 East, 281; 3 Smith's R. 225, (Chit. j. 724); ante, 500, n. (r); and the other cases in the notes. And see per Tindal, C. J. in Hicks v. Duke of Beaufort, 5 Scott, 598, 604; 4 Bing. N. C. 229, 232; S. C. post, 505, note (x).

It is upon this ground of presumption, that in pleading, the general allegation of notice suffices, where there has been a wairer of notice; while in the case of a dispensation with notice, the facts shewing such dispensation must be specially averred. See Burgh v. Legge, 5 M. & W. 418, 419; post, Part II. Ch. II. Decla-

(1) { Reynolds r. Douglass, 12 Peters, 497. But a promise to pay, qualified with a condition which was rejected, is not a waiver. Ibid.

A recognition of the parties to a letter of credit, of their obligation to pay as guarantors under a supposed liability, which did not arise from the facts of the case, and of which facts they were ignorant, would not be a waiver of the notice they were entitled to have of the acceptance of their guaranty. Ibid. }

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and necessary Proceedings thereon.

Notice.

I. Of Non- or for payment in due time, and had been dishonoured, and that due notice had been given of it to the indorser, and superseded the necessity of other proof to satisfy those averments in the declaration; and that the second conversation only limited the inference from the former, so far as the want of regular notice of the dishonour to the defendant went, which objection he Waiser of then waived (z). So where the drawer of a foreign bill upon being applied to for payment, said, "my affairs are at this moment deranged, but I shall be glad to pay it as soon as my accounts with my agent are cleared," it was decided that it was unnecessary to prove the averment of the protest of [*502] the bill(a)(2). *And where in an action by the indorsee against the drawer of a bill, the plaintiff did not prove any notice of dishonour to the defendant, but gave in evidence an agreement made between a prior indorser and the drawer, after the bill became due, which recited that the defendant had drawn, amongst others, the bill in question, that it was over-due, and ought to be in the hands of the prior indorser, and that it was agreed the latter should take the money due to him upon the bill by instalments; it was held, that this was evidence that the drawer was at that time liable to pay the bill, and dispensed with other proof of notice of dishonour(b). Again, where in an action against the drawer, in lieu of proof of actual notice the defendant's letter was proved, stating, "that he was an accommodation drawer, and that the bill would be paid before next Term," though not saying "by defendant." Lord Ellenborough said, "the defendant does not rely upon the want of notice, but undertakes that the bill will be duly paid before the Term, either by himself or the acceptor; I think the evidence sufficient(c)."

> (z) Lundie v. Robertson, 7 East, 231, (Ch. j. 724); ante, 500, note (r); and see Gibbon v. Coggon, 2 Campb. 188, (Chit. j. 774), where, from the drawer's promising to pay a bill, Lord Ellenborough directed the jury to presume that it had been duly protested. See also Taylor v. Jones, 2 Campb. 105, (Chit. j. 771).

(a) Gibbon v. Coggon, 2 Campb. 189, (Ch. j. 774); Greenway v. Hindley, 4 Campb. 52, (Chit. j 914); Patterson v Beecher, 6 Moore, 319, (Chit. j. 1126).

(b) Gunson v Metz, 1 Bar. & Cres. 193; 2

D. & R. 334, (Chit. j. 1168).

(c) Wood v. Brown, 1 Stark. R. 217; 2 East, 471, n., (Chit. j. 953;) tamen vide Hicks

Where the drawer of a protested bill, on being applied to for payment on behalf of the holder, acknowledged the debt to be due, and promised to pay it; saying nothing about notice; it was held, that the holder was not bound to prove notice, on the trial. Walker r. Laverty, 6 Munf.

An unconditional promise by the indorser of a bill or note to pay it, or an acknowledgment of his liability, and knowledge of his discharge by the laches of the holder, will amount to an implied waiver of due notice of a demand of the drawce, acceptor or maker. Thornton r. Wynn, i Wheat. 193.

So, where the indorser of a promissory note, before it became payable, agreed with the holder, in consideration of time being given, that he would pay the note; it was held, that this was equivalent to proof of demand and notice, and satisfied the usual averments of demand and notice in the declaration. Norton r. Lewis, 2 Conn. Rep. 487. ⟨ Higgins v. Morrison's Ex'r., 4 Dana, 103. }

So also, when a bill is returned protested, and the drawer, on payment being demanded, promises to pay, he cannot afterwards resist the payment, on the ground that due notice of the protest was not given. Pate v. M'Clure, 4 Rand, 164.

And so, where the plaintiff, indorsee of a promissory note, who lived in New York, observed, when he received it, to his immediate indorser, who lived elsewhere, that he had no confidence in the other parties to the note, and did not know them, and should look wholly to the defendant, the indorser; who replied, that he should be in New York when the note would become due, and would take it up, if it were not paid by any other party to it;—Held, that this was a waiver of the right to notice of dishonor; and that an attempt on the part of the plaintiff to give notice, did not affect the question. Boyd r. Cleveland, 4 Pick. 525.

⁽¹⁾ To the same effect are decisions made in the United States. A promise by an indorser to pay a note or bill dispenses with the necessity of proving a demand on the maker or drawee, on notice to himself. Pierson v. Hooker, 3 John. Rep. 68. Hopkins v. Liswell, 12 Mass. Rep.

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where the drawer of a bill being asked if he was aware that the bill had been I. Of Nondishonoured, answered, "Yes, I have had a civil letter from Mr. G. on the payment, subject; and I will call and arrange it;" in an action against him it was held, sary Prothat the above admission relieved the plaintiff from the necessity of proving ceedings And the new rules of pleading have introduced no thereon. a regular notice (d). alteration in this respect, therefore, although a specific issue be now Waiter of joined upon the allegation of notice, a promise to pay the amount of the bill Notice.

or note will be equally evidence to support such issue(e). It seems to have been once considered, that a misapprehension of the legal Misappreliability would prevent a subsequent promise to pay from being obligatory, Legal and that even money paid in pursuance of such promise might be recovered Liability. back(f). But from subsequent cases it appears that *such doctrine is not [•503] law(g), and that money paid by one knowing (or having the means of such knowledge in his power) all the circumstances, cannot, unless there has been deceit or fraud on the part of the holder, be recovered back again on account of such payment having been made under an ignorance of the law, although the party paying expressly declared that he paid without prejudice(h). And as an objection made by a drawer or indorser to pay the bill, on the ground of the want of notice, is stricti juris, and frequently does not meet the justice of the case, it is to be inferred from the same cases, and

it is indeed now clearly established, that even a mere promise to pay, made

after notice of the facts and laches of the holder, would be binding, though

v. Duke of Benufort, 5 Scott, 598; 4 Bing. N. C. 229; post, 505, note (x), that such evidence would not be conclusive.

(d) Norris v. Salomonson, 4 Scott, 257.

(e) Croxon v. Worthen, 5 M. & W. 5. This was an action by the indorser against the maker of a promissory note, made payable at the defendant's bankers, and a promise by the defendant to pay the amount of the note by instalments, was held sufficient, upon the authority of Lundie r. Robertson, 7 East, 231; anle, 500, note (r), to dispense with proof of a due presentment, notwithstanding issue had been taken on the fact of presentment. Per Alderson, B: "The defendant is supposed to know the law: he knows, therefore, that he is not linble unless the note has been duly presented; with that knowledge he undertakes to pay it. Is not that evidence for the jury that he knows it has been presented? I do not see how the new rules make any difference. Before they were framed, all the material allegations of the declaration were put in issue by the general issue; therefore the plaintiff was to prove allthat is, each and every of them: now, each must be separately denied; but still the same evidence will apply to the particular allegation put in issue.

(f) Chatfield v. Paxton and Co., Sittings after Trinity term, 38 Geo. 3, K. B. MS; 2 East, 471, n. The plaintiff gave a bill to the defendants on Luard and Co. The defendants gave time to the acceptors, and they afterwards became insolvent, of both which circumstances the defendants gave the plaintiff notice, and he at their request, in a letter, accepted another bill, which he afterwards paid; and this action was brought to recover back the money paid. Lord Kenyon: "My opinion is against the defendants; it is not only necessary that the plaintiff should know all the facts, but that he should know the legal consequences of them; it seems

to me that the plaintiff did not know the legal consequences of them, and that he paid this money under an idea that he might be compelled to pay it. When the defendants granted this indulgence of two months to Luard and Co., they gave it at their own risk. Where a man, knowing all the facts explicitly, and being under no misapprehensions with regard to any of them, nor of the law acting upon them, chooses to pay a sum of money, volenti non fit injuri', he shall not recover it back again; but the letters of the plaintiff in this case prove directly the contrary, for they are written in a complaining style." Verdict for the plaintiff, 200cl, and interest, from the time of pay-Erskine and Giles for the plaintiff. Gibbs for the defendants. See this case observed upon in Bilbie v. Lumley, 2 East, 471; and Williams r. Partholomew, I B. & P. 526. In Stevens r. Lynch, 12 East, 38; 2 Campb. 332, (Chit j. 782); the court said this case proceeded on the ground that the party was ignorant of the facts. In Roscoe on Bills, 220, there is this observation, "differently reported 2 Fast, 471, n.; 5 Taunt. 155. But when this case was afterwards brought before the K. B. there were other circumstances of fact relied on, and it was so doubtful at last on what precise ground the case turned, that it was not reported, 2 East, 471; and the opinion of Lord Kenyon is not now considered to be law; see Bibbe r. Lumley, 2 East, 463; Brisbans v. Da. cres. 5 Tount. 143; and as appears from the case of Stevens r. Lynch, isfea, note (k).

(g) Bilbie v. Lumley, 2 Fast, 469; Prisbane r. Dacres, 5 Taunt. 143; Williams r. Bartholomew, 1 B. & P. 326; Stephens r. Lynch, 12 Last, 38; 2 Camp 332, (Chit j. 782).

(h) See also Brown r. M'Kinnally, 1 Esp. Rep. 279; Marriott v. Hampton, 2 Esp. Rep. 546; Cartwright r. Rowiey, id. 723.

and neces. sary Proceedings thereon.

Notice.

L of Non- the party making it misapprehended the law(i). Therefore, where the drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable upon the bill in default of the acceptor, three months after it was due, said, "I know I am liable, and if the acceptor does not pay it I will," it was adjudged that he Wairer of was bound by such promise; and the Court said, "that the cases above referred to proceeded on the mistake of the person paying the money under an ignorance or misconception of the facts of the case, but that in the principal case the defendant had made the promise with a full knowledge of the circumstances three months after the bill had been dishonoured, and could not now defend himself upon the ground of his ignorance of law when he

Promise to Pay after declara-[***504**]

A promise to pay made after a declaration filed or delivered, not only precludes the party from availing himself of the laches of the holder, but also dispenses with evidence in proof of the allegations in such declaration(m); and if the promise be made to any party holding the bill, *another person who has afterwards taken it up may avail himself of such promise, and sue the party making it(n). And a recital in an agreement between the

And such a promise will dispense with the neces-

(i) Cooper v. Wall, Guildhall, K. B. 1820, before Abbott, C. J. Scarlett and Chitty for the plaintiff, and Marryatt for defendant Action against drawer. No evidence of presentment to acceptor or notice of non-payment to drawer. The bill was due Saturday, 7th August, 1819. On 12th August witness called with bill on defendant, and informed him that at request of plaintiff, the holder, he called for payment. Defendant said he was sorry the acceptor had not paid the money, that he had promised to advance the money, but that he had deceived him, and that he, defendant, would see the acceptor upon the business, and they would call on the holder; and per Abbott, C. J., "This is sufficient to waive laches of holder (though Marryatt contended that there ought to be an express waiver), and if the drawer deal with the bill after it has been dishonoured, that suffices to charge him."

(k) Stevens v. Lynch, 12 East, 38; 2 Campb. 822, (Chit. j. 782); and see Taylor v. Jones,

made the promise (k).

sity for a protest of a foreign bill(l)(1).

22 Campb. 105, (Chit. j. 771).
(1) Patterson v. Becher, 6 Moore, 319, (Chit. j. 1126); Gibbon v. Coggon, 2 Campb. 188, 189, (Chit. j. 774); Stevens v. Lynch, 2 Campb. 332, 833; 12 East, 38; Greenway v.

Hindley, 4 Campb. 52, (Chit. j. 914).

(m) Hopley r. Dufresne, 15 East, 275, (Chit. j. 856). Action against indorser of a bill accepted payable at a banker's. Defence, no regular presentment during banking hours. The declaration alleged a due presentment for payment, and after such declaration filed, the defendant applied to the plaintiff for the indulgence of a further extension of time to pay the bill, which was insisted on as a waiver of the defective presentation. For defendant it was contended, that there could be no waiver of the defective presentation, without shewing that

the defendant knew, in fact, of the defect at the time, which, though attempted to be, was not shewn in this case. For this was cited Blesard v. Hirst (ante, 343, note (d)), where a subsequent promise by an indorser to pay the bill having been made under ignorance of the prior laches of the holder, by which he was discharged, was held to be no waiver of the objection. For the plaintiff, the counsel relied principally on the waiver which took place after declaration, containing the allegation that the bill was duly presented for payment, was filed; and therefore, after the defendant's attention was called to the fact, and he referred to Lundie v. Robertson (7 East, 231, ante, 500, note (r)), where a promise by an indorser to pay the bill three months after it became due, was held to be prima fucie evidence of his admission that the bill had been presented to the acceptor for payment in due time, and dishonoured, and due notice of it given to him. Lord Ellenborough, C. J., stopping the argument, said that the court thought that it should have been left to the jury to say whether, under the circumstances of the case, the defendant had notice at the time of his application for indulgence, that there had been no due presentation, and therefore made the rule absolute.

(n) Potter v. Rayworth, 13 East, 417, (Chit. j. 826). Indorsee of a note against the payee and indorser. It appeared that the note, which had been negotiated in the country, had been indorsed by the defendant to Fulford, by him to the plaintiff, by the plaintiff to Kirton, and by him to others, before it became due. A fortnight after it became due, Kirton, who had taken it up, called on the defendant, who, until then, had received no notice of its dishonour, the defendant then promised Kirton to pay him the next day; having failed in this, Kirton re-

⁽¹⁾ Where there has been laches in not giving notice to the indorser of the non-acceptance of a foreign bill, a promise by the indorser to pay, is not binding on him. Philips v. M'Curdy, 1 Harr. & Johns. 187.

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drawer and first indorsee, recognizing an existing liability of the drawer to pay L Of Nonthe bill, may be given in evidence to dispense with notice in an action against Payment. such drawer, at the suit of a subsequent indorsee(o).

and neces sary Proceedings

If, however, a promise to pay be made without a knowledge of the fact thereon. of a previous refusal to accept, it will not be binding (p)(1); and even a pay- Waiver of ment under such circumstances might, if the party making it were prejudiced Notice. by the conduct of the holder, and there were any wilful concealment on his Ignerance part, be recovered back(q); though it should seem, that according to the $\sqrt[q]{Laches}$. French law the party paying could not recover back the money, unless the party receiving was guilty of deceit or fraud(r). A promise to pay made after a bill becomes due is considered an admission of regular presentment for payment and of due notice, or at least waives the objection, because the party must be supposed to have known when the bill became due, and must have actually known or might readily have ascertained the fact whether or not there had been laches; and therefore when such a promise has been made, the plaintiff may avail himself of it, without proving that the defendant *knew that the bill had actually been presented and refused(s). But the [*505] fact of the bill having been previously presented for acceptance and refused, lies peculiarly within the knowledge of the party so presenting, and there is no inference that a party who promises to pay after the bill became due knew of the refusal to accept, or of the neglect to give him notice of such refusal; and therefore his promise to pay is not any waiver of the neglect, unless the plaintiff prove that the defendant had actual knowledge of it when he promised to pay. Attention to this distinction will reconcile the cases(t).

sorted to the plaintiff, who paid the amount, and the defence now being the want of notice, the question was, whether the plaintiff could avail himself of this promise so made to Kirton. Graham, B. directed a verdict for the plaintiff, and on motion to sot it aside, the court held that this promise was an acknowledgment by the defendant either with notice, or that without notice, he was the proper person to pay the note, and refused a rule. Lord Ellenborough, C. J. said, "Whether the promise to pay were made to the plaintiff or any other party who held the note at the time, it is equally evidence that the defendant was conscious of his liability to pay the note, which must be because he had had due notice of the dishonour." Bayley, J. considered the promise by the defendant either as an acknowledgment that he had had due notice of the dishonour, or that without such notice he was the proper person to pay the note, as for the party for whose use it was drawn. Rule absolute.

(o) Gunson v. Metz, 1 Bar. & Cres 193; 2

D. & R. 334, (Chit. j. 1168); ante, 502, n. (b). (p) Blesard v. Hirst, 5 Burr. 2672, (Chit j. 384); Goodall v. Dolley, 1 T. R. 712, (Chit. j. 410); ante, 343, note (d); Williams v. Bartholomew, 1 B. & P. 326; Stevens r. Lynch, 2 Campb. 333, admitted in 12 East, 39, (Chit. j. 782); Hopley r. Dufresne, 15 East, 276, 277, (Chit. j. 856); ante, 503, note (m). And see Pickiu r. Graham, 1 C. & M. 725; 3 Tyr.

923, S. C.; post, 506, note (c).

(q) Chatfield r. Paxton, ante, 502, n. (f). Martin r. Morgan, 3 Moore, 635; 1 Gow, C. N. P. 123; 1 B & B. 289, (Chit. j. 1065); Williams v. Bartholomew, 1 B. & P. 326; Bilbie v. Lumley, 2 East, 469; Malcom v. Fullarton, 2 T. R. 645. Quære, if not prejudiced, could be sustain such action? Farmer v. Arundel, 2 Bla. Rep. 824; Price v. Neal, 1 Bla. Rep. 399; 3 Burr. 1353, (Chit. j. 364); Ancher v. Bank of England, Dong. 637, (Chit. j. 406); Dize v Dickinson, 1 T R. 285. ble, he could; see Milnes v. Duncan, 6 Bar, & Cres. 671; 9 Dowl. & Ry. 731, (Chit. j. 1330);

anle, 425, note (k).
(r) 1 Pardess. 458.

(s) In Taylor v. Jones, 2 Campb. 105, (Chit. . 771), it was contended for defendant, who had promised to pay, that the plaintiff ought to show that at the time of such promise the defendant had full knowledge of the laches of the holder; but Bayley, J. held, "that where a party to a bill or note, knowing it to be due, and knowing that he was entitled to have it presented when due to the acceptor or maker, and to receive notice of its dishonour, promises to pay it, this is presumptive evidence of the presentment and notice, and he is bound by the promise so made."

(t) Blesard v. Hirst, 5 Burr. 2670, (Chit. j. 384); and Geodall r. Dolley, 1 T. R. 712, (Chit. j. 440); ante, 343, note (d), where cases

^{(1) {} So where the drawer, upon the supposition that a demand had been made upon the drawce, which was not the fact, promised to pay, it was held not binding. Tickner v. Roberts, 11 Curry's Louis. 14. }

1. Of Nonpayment, and necessary Proceedings thereon.

Notice.

pay, when not sufficient.

The conduct also of the party insisting on the want of notice must, in general, be unequivocal, and his promise must amount to an admission of the holder's right to receive payment. The cases seem to go to this extentwhere the drawer of a bill, after it has been dishonoured, makes a distinct promise to pay, such promise is evidence that he has received notice of dis-Waiter of honour; and the reason is this, that men are not prone to make admissions adverse to their own interest; and therefore where the drawer promises pay-Promise to ment, it is to be presumed that he does so because he is conscious that he is To that extent goes Lundie v. Robertson(u), and no further(x). liable. Where, therefore, the drawer of a bill, on being applied to for payment, said, "If the acceptor does not pay, I must, but exhaust all your influence with the acceptor first," and the drawer afterwards directed the applicant to raise

the money on the lives of himself and acceptor, it was held, that this admission was not to be taken as conclusive evidence of defendants having received or waived notice of dishonour(x). And where a foreigner said only, "I am not acquainted with your laws, if I am bound to pay it I will," such promise was not considered a waiver of the objection of want of notice (y): and it has been considered, that if the promise were made on the arrest, it shall not prejudice(z); but this doctrine seems questionable(z). And where the drawer, after having been arrested, upon being asked what he had to propose by way of settlement, said, "I am willing to give my bill at one or two months," but which was rejected, this was held not to obviate the necessity of proving notice; and Lord Ellenborough observed, "This offer is neither an acknowledgment nor a waiver to obviate the necessity of expressly proving notice of the dishonour of the bill. He might have offered to [*506] give his acceptance at one or two months, although being *entitled to notice of the dishonour of the former bill, he had received none, and although, upon this compromise being refused, he meant to rely upon the objection. If the plaintiff accepted the offer, good and well; if not, things were to remain on the same footing as before it was made(a). So an offer on the part of the indorser of a bill to pay part of the amount and the costs, and to give a warrant of attorney for the residue, will not dispense with proof of notice of dishonour(b). And where the day after a bill of exchange had been dishonoured in London, and before the fact of the dishonour could be known in Yorkshire, the drawer's clerk called in Yorkshire upon the indorser prior to the holder and a conversation took place as to the bill being likely to come back, and the clerk said, "I suppose there will be no alternative but my taking up the bill, and if you will bring it to Sheffield on Tuesday, I will pay the money;" and the indorser did not receive either the bill or notice until some days after the Tuesday, and notice of dishonour was not given to the drawer in due time; it was held, that such promise was not sufficient to dispense

> of a promise to pay after an unknown refusal to accept. Lundie v. Robertson, 7 East, 231, (Chit. j. 724), and the other cases referred to, ante, 500, note (r), were cases of a promise after a neglect to give notice of non-payment, which must have been known to the defendant.

 (u) 7 East, 231; ante, 500, note (r).
 (x) Per Tindal, C. J. in Hicks v. Duke of Beaufort, 5 Scott, 598, 604; 4 Bing. N. C. 229, 232, S. C.

(y) Dennis v. Morris, 3 Esp. Rep. 158.

(Chit. j. 626).
(z) Rouse r. Redwood, 1 Esp. Rep. 153. Defendant, on being arrested, said to the plaintiff "that it was true the note had his name on it, but that he had security, though he wished

for time to pay it." Lord Kenyon said, "When a person is arrested, and at the time is ignorant of his rights, or whether he is bound by law to pay the demand or not, and under such circumstances makes any confession, and seemingly admits the demand, such admission shall not be allowed to be given in evidence to charge him." Sed quære. But note, Lord Kenyon was probably influenced by the same opinion of the law as that expressed in Chatfield v. Paxton, ante, 502, note (f), since overruled, ante, 503.

(a) Cuming v. French, 2 Campb. 106, note, (Chit. j. 771).

(b) Standage v. Creighton, 5 Car. & P. 406.

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with giving due notice of the dishonour to the drawer(c). But we have 1. Of Nonseen, that an offer of composition, although not accepted, is considered as payment,

dispensing with proof of notice of dishonour(d).

Where the plaintiff relies on a statement by the indorser after the bill was ceedings due, that he knew he was discharged, but that the plaintiff had behaved so thereon. well to him in money matters that he should take no advantage of it, but Wairer of would pay the money, he must, it is said, also prove a demand on the ac- Notice. ceptor(e).

and neces-

A qualified promise of payment, though an admission of the receipt of due Consenotice, must nevertheless be taken as a qualified promise, and acted upon quence of accordingly (f).

qualified Promise.

It has been considered, that admitting that a drawer of a bill may by cir- Waiver by cumstances impliedly waive his right of defence founded on the laches of the an Indorsholder; yet an indorser can only do so by an express *waiver, there being a be implied. material distinction in this respect between the situation of a drawer and in- | *507] dorser(g).

(c) Pickin v. Graham, 1 Crom & M. 725; 8 Tyrw. 923, S. C. It was also held, that the promise was not binding, having been made in ignorance of the dishonour, see ib. 729.

(d) Ante, 501, note (w). Sed quære, whether the same principle upon which an offer of composition is held to dispense with proof of notice of dishonour, does not apply with equal if not greater force to an offer to pay the whole debt, upon having time. But as in both cases such offer amounts at most to a conditional promise, it is submitted that in neither case, where the offer is unaccepted, ought the party making it to be prejudiced thereby.

(e) Brown v. M'Dermot, 5 Esp. Rep. 265,

(Chit. j. 721).

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(f) Fletcher v. Froggatt, Guildhall, K. B. 3d March, 1827. Bill for 2141. Payee v. Indorser. Notice was not proved, but defendant had said subsequently, on being applied to, that he was not liable to the amount of more than 701. This was held by Abbott, C. J. to be a qualified admission, and only enabling plaintiff to recover that sum; for the defendant might make that offer, waiving the right to object to the want of notice. S. C. is reported in 2 Car. & P. 569. Assumpsit on a bill of exchange for 2001., by indorsee against drawer. Sufficient notice of dishonour had not been given, but a witness was called, who stated, that in a conversation with the defendant about the bill in question, the defendant said, "I do not mean to insist upon want of notice, but I am only bound to pay you 701." Something was then to be done by some other person in the course of the day on which the conversation took place; and the defendant added, "I will call to-morrow morning and see that all is arranged satisfactorily." Hill, for the defendant, submitted, that at least this admission would only entitle the plaintiffs to the sum mentioned in it. Scarlett, for the plaintiff, contended, that as it was a waiver of the objection on the ground of want of notice, it would entitle the plaintiffs to recover the whole amount of the bill. Abbott, C. J. " The defendant does not say that he

will pay, but that he is only bound to pay 701. I think the plaintiff must be satisfied with 701." And verdict accordingly. MS. And see 2 Car.

& P. 569, (Chit. j. 1325).

(g) Borradaile v Lowe, 4 Taunt. 93, (Chit. j. 835); and see Shepherd, Serjeant's, argument, 4 Taunt. 96, 97. The defendant, who was an indorser, in answer to a request to ninke provision for the bill, wrote the following letter:-" Sir, I cannot think of remitting until I receive the draft, therefore, if you think proper, you may return it to Trevor and Co. Whitchurch Old Bank, if you consider me unsafe. 28th January, 1811. (Signed) J. Lowe, Whitchurch. To Mr. John Wilkins." This letter was held not to amount to a waiver of the laches in not giving due notice of non-payment. And per Lord Mansfield, C. J. "I am extremely glad I saved this point; for my mind fluctuated upon it very much at the trial; but, upon a further consideration, I do not find any case in which an indorser, after having been discharged by the laches of the holder, has been held liable upon his indorsement, except where an express promise to pay the bill has been proved. Now the letter of the defendant contains no such express promise, but in a great measure shews, that the defendant was writing under a supposition that he was liable, and that the prior indorsers would pay the bill; for he desires that it may be sent to Trevor and Co. who were the indorsers next in priority; but when he afterwards finds that the case is otherwise, and that the other indersers would not pay, and that he also was discharged, he refuses, as it was still open to him to do. I cannot consider the letter as conveying an absolute promise to pay at all events, whether Trevor and Co. did or not; and I think, in this case, it would be too much to fix the defendant by any such implied promise. In most of the cases where the defendants have been held liable, they have either made an express promise to pay, or a promise when they had a full knowledge at the time that they were discharged, or where there was a real debt binding in conscience due from them; but none of

I. Of Nonpayment. and necessary Proceedings thereon.

A person who has been once discharged by laches from his liability, is always discharged; and therefore where two or more parties to a bill have been so discharged, but one of them not knowing of the laches, pays it, such payment is in his own wrong, and he cannot recover the money from another of such parties (h)(1).

the cases have gone to the extent of making this defendant liable; and to hold that he was, in this instance, would be extending them beyond their fair import."

(h) Roscoe v. Hardy, 12 East, 484; 2 Campb. 458, (Chit. j. 801); Turner v. Leach, 4 B. &

Al. 541, (Chit. j 1108); ante, 391, 426, 484. When payment without notice of dishonour no bar to action founded on contract of indemnity, Huntley v. Sanderson, 1 C. & M. 467; 3 Tyrw. 469; ante, 331, note (z), 348, note (e).

(1) There are many circumstances which in point of law amount to a waiver of notice. And the doctrines respecting waiver of notice equally apply to the non-acceptance, and non-payment of bills, and non-payment of notes, the cases on this subject which have been decided in the United States, will be here collected together. If the maker of a note abscond, and the indorser before it becomes due, informs the holder of the fact, and requests delay, and agrees to give a new note for the amount, it is a waiver of demand and notice of non-payment. Leffingwell v. White, 1 John. Cas. 99. So if the indorser, before the note becomes due, takes an assignment of all the property of the maker as security for his indorsements. Bond v. Farnham, 5 Mass. Rep. 170. But it will be otherwise if he take an assignment of property only to secure him against his indorsement of other specified notes | Ibid. See Prentiss v. Danielson, 5 Conn. Rep. 175. So, if the inderser of a note, to protect himself from eventual loss, take collateral security of the maker, on account of the particular note indorsed, it is a waiver of the legal right to require proof of demand on the maker and notice to himself. Mend v. Small, 2 Greenl. 207.

And a waiver of notice or an agreement to be bound by a notice different from that which the

law requires, may be inferred from the conduct of the parties. Upon this ground it has been decided in Massachusetts, that if the parties do their business at a particular bank at which a note is made payable, they will be presumed to agree to be bound by the usage of that bank as to demand and notice, although such usage may be entirely at variance with the general rules of law; as for instance, if the usage of the bank be to make a demand on the maker before the note becomes due, or to give notice to the indorser before or after the time required by law; or by putting letters into a post-office, or by any other mode of conveyance varying from the rules of law. Jones v. Fales, 4 Mass. Rep. 245. Widgery v. Munroe, 6 Mass. Rep. 449. President, Directors & Co of the Lincoln and Kennebeck Bank v. Hammett, 9 Mass. Rep. 159. The same v. Page, 9 Mass. 155. These decisions do not seem to have been recognized in any other state; and may perhaps be thought to deserve further consideration. But the general principle running through these cases, seems to have been recognized by the Supreme Court of the United States, in the case of Mills r. Bank of the United States, 11 Wheat. 431, wherein it was held, that although by the general law, demand of payment of a bill or note, must be made on the third day of grace; but where a note is made for the purpose of being negotiated at a bank whose usage is to demand payment and give notice on the fourth day, such usage forms a part of the law of the contract: and it is not necessary that a personal knowledge of the usage should be brought home to the indorser. See Bank of Washington v. Triplett, I Peters, 25.

A promise to pay a dishonoured note or bill made with a full knowledge of all the circumstances, will also be deemed a waiver of a due demand and notice. Donaldson v. Means, 4 Dall. Rep. 109. Pierson v. Hooker, 3 John. Rep. 68. Duryee v. Dennison, 5 John. Rep. 248. Miller v. Hackley, 5 John Rep. 875. Copp v. M'Dugull, 9 Mass. Rep. 1. Hopkins v. Liswell, 12 Mass. Rep. 52. But the promise must be explicit and made out by the most clear and unequivocal evidence. Therefore where the indorser speaking of several bills on different places, and under different circumstances, said "he would take care of them;" or "he would see them paid;" it was held not sufficient evidence of a proprise to pay one of the bills on which no notice of non-acceptance had been given. Miller v. Hackley, 5 John. Rep. 375, and see Griffin v. Goff, 12 John. Rep. 423. And what a man says under the surprise of a sudden and unexpected demand ought to be construed with a good deal of strictness. May v. Coffin, 4 Mass. Rep. 341. Indeed it seems to have been held that under such circumstances a promise to pay a bill which had been protested for non-acceptance, and of which due notice had not been given to the indorsr, did not bind him, as it was wholly without consideration, and especially as he retracted his promise within a few days afterwards. May v. Coffin. And it has been repeatedly decided in-Massachusetts, that if an indorser under ignorance of the law, or through mistake of the law, promise to pay a dishonoured bill or note, he is not bound by such promise. Warder v. Tucker, 7 Mass. Rep. 449. Freeman v. Boynton, 7 Mass. Rep. 483. May v. Coffin. And it seems generally agreed that a promise to pay, or an actual payment under a mistake of the facts, is not binding. Donaldson v. Means. Garland v. The Salem Bank, 9 Mass. Rep. 468. Crain v. Colwell, 8 John. Kep. 384. Tower v. Durell, 9 Mass. Rep. 332. Fotheringham v. Price's Exr's. 1 Bay's Rep. 291. Griffin v. Goff, 12 John. Rep. 423. Trimble v. Thorne, 16 John. 152. But a waiver of a right to notice made by the indorser of a note, does not in general excuse

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With reference to the decisions upon the liability of an agent who has I. Of Nonneglected to give due notice of non-acceptance, it is clear that an agent, to payment, obtain payment or to forward notice, would be liable to a special action on sary Prothe case to recover compensation for any loss sustained by the neglect of his ceedings duty(i)(1).

In foreign countries, especially in France, when a bill has been duly protested for non-payment, the holder has a right to draw a bill of exchange case of upon the drawer or one of the indorsers, called retraite, and which is com- Neglect. posed, first of the principal sum, and interest from the day of the protest; 10thly, Of secondly, of the expense of the protest; thirdly, of other legal expences, Bill to resuch as bank commission or brokerage, and of journies, when requisite, to imburse obtain payment; fourthly, of the stamp and of the postage of letters, which the Princithe default of payment rendered necessary to write. These charges must pal, Internot exceed what of right ought to be demanded, and the speed of commer- Expenses, cial transactions renders it necessary that the authentic vouchers of such called in charges should accompany the bill. The evidence in support of the charges France is established by an account called "compte de retour," which ought to be annexed to the retraite bill of exchange as well as the protest, or a copy This account ought to name the person on whom the retraite bill is drawn, in order to shew that it relates to such retraite bill, and to avoid the frauds might result from the omission. The account *ought also to announce the [*508] rate of exchange at which the retraite bill is negotiable, and which the law terms rechange(k).

9thly, Lia-

(i) Ante, 273, 331, 332; Van Wart v. Wool- of re-exchange, see 1 Pardess. 461, &c. There ley, 3 Bar. & Cres. 489; 5 Dow. & Ry. 347; 1 R. & M. 4, (Chit. j. 1235).

is no accumulation of re-exchange between indorsers. 1 Pardess. 468.

(k) 1 Pardess 460 to 465. As to amount

the holder from demanding payment of the maker at the maturity of the note, for it may be done in the confidence that the maker will punctually pay it. Berkshire Bank v. Jones, 6 Mass. Rep. 524. And a qualified or conditional promise of the indorser to pay, which is rejected by the holder, is not a waiver of notice. Agan r. M'Manus, 11 John. Rep. 180. Crain v. Colwell, 8 John. Rep. 180.

It seems that if an indorsec of a note cannot recover upon it against the maker, by reason of usury between the maker and his indorser, of which usury the indorsee was ignorant at the time of the purchase, he may recover against such indorser, without having given him due notice of the dishonor of the note. Copp v. M'Dugall, 9 Mass. Rep. 1.

If the drawer of a promissory note be known by the indorser to have been insolvent when the note was made, and when it became due, the indorser is, nevertheless, entitled to due notice of non-payment by the drawer. But if the indorser has accepted from the drawer, a general assignment of his estate and effects, notice is not necessary. Barton v. Baker, 1 Serg. & Rawle, 334.

When the drawer of a note is known to be a bankrupt or insolvent, demand and notice are not necessary. Clark v. Minton, 2 Const. Rep. 682. But it must be an utter and declared insolvency of record and known as such to the indorser. Kiddell v. Ford, Ibid. 678.

In an action against the indorser of a note, proof of a waiver of notice will support an allegation of actual notice. Thus, where the indorser of a note applied to a bank to get it discounted, and promised to attend to the renewal of it, and to take care of it; and directed that a notice to the maker should be sent to his care, and such notice was sent accordingly; it was held, that this was a waiver of a regular demand and notice;—or at least, the jury, from these circuinstances, might legally infer a waiver. Taunton Bank v. Richardson, 5 Pick. 436. See Barker v. Parker, 6 Pick. 80.

(1) { But a notary is not liable for omitting to give due notice so long as the holder may resort to other grounds for fixing the indorser in default of the notice and does not avail himself of such grounds. Franklin v. Smith, 21 Wend. 624. }

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II. OF PAYMENT SUPRA PROTEST.

WE have already considered the nature of the protest for better security, II. Of Payment Suand of an acceptance supra protest, and of the proceedings of the holder, and pra Proultimate payment by such acceptor (l). The nature of a payment supra proiest. test remains to be considered.

Who may pay Supra Protest (l).

Payment of a bill, whether foreign or inland (m), being refused, any third person, not before a party to the bill, as he might have accepted, so he may after protest pay it for the honour of the drawer, or any of the indorsers(n); which payment, as it is always made after protest, is called payment supra protest(o); but the acceptor, if he have previously made a simple acceptance, cannot pay in honour of an indorser, because, as acceptor, he is already bound in that capacity (p); he may, however, when he has accepted a bill without having effects of the drawer in his hands, and no provision has been made by the drawer for payment, suffer the bill to be protested, and then pay supra protest(q), in which case he will have a remedy on the bill against the drawer(r); but that seems unnecessary, excepting as a precaution with regard to evidence, for without it he might, in an action for money paid, though not on the bill, recover all money paid without consideration. A party paying a bill supra protest, which has already been accepted by another, may sue such first acceptor(s); but if a person take up a bill for the bonour of the drawer, he has no right of action against the acceptor, if he accepted it for the accommodation of the drawer(t). A bill previously accepted supra protest must be duly presented for payment to the original drawee, and duly protested for non-payment by him, before the acceptor supra protest can be We have seen, however, that in the case of a bill made payable at a place other than the residence of the drawee, a second presentment to the drawee is dispensed with; and we have also seen, that since the 6 & 7 Will. 4, c. 58, the presentment to the acceptor supra protest need not be made until the day after the bill falls due(x). If several persons separately offer to pay supra protest, the holder ought to receive payment from him whose offer is most favourable, or for the honour of most parties (y).

Necessary

In general, no person should pay on honour of a bill, or of a particular precaution party to it, before the bill has been duly protested for non-payment by the drawee(z); and if he do, it will be presumed that his payment is on the behalf of the drawee(a), and he will have no claim upon the drawer or indors-[*509] ers(b). Nor should a party pay after protest, *without ascertaining that the signatures of those for whose honour he pays are genuine, for if he do, and they should turn out to have been forged, he will have no remedy against them; nor can he recover back the amount from the party paid, unless he

> (1) Ante, 349 to 352; 1 Pardess. 430, 464, 465.

(n) Fairly v. Roch, Lutw. 891, 892, (Chit. j. 172); Marius, 128; Bayl. 5th edit. 325. (o) Beawes, 2d edit. pl. 50; Mar. 128. See

the custom stated, Lutw. 899.

(p) Beawes, pl. 51.

(q) Id. pl. 52. (τ) Id. ibid.; and Raper v. Birkbeck, 15 East, 17, (Chit. j. 851).

- (s) Ex parte Wackerbath, 5 Ves. 574, (Ch. j 627)
- (t) Ex parte Lambert, 13 Ves. 179, (Chit. j. 732).
 - (u) See anie, 347 to 352.

(x) Ante, 349, 351. (y) 1 Pardess. 430.

- (z) Vandewall v. Tyrrell, Mood. & M. 87, (Chit. j. 1352); Forbes on Bills, 149; ante, 346, note (r).
 - (a) 1 Pardess. 430.
 - (b) Same cases as in notes (z) and (a).

⁽m) Ante, 344; Smith v. Nissen, 1 T. R. (Chit. j. 435). A promissory note is sometimes, but very rarely, paid supra protest.

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discovers his mistake, and gives notice to him on the very day of payment, II. Of so as to enable him to give the promptest notice of dishonour, and prevent Payment the discharge of prior parties from want of such notice(c). It is said, that test a person who has paid supra protest, may, in France, summon the holder Necessary whom he has paid, and compel him to communicate the names and residences precaution. of all the indorsers, and at all events of his immediate indorser, and each of them in his turn is also bound to communicate all particulars to his immediate inderser(d). After having thus caused the bill to be protested for nonpayment by the original drawes, and ascertaining that the signatures of the drawer and indorser are genuine, even then a party should not pay supra protest before he has declared to a notary public for whose honour he intends making it, and obtained the notary's certificate (usually termed an act of honour) to that effect; of which declaration the notary must give an account to the parties concerned, either in the protest itself, or in a separate instrument(e)(1). If, however, the acceptor supra protest for the honour of the drawer or indorser, had received his approbation of the previous acceptance, he may then pay the bill without any protest for non-payment (f).

Although, with respect to other debts, a stranger who has no interest in Remedy of them, does not, by paying them, entitle himself to the rights of a creditor, Party payunless he have the consent of the debtor to such payment(g), yet, with re-ing Supra gard to a bill of exchange, a stranger who pays it supra protest for the honour of the bill or generally, becomes an indorsee, and acquires all the same rights, and is entitled to all the same remedies as the holder had, whom he paid, although no formal indorsement or transfer of the bill be made to him(h)(2); and such payment supra protest does not, like a simple payment by the original drawee, operate as a satisfaction of the bill, but itself transfers the holder's rights to the party paying(i); unless the party paying, by his own act, limits and narrows his right. Therefore a party so paying supra protest generally, has a right to sue not only the original acceptor, but

(c) Wilkinson v. Johnston, 3 B. & C. 428; 5 Dowl. & Ry. 403, (Chit. j. 1231); Cocks v. Masterman, 9 B. & C. 902; 4 Man. & Ry. 676; Dans. & Ll. 329, (Chit. j. 1446); Bayl. 5th edit. 320; ante, 426, 427.

(d) 1 Pardess. 474, 475.

(e) Beawes, pl. 53; Mar. 128; Forbes on Bills, 149. As to the necessity of an act of honour upon an acceptance or payment supra protest, see Brooke's Office of Notary, pages 86 to 89, 101; and see forms, ib. 228 to 233. (f) Beawes, pl. 48.

(g) Exall v. Partridge, 8 T. R. 810; 1 Rol. Ab. 11; Lampleigh v. Buthwait, Hob. 105; Stokes v. Lewis, 1 T. R. 20; Williams v. Millington, 1 Hen. Bla. 83; Jenkins v. Tucker, id.

(h) Poth. pl. 171; 1 Pardess. 437, 438; Mertens v. Winnington, 1 Esp. R. 112.

Mertens v. Winnington, 1 Esp. R. 112, (Chit. j. 523). Assumpsit against defendant as drawer of a bill. The bill in question was

drawn by the defendant on Carrioni, in Italy, in favour of Webhould. Webbould indorsed it to Burton, Forbes, and Gregory, they sent it to their correspondent in Holland, who sent it to Italy, where it was presented to Carrioni for payment, who refused it, upon which the plaintiffs, who were merchants resident at Venice, paid the bill for the honour of Burton, Forbes, and Gregory, and now brought their action against the defendant as drawer. The counsel for the defendant contended, that where a bill is taken up for honour of any of the parties whose names are on it, that such person only shall be liable. But Lord Kenyon was of opinion, that where a bill is so taken up, that the party who does so is to be considered as an indorsee, paying full value for the bill, and as such entitled to all the remedies to which an indorsee would be entitled, that is, to sue all the parties to the bill, and he therefore directed the jury to find a verdict for the plaintiff. (i) 1 Pardess. 438.

(1) { The payer of a bill supra protest, for the honor of the indorser, must give reasonable notice to the party that he has made such payment for his credit; otherwise he is not liable to

refund. Woon v. Pugh et al., 7 Ham. pt. 2d, 164. }

(2) { Where a party to a bill is once exonerated, his liability cannot be revived without his assent; even payment by his friend, for his honor, subjects him to no legal liability. Higgins v. Morrison's Ex'r, 4 Dana, 102. }

IJ. Of **Payment** Supra Pro-

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also all the indorsers and the drawer, either specially upon the custom (k), or perhaps *generally upon a count for money paid for the defendant's use(1), though it is considered safer to declare specially (m). In an action upon a bill with several indorsements by a plaintiff, who has paid the bill under pro-Remedy of test for the honour of one of one indorsers, it is sufficient, even on a ing Supra special demurrer, to state that he paid the bill according to the usage and custom of merchants, without stating that he had paid it to the last indorsee (n). [*510] If a party pay for the honour of a particular indorser, he may then sue all prior indorsers, and the drawer(o), and acceptor, but not subsequent indorsers, he having by such special payment excluded and discharged them, and narrowed and limited his right. In general, a party paying for the honour of the drawer, may sue the acceptor(p); but a person taking up a bill for the honour of the drawer in particular, and not generally for the honour of the bill, has no right against the acceptor without effects (q). a person who has paid supra protest, may compel any prior indorser who has received a guarantee or security to render them available, but he has no claim on any subsequent indorser (r). The reason of this exception to the general rule, precluding a party from constituting himself the creditor of another, without his concurrence, it has been observed, is, that it induces the friends of the drawer or indorsers to render them this service; it tends to prevent the great expense attending the return of a bill, and preserves the credit of the trader(s).

> (k) Fairley v. Roch, Lutw. 891, (Chit. j. 172); and Manning's Index, 70.

> (1) Semble, Smith v. Nissen, 1 T. R. 269, (Chit. j. 435); Vandewall v. Tyrrell, Mood. & M. 37, (Chit. j. 1352); ante, 346, note (r).

(m) In Reid and others v. Smart, Monday, 18th April, 1828, at Gaildhall, before Lord Tenterden, the leading counsel inclined to think, that a plaintiff who has paid bills supra protest for the honour of the payees, who were first indorsers, could not recover on a count for money paid against the drawer, and thereupon special counts were added on the morning of trial, by leave of Lord Tenterden. Plaintiffs were nonsuited for want of a stamp on a letter.

N. B.—There were several special indorsements, and the first by Kennedy and Maitland was special; but Lord Tenterden held, that it was unnecessary for plaintiffs to prove any indorsement excepting that of the first indorsers, who gave it due circulation, and that it was not incumbent on a holder supra protest to prove more than the indorsement, and the protest and payment supra protest, and due notice of dis-honour. A. Gordon, attorney for plaintiffs.

(11) Cox v. Earle, 3 Bar. & Ald. 430, (Chit.

j. 1078).

(o) Mertens v. Winnington, 1 Esp. R. 112, (Chit. j. 523); ante, 509, note (h).

(p) Ex parte Wackerbath, 5 Ves. 574, (Chit. j. 627); see observations on that case in Ex parte Lambert, 13 Ves. 179.

(q) Ex parte Lambert, 13 Ves. 179, (Chit.

j. 782); Bayl. 5th edit. 329, 438.

(r) 1 Pardess. 438.

(s) Beawes, pl. 54; Poth. pl. 171.

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*CHAPTER XI.

OF CHECKS ON BANKERS.

Definition of, and Parties to Form of When exempt from Stamp Transfer of May be taken in Execution	 511 Time of Transfer ib. Presentment for Payment, Time of ib. Payment of ib. Liability of Banker for not Paying 513 Rules as to Bills and Notes, appli 	514 g ib.
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A CHECK or draft on a banker, is a written order or request, addressed to Definition persons carrying on the business of bankers, and drawn upon them by a par- and Parties ty having money in their hands, requesting them to pay, on presentment, to to. a person therein named, or to bearer, a named sum of money.

The form of a check has already been given (a). It nearly resembles a Form. bill of exchange, but it is uniformly payable to bearer, and should be drawn upon a banker, or person acting as such(b).

On account of the daily and immediate use of checks, the 55 Geo. 3, c. When ex-194, has exempted them from stamp duties, provided they be for the pay- empt from ment of money to the bearer on demand, and drawn upon a banker, or a per- Stamp. son acting as such, and residing or transacting the business of a banker, within fifteen miles of the place where such draft or order shall be issued(c), and provided also that such place be specified in such draft or order (d), and that the same shall bear date on or before the day the same shall be issued, and do not direct the payment to be made by bills or promissory notes (e).

We have before considered the decisions upon this enactment (f). these requisites be not strictly observed, an unstamped check cannot in general be read in evidence for any purpose(g), except to prove a crime or These instruments are expressly excepted out of the provisions of the 7 Geo. 4, c. 6, s. 9, and 9 Geo. 4, c. 65, s. 4, and which authorize checks on bankers for sums under 5l.(i).

Where several persons, not partners in trade, as for instance, assignees of a bankrupt, deposit money in the bank, or at an ordinary bankers, all must, at law, sign checks for drawing out the amount; but if one abscond, a court of equity will compel payment to the others (k).

It was once thought that a check drawn on a banker was not *transferable Transfer of. generally, but only so within the bills of mortality (1). But it is now settled, [*512]

(a) Ante, 147. what purposes an unstamped instrument is admissible in evidence, see Stark. on Evid. part (b) Anie, 106, 118. (c) 9 Geo. 4, c. 49, s. 15; anle, 106, n. (u). iv. 1381 to 1393; Coppock v. Bower, 4 M. & (d) Anie, 106, note (x). (e) 55 Geo. 3, c. 184; anie, 106, 107, 118. W. 861; ante, 128, 124. See post, 821, (47). (i) Ante, 150, 151, 160. (k) Ex perte Hunter, 2 Rose, 868, (Chit. j. (f) Ante, 118. (g) Borradaile v. Middleton, 2 Campb. 58, 1246). (Chit. j. 765); ante, 122, 128. (1) Grant v. Vaughan, 8 Berr. 1517, (Chit. (h) Rex v. Pooley, S B. & P. 316. As to j. 365).



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Of Checke that they are as transferable as bills of exchange, though, strictly speaking, they are not due before payment is demanded, in which respect they differ from bills of exchange and promissory notes, payable on a particular day(m); and therefore the mere circumstance of a person receiving a check, a few days after its date, does not necessarily, as in the case of an over-due bill, subject him to the objections which would have affected it in the hands of the person from whom he received it(n). A banker's check is not considered as money, although it affords the means of receiving money immediately(0), but it is a mere chose in action, not in possession, and not recoverable but by In practice, however, they are taken in payment as cash, and the acceptance by a creditor of a check in his favour, drawn by his debtor, operates as payment, unless dishonoured (q); and it has been decided that a banker in London, receiving bills from his correspondent in the country, to whom they had been indorsed to present for payment, is not guilty of negligence in giving up such bills to the acceptor upon receiving a check on a banker for the amount, although it turn out that such check is dishonour-But a check to operate as a payment must be unconditional in its terms; and, therefore, if a debtor transmit to his creditor a check drawn for a less amount than the debt, and expressed to be for the balance of account, the creditor is not bound to receive it as payment, and may commence an action for the debt, notwithstanding the check is still in his hands unpresented; for the presentment of such a check would at least furnish some evidence that the creditor had received it as payment of the balance of account(s). And even if the check were unconditional, the creditor would have a right to exercise his discretion, whether or not he would receive it as payment, by presenting it(t). We have before considered under what circumstances the production of a check will be evidence of payment to the party named there-In an annuity transaction, a check must be described as such, and not as cash(x); and, in an action for usury, it was held, that the forbearance should be laid from the time when the check was actually received, and not from the time when it was given(y). It is said that checks are not protest-

(m) Per Lord Kenyon, in Boehm v. Stirling, 7 T. R. 430; 2 Esp. 575, (Chit. j. 593).
(n) Rothschild v. Corney, 9 B. & C. 388; 4 M. & Ry. 411; Dans. & Lloyd Rep. 325, (Chit. j. 1430); ante, 221, 222.

(o) See Down v. Hulling, 4 B. & C. 330, 333; 6 D. & R. 455, S. C.

(p) Per curiam, in Moore v. Bartrup, 2 D.

& Ry. 29; 1 Barn. & Cres. 5, (Chit. j. 1153).

(q) Pearce v. Davis, 1 Mood. & R. 365.

The mere fact of a person's drawing such a check in favour of another is not evidence of a

Boswell v. Smith, 6 Car. & P. 60. A. had a claim on B., C., and D. Several months afterwards B. signed a check for a larger sum, in the name of himself and C. and D., as his partners, which was proved to have passed through the hands of A., and to have been appropriated by him to his own purposes. A. died:-Held, in an action by his executors against the three partners for the original claim, that the check, prima facic, was evidence of payment; but there being other circumstances from which a loan of its amount might be inferred, it was left to the jury to say whether it was a loan by B. alone, or by the partnership, although no memorandum or acknowledgment of any kind was produced, by which the executors could ascertain whether it was a loan.

(r) Russell v. Hankey, 7 T. R. 12, (Chit. j. 530); ante, 369, note (x). Sed quære, id. ibid.

(s) Hough v. May, 4 Ad. & El. 954; 6 Nev. & Man. 525; 2 Har. & Wol. 33, S. C. In this case the plaintiff had offered to return the check, but not until after a writ had been issu-

(t) Id. ibid.

(u) Ante, 400.

(x) Poole v. Cabanes, 8 T. R. 328; Duff v. Atkinson, 8 Ves. 577, 580.

(y Borradaile v. Middleton, 2 Campb. 53, (Chit. j. 765).

⁽¹⁾ If a person receives a check drawn by another, and passes it in payment, he stands in the situation of an indorser of a bill; and unless he knew that the drawer had not money in bank, is not liable, except on due notice and diligence. Humphries v. Bicknell, 2 Litt. 299.

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able(z); and this doctrine seems to be correct, because checks are payable of Checks on *presentment, and the statute 9 & 10 Will. 3, c. 17, applies only to bills on Bankof exchange payable after the date. Since the 1 & 2 Vict. c. 110, s. 12, ers. checks are liable to be taken in execution. The criminal law relating to these instruments will hereafter be considered (z).

In the ordinary course of business, a check cannot be circulated, negoti- Time of ated, or transferred, so as to affect the drawer, who has funds in the hands Transfer. of the bankers, after banking hours of the day after he first issued it(a). But where the drawers of a banker's check themselves issued it nine months after it bore date, upon a consideration which afterwards failed, as between them and the persons to whom they delivered it, it was held that they could not be permitted to object to this circumstance in an action brought by a subsequent holder for a valuable consideration, and without notice; though by the general rule, any person receiving a negotiable instrument after it is due, is deemed to have taken it upon the credit of the person from whom he received it, and subject to the same equities as existed between him and the parties sued on such instrument(b)(1).

With respect to the time when a check should be presented for payment, Presentthe general rule seems to be, that it suffices to present it at any time during ment for Payment, banking hours of the day after it was issued, as against the drawer, or as Time of against the party delivering it on the day after it was received from him(c); and where it has been received at a place distant from that where it was payable, then it should be forwarded for presentment on the day after it was received(d).

According to the custom in the City of London, a person receiving a check with his banker's name written across it, pays it in at the banker's, and the banker, if he receives it in time, presents it at the clearing house, and obtains payment the same day: where, however, a debtor paid his creditor by a crossed check, and the latter on the same day transmitted it to his banker's, and the banker negligently (as it was alleged) omitted to present it at the clearing house in time for that day (when it would have been paid), and on the next it was dishonoured, the firm on which it was drawn having stopped payment; it was held that the supposed negligence of the banker, though it might render him liable to his customer, did not discharge the drawer, the holder of the check being entitled, by the general law, to present it the day after he receives it; and no custom of the city being proved as between debtor and creditor, that a crossed check, if received by the latter and sent by him to his banker in sufficient time, must be cleared the same day(e).

(z) Post, Part III.

(a) Ante, 222, 223, 385 to 388.

(e) Boddington v. Schlencker, 4 Barn. &

cause was tried before Lord Tenterden, C. J., who left it to the jury whether or not the check was paid into the plaintiff's bankers in time to be presented at the clearing house on the same day. The jury found a verdict for the defendant. On motion for a new trial, Parke, J. said, "there is no doubt that the receiver of a check has till the close of the banking hours on the following day to present it. It is said, however, that there is a particular custom, qualify-

⁽z) Grant v. Vaughan, 3 Burr. 1519, (Chit. Adol. 752; 1 Nev. & Man. 540, S. C. The j. 365).

⁽b) Boehm v. Stirling, 7 T. R. 423; 2 Esp. 575, (Chit. j. 593); ante, 222, 387, in notes. (c) Ante, 385 to 387.

⁽d) Ante, 386. When too late; Moule v. Browne, 4 Bing. N. C. 266; 5 Scott, 694, S. C.; ante, 386, 387, note (f).

^{(1) {} A check upon a bank is transferable like a bill of exchange; and the mere circumstance of its being dated on a day after that on which it is taken by the holder is not sufficient in an action against him by the holder, to let the drawer into a defence of want of consideration between him and the payee. Nor is it sufficient to let the drawer into such defence, that the check was taken by the plaintiff in payment of an antacedent debt. Walker v. Geisse, 4 Whart. 252. }

of Checks We have seen, that by the practice of London *bankers, if one banker who holds a check drawn upon another banker presents it after four o'clock, though it is not then paid, a mark is put upon it to shew that the drawer has effects, and that it will be paid; and this marking binds the banker to pay on the following day at the clearing house (f).

Payment

Formerly, if the banker on whom the check was drawn had reason to suspect, but had not actual notice, that the drawer had committed an act of bankruptcy, he could not safely pay the draft, because the payment of a check on a banker was not protected by the statute 19 Geo. 2, c. 32, s. 1, which mentioned only bills of exchange and debts for goods sold(g); but such a payment would now be protected by the 82d sect. of the Bankrupt Act, 6 Geo. 4, c. 16(h), and the recent statute 2 & 3 Vict. c. 29. The banker must not pay after notice of a loss(i), nor prematurely (j); and he must take care that the sum in the body of the check was inserted by the authority of the drawer, and not since substituted for a smaller sum, for otherwise he may have to bear the loss of the difference (k), unless his customer enabled the party to practice the fraud by the manner in which he drew the check (l).

Liability of not Paying.

A banker is bound by law to pay a check drawn by a customer with-Banker for in a reasonable time after he, the banker, has received sufficient funds belonging to the customer; and the latter may maintain an action of tort against the banker for refusing payment of a check under such circumstances, although he has not thereby sustained any actual damage(m). But where the [*515] plaintiff, receiving a check drawn upon the *defendants, who were his own bank-

> ing this rule. The question on that point was not distinctly submitted to the jury, inasmuch as the difference between the usage as affecting the relation of creditors and debtors, and that of customer and banker, was not pointed out; if it had been, I should say that the jury had come to a wrong conclusion on the evidence. The custom contended for, if it could be supposed set out on the record, would appear a very complicated one. It would be a custom as between debtor and creditor, that if the creditor received a crossed check from his debtor, he is not bound to present it till the following day; but that if he hands it to his own banker on the same day, within a reasonable time before four o'clock, for the banker to send it to the clearing-house, and the banker neglects to do so, the creditor is answerable for that neglect as between himself and the debtor, and the debtor is discharged; or that the banker becomes a holder in this special situation, that if he does not present the check at the clearinghouse before four, the debtor is discharged, and the banker must take the consequences of the non-payment. No such custom was established, and it seems to me that the whole of the evidence comes to this point: that if the holder of a crossed check delivers it to his banker on the day he receives it, within a convenient time before the clearing hours, the banker is liable as between him and his customer for neglecting the usual practice; as he would for disobedience of a special direction to present it for payment on that day; but the respective situations of the debtor and creditor are not altered. It comes to the case I put during the argument, that if the helder of a bill places it in his banker's

hands on the day on which it is payable, with directions to present it at ten o'clock, and be does not present it till five, in consequence of which it is not paid, that does not discharge the drawer. It has been decided that the bolder of a check may present it at any time he pleases during banking hours on the day after he regeneral rule as between creditor and debtor." Rule absolute. And semble, per Littledale, J., that seven minutes is not a reasonable time for a banker to enter a check and send it to the clearing-house. The defendant paid the amount of the check, and the cause was not tried again.

(f) Ante, 292; Robson v. Bennett, 2 Taunt. 388. (g) Holroyd r. Whitehead, 1 Marsh. 128; 5

Taunt. 444, (Chit. j. 905); but see ante, 396. (h) Ante, 396.

(i) Ante, 897, 425, 429.

(j) Id. ibid. (k) Hall v. Puller, 5 Barn. & Cres. 750; 8 Dowl. & Ryl. 464, (Chit. j. 1294); ante, 427, note (x). (1) Young v. Grote, 4 Bing. 253; 12 Moore,

484, (Chit. j. 1844); ante, 428, note (y).
(m) Marzetti v. Williams, 1 Barn. & Adol. 416; 1 Tyr. 77, n., (Chit. j. 1625). Per Lord Tenterden, C. J.: "I think that the plaintiff is entitled to have a verdict for nominal damages, although he did not prove any actual damage at the trial. I cannot think there can be any difference as to the consequences resulting from a breach of contract by reason of that contract being either express or implied. The only difference between an express and an implied contract is in the mode of substantiatPill

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ers, took the check to the banking house, where he first gave some directions Of Check to a clerk upon another subject, and then, while the clerk was minuting such on Bankdirections, laid the check on the counter, and said, "Place this to my account," or "credit," and nothing more was said on either side, and the Liability of plaintiff left the check, which was not cancelled, or placed to the plaintiff's Banker for not Paying. credit, or debited to the drawer, who had already overdrawn his account, and the bankers, after making some inquiries after the drawer, which led to no result, gave the plaintiff notice on the following day, that the check would not be paid; it was held, that in the absence of any express direction or demand by the plaintiff at the time of presenting the check, the bankers were entitled to consider it presented to them, not as the agents of the drawer for the purpose of present payment, but as the plaintiff's agents, to place the check to his credit, like any other negotiable security, and obtain payment with reasonable diligence; and, consequently, that no implied promise to pay arose from the check being received without observation, and no further communication made to the plaintiff till the following day (n). Nor is a banker bound to pay a check or bill made payable there, unless presented within the usual hours of business. Where, therefore, a customer of the Bank of England was in the habit of making his acceptances payable at the Bank, and one of such acceptances being presented for payment at eleven o'clock in the morning, was dishonoured for want of effects, and was presented again by a notary at six in the evening, when the same answer was given by a person stationed for that purpose; it was held, that the bank, although they had before six o'clock received sufficient funds, were not bound to pay the bill, it being after the usual hours of business (o)(1).

Rules as to Bills and

Notes ap-

plicable to.

Most of the rules respecting bills of exchange and promissory notes, espe-

ing it. An express contract is proved by an actual agreement; an implied contract by circumstances, and the general course of dealing between the parties; but whenever a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence. The Attorney-General was compelled to admit in this case, that if the action were founded on an express contract, the plaintiff would have been entitled to recover nominal damages, though no actual damage were proved. Now this action is, in fact, founded on a contract, for the banker does contract with his customer that he will pay checks drawn by him, provided he, the banker, has money in his hands belonging to that customer. Here that contract was brokon, for the defendants would not pay the check of the plaintiff, although they had in their hands money belonging to him, and had had a reasonable time to know that such was the fact. In this case the plaintiff might, for the breach of that contract, have declared in assumpsit. So in Burnett v. Lynch, 5 Barn. & Cres. 589, the plaintiff might have declared as for breach of a contract. It is immaterial in such a case whether the action in form be in tort or in assumpsit. It is substantially founded on a contract; and

the plaintiff, though he may not have sustained a damage in fact, is entitled to recover nominal damages. At the same time I cannot forbear to observe that it is a discredit to a person and therefore injurious in fact, to have a draft refused payment for so small a sum (871. 7s. 6d.), for it shows that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade. My judgment in this case, however, proceeds on the ground that the action is founded on a contract between the plaintiff and the bankers, that the latter, whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should have received such money, would pay his checks; and there having been a breach of such contract, the plaintiff is entitled to recover nominal damages." Parke, Taunton, and Patteson, Js. concurred. Rule discharged.

Crom., Mee. & Rosc. 744; 1 Gale, 54; 6 Car. & P. 700, S. C. But semble, that it was the duty of the bank to have informed the notary that they had received assets, and that the bill would be paid the following day.

⁽n) Boyd v. Emmerson, 2 Adol. & Ellis, 184; 4 Nev. & Man. 99, S. C.
(o) Whitaker v. The Bank of England, 1

⁽¹⁾ Where the cashier of a bank refuses to pay a check for the want of funds of the drawer, but at the same time advances the money to the bearer, it will be presumed the cashier p. id his own money as a loan, which will authorize him to recover, in a personal action in his own name, against the borrower. Menard v. Cox, 7 Louis. Rep. 167.

Of Checks cially when payable on demand, affect checks on bankers, and therefore it on Bankmay suffice to refer to the preceding parts of the work(1).

Rules as to Bills and Notes applicable to.

 The obligation on the drawee to pay a check and a bill of exchange are the same. Both contain a request from the drawer to the drawee to pay a sum of money to a third person in whose favor the check or bill is drawn. City Bank of New Orleans v. Girard Bank, 10 Curry's Louis. Rep. 562.

An action does not lie on a bank check against the drawer until after notice of presentment and non-payment, but a doubt exists as to the degree of diligence necessary in making such presentment and giving notice. Harker v. Anderson, 21 Wend. 372. See the same case for a full exposition by Mr. Justice Cowen, of the law in relation to bank checks and the differences between them and bills of exchange.

Checks are governed in several particulars by the same rules that prevail in relation to inland bills of exchange, payable either on demand or at a given number of days after sight. Smith v. Janes, 20 Wend. 192.

Due diligence in presentment and notice is required to charge the indorser, but no greater dili-

gence than for bills of exchange. Ib.

In an action by a second indorser against the payee, laches on the part of the first indorsee will not be presumed; nor on the part of a subsequent holder, where the check has been put in circulation by the second inflorsee and remained in circulation only four or five days before presentment; the burden lies on the defendant.

When the parties reside at the same place, the check should be presented on the day it is received, or the following day; and when payable at a different place from that in which it is negotiated, it should be forwarded by mail on the same or the next succeeding day for pre-entments And where by the course of the mail the check may be presented in three days, and the holder instead of putting it in circulation, holds it in possession seven or eight days, he is chargeable with want of diligence. Ib.

How long a bill or check, payable on demand or at a given number of days after sight, may be kept in circulation before presentment, without discharging an indorser is an unsettled question.

The holder of an indorsed check, is entitled to recover against the indorser, on a promise to ly, made after maturity, without direct proof of demand and notice: and the admission of the indorser, that he knows that the check has been dishonoured, that he has received part of the money for which it was given, and his promise to take up and pay the check, are presumptive evidence of demand and notice proper for a jury. Tebbetts v. Dowd, 23 Wend. 379.

The payee of a check is not responsible to a bank for the amount of it paid to him, without fraud on his part, although the bank paid it by mistake, supposing it had funds of the drawer on hand, when in fact it had not. Hull v. Bank of the State, Dudley's Rep. So. Car. 259.

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*CHAPTER XII.

OF PROMISSORY NOTES—BANKERS' NOTES, AND BANK OF ENGLAND NOTES.

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THE law respecting bills of exchange having been pointed out in the preceding chapters, it remains, in the present, to make a few observations relative to promissory notes, bankers' notes, and Bank of England notes.

I. OF PROMISSORY NOTES.

I. Of Promissory Notes.

A promissory note is defined to be a promise or engagement in writing to Definition pay a specified sum at a time therein limited, or on demand, or at sight, to and a person therein named, or his order, or to the bearer(a). The person who makes the note is called the maker, and the person to whom it is payable the payee, and the person to whom he transfers the interest by indorsement, the indorsee.

The usual form of the instrument is thus:—

Form of.

£50 London, 1st January, 1840. Two months after date (or "on demand,") I promise to pay to Mr. A. B., or order, (Stamp.) fifty pounds, for value received.

[Sometimes are here subscribed, "Payable at Messrs. G. H. and Co. bankers, London." Those words are immaterial when so subscribed at the foot, ante, 154, n. (i), but if inserted in the body of the note they form part of the contract(b).

Observing on the origin and nature of promissory notes, it has been re- Origin of. marked(c), that as commerce advanced in its progress, the multiplicity of its concerns required, in many instances, a less complicated mode of payment and of obtaining credit, than through the medium of bills of exchange, to which there are, in general, three parties. A trader, whose situation and circumstances rendered credit from the merchant or manufacturer who supplied him with goods absolutely necessary, might have so limited a connection with the commercial world at large, that he could not easily furnish his

⁽a) 2 Bla. Com. 467; Bayl. 5th edit. 1 Kyd. (b) Ante, 153, 154, 365. 18; Selw. N. P. 9th edit. 379. (c) Kyd, 18.

I. Of Pro- creditor with a bill of exchange on a *third person, but his own responsibility might be so good, that his engagement to pay, reduced into writing, might be accepted with the same confidence as a bill on another. However, in Origin of. practice, promissory notes are seldom given in ordinary commercial transactions, but are confined to acknowledgments and securities for and modes of paying private debts, out of the usual course of trade, where the vendor usually draws a bill of exchange upon the purchaser, payable at the expiration

of the stipulated credit. The validity of these instruments, though favoured by many judges, met with a strenuous opponent in Lord Holt, who, as it has been observed(d), most pertinaciously adhered to his opinion, that no action could be maintained on a promissory note as an instrument, but that it was only to be considered as evidence of a debt. He was of opinion, that actions upon notes, as such, were innovations upon the rules of the common law, and that the declarations upon them amounted to the setting up a new sort of specialty unknown in Westminster Hall(e). The learned judge appears to have retained this opinion in a case (f) where judgment for the plaintiff, in an action on a promissory note, was reversed, on the ground that the custom alleged in the declaration was void, since it tended to bind a man to pay money with-Negotiabil- out any consideration. And certainly, before the statute of Anne, a proity of, &c. missory note was not transferrable by indorsement(g). As observed by Lord Kenyon, C. J. this question exercised the judgments of the most able lawyers of the last century; but the authority and weight which Lord Holt's opinion had in Westminster Hall, made others yield to him; and it was thought necessary to resort to the legislature(h), and accordingly the 3 & 4 Anne, c. 3 & 4 An- 9, (made perpetual by 7 Anne, c. 25, s. 3,) was passed(i), by which, after

ne, c. 9.

reciting that it had been held, that notes in writing, signed by the party who made the same, whereby such party promised to pay unto any other person, or his order, any sum of money therein mentioned, were not assignable or indorsable over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note was payable, could not maintain an action by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note had been assigned, indorsed, or made payable, could not, within the custom of merchants, maintain any action upon such note against the person who first drew and signed the same, it was to the intent to encourage [*518] trade and commerce, which would be much *advanced if such notes should have the same effect as inland bills of exchange, and should be negotiated in

(d) Brown r. Harraden, 4 T. R. 151, (Chit. j. 470); he continued his dislike to this construction, even after the passing of the 3 & 4 Anne, c. 9; see Garnet v. Clarke, 11 Mod. 226,

(Chit j. 229). (e) Clerke v. Martin, 2 Ld. Raym. 758, (Chit. j. 181, 206); Story v. Atkins, 2 Ld. Raym. 1430, (Chit. j. 960); Trier v. Bridgman, 2 East, 359; Walmsley v. Child, 1 Ves. 346, (Chit. j. 323); Blanckenhagen v. Blundell, 2 B. & Ald. 417, (Chit. j. 1054).

(f) Clerke v. Martin, 2 Ld. Raym. 759, (Chit. j. 181, 206); Buller v. Crips, 6 Mod. 29, 30, (Chit. j. 223); Grant v. Vaughan, 3 Burr. 1520, (Chit. j. 365).

(g) Per Lord Tenterden, in De la Chaumette, r. Bank of Eugland, 9 Ear. & Cres. 215; Dans. & L. 319, S. C.; and see 2 Bar. & Adol. 385, (Chit. j. 1419, 1542).

(h) Brown v. Harraden, 4 T. R. 151, (Chit.

j. 470).

Before the statute 3 & 4 Anne, c. 9, many attempts were made to put promissory notes on the footing of bills of exchange, but without success, ride Pearson r. Garrett, 4 Mod. 242, (Ch. j. 198, 199); Clerke v. Martin, 2 Ld. Raym. 757; Salk. 129; Burton v. Souter, Ld. Raym. 774, (Chit. j. 221); and Williams r. Cutting, Ld. Raym. 825; Salk. 24; 7 Mod. 154; 11 Mod. 24, (Chit. j. 220); and see Brown v. Harraden, 4 T. R. 151, 152, (Chit. j. 470)

(i) See observations on this statute, Colchan r. Cooke, Willes, 395, (Chit. j. 298). The act being remedial, and made for the encouragement of trude, should be construed liberally, per curiam, in Milne v. Graham, 2 Dowl. & Ry. 294; 1 Bar. & Cres. 129, (Chit. j. 1168). As to Scotland, see 12 Geo. 3, c. 72, s. 36; and as to Ireland, 9 Geo. 4, c. 24, s. 2.

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like manner, IT IS ENACTED, "That all notes in writing, made and signed I. Of Proby any person or persons, body politic or corporate, or by the servant or missory agent of any corporation, banker, goldsmith, merchant, or trader, who is usually entrusted by him, her, or them, to sign such promissory notes for Negotiability of, &c. him, her, or them, whereby such person or persons, body politic and corporate, his, her, or their servant or agent as aforesaid, doth or shall promise to of 3 & 4 pay to any other person or persons, body politic and corporate, his, her, or Anne, c. 9. their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politic and corporate, to whom the same is made payable; and also, that every such note payable to any person or persons, body politic and corporate, his, her, or their order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person or persons, body politic and corporate, to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they might do, upon any inland bills of exchange, made or drawn according to the custom of merchants, against the person or persons, body politic and corporate, who, or whose servant or agent as aforesaid, signed the same; and that any person or persons, body politic and corporate, to whom such note that is payable to any person or persons, body politic and corporate, his, her, or their order, is indorsed or assigned, or the money therein mentioned, ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons, body politic and corporate, who, or whose servant or agent as aforesaid, signed such note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange(1)."

It has been considered that this statute of the 3 & 4 Anne, c. 9, giving the To what like remedy upon promissory notes as upon bills of exchange, (though Notes Act made perputual by the statute 7 Anne, c. 25, passed after the Union with Scotland) does not extend to promissory notes made in Scotland, because such subsequent statute only made the former act, which was a temporary law of England, to have perpetual force here in England(k), but subsequent statutes appear to recognize notes made in Scotland as valid(1). And according to the decision in Milne v. Graham(m), a promissory note

Forbes on Bills, 174.

(1) 39 Geo. 3, c. 107; 12 Geo. 3, c. 72.

(k) King v. Esdale, 6th December, 1711, notes has prevailed long and to a great extent, and we ought not to unsettle that practice, unless express authorities are produced for our guidance in so doing. The words of the statute do not exclude notes made in Scotland, and the reason and probabilities of the case clearly include them in its beneficial operation." The same point was decided in Bentley r. North-

(1) See Du Ponceau in his Treatise on the nature and extent of the jurisdiction of the Courts of the United States, p. 122. See also the Appendix to 1 Cranch Rep.

By the N. Y. Revised Statutes, 1 Vol. 768, promissory notes payable

⁽m) Milne v. Graham, 1 Bar. & Cres. 192; 2 Dow & Ry. 293, (Chit. j. 1168). "The act should be construed liberally, being a remedial law for the encouragement of trade. The practice of suing upon foreign as well as inland

By the N. Y. Revised Statutes, I Vol. 768, promissory notes payable in money to any person, or to the order of any person, or to bearer, are negotiable like Inland Bills of Exchange. In most of the States, the indorsee has all the privileges of an indorsee under the law merchant. In Connecticut a note must be of the amount of \$35 or more, and payable to order or bearer, or it is not negotiable. In Indiana, notes payable at chartered banks within the State, are by statute placed on a footing of inland bills of exchange; but other notes are not governed by the law merchant. Bullett c. Scribner, I Black. Ind. Rep. 14. Piatt v. Eades, ib. 81. So in Kentucky the law merchant is not recognized relative to promissory notes. And it is subject to some restrictions in Vermont, New Jersey, and Pennsylvania. 3 Kent's Com. 72—4. Griffith's Law Register, passim.

ity of, &c. [*519]

I. Of Pro- made in Scotland may be sued upon here. And although the statute of Anne appears not to apply to notes made out of this country (n), yet it should seem that notes made in a foreign country would now be held valid Negotiabil- at common law(o), though it would be improper to declare upon them as made, *in pursuance of the statute(p); and it is now settled, that the statute of Anne applies to a note made in Scotland, and all notes are transferrable by indorsement in England(q); and it is now also settled, that promissory notes made in this country are, since that act, negotiable abroad, in the same manner as inland bills of exchange, and, therefore, that a promissory note payable to bearer, made in England, is transferrable by delivery in We have seen, however, that the English holder of a promissory note, made and indorsed in France, cannot sue thereon in this country in his own name, unless the indorsement were made according to the formal-

> ouse, Guildhall, 30th May, 1827, before Lord Tenterden, on a note averred to have been made at Glasgow, in Scotland, MS. and see Bently v. Northouse, Mood. & Mal. Rep. 66, (Chit. j. 1335).

(n) Carr v. Shaw, infra, note (p), next

page.

(o) In Pollard v. Herries, 3 Bos. & Pul. 335, (Chit. j. 672), a promissory note was made in Paris, payable there or in England, and no objection was taken on that account. Hewit v. Morris, 3 Campb. 303, a declaration on a note made at Paris, stated that it was made in London, and Lord Ellenborough held that this was no variance, because the contract evidenced by a promissory note is transitory, and the place where it purports to be made is immaterial, and the plaintiff recovered. Roche v. Campbell, 3 Campb. 247, (Chit. j. 870), the plaintiff declared on a note made in Ireland, and no objection was taken on that account. In Spiltgerber v. Colm, 1 Stark. R. 125, (Chit. j. 947), the plaintiff declared on a promissory note drawn in Prussia against the maker, and no objection was taken. And see Brown v. Gracy, Dowl. & Ryl. N. P. C. 41, note; and per cur. in Milne v. Graham, 2 D. & Ryl. 294; 1 B. & C. 192, (Chit. j. 1168).

(p) Carr v. Shaw, B. R. Hil. 39 Geo. S, MS., (Chit. j. 614). In an action on a promissory note made at Philadelphia, the first count of the declaration stated that the defendant, at Philadelphia, in parts beyond the seas, to wit, at London, &c., according to the form of the statute, &c., made his note in writing, &c. There were also the common money counts. The defendent demurred specially to the first count, and pleaded the general issue to the others. On the demurrer the court intimated a strong opinion that the statute did not apply to foreign notes, and advised the plaintiff to amend; but on the general issue, Lord Kenyon said, the note, though not within the statute, is evidence to support any of the money counts, and the plaintiff had a verdict, at Guildhall, 1st May, 1799. N. B.—The plendings are entered as of Michaelmas Term, 39 Geo. 3, Roll, 1238. See Bayl. 5th edit. 26, note 57, S. C. Sed vide Milne v. Graham, 1 Barn. & Cres. 192; and 2 Dow. & Ry. 293, S. C.; ante, 518, n. (m). It seems plaintiff there declared in the usual form as on an English note.

(q) Milne v. Graham, I Barn. & Cres. 192;

2 Dowl. & Ryl. 293, (Chit. j. 1168); Bentley v. No thouse, Mood. & M. 66, (Chit. j. 1335); Bayl. 5th edit. 27; ante, 518, note (m).

(r) De La Chaumette r. Bank of England, 2 Barn. & Adol. 385. Trover for a Bank of England note, stolen in this country and sent over to France, and purchased, among several others, by certain bankers at Paris, in the usual course of business, for the purpose of being remitted to the plaintiff in this country, to whom they were indebted. The plaintiff received the note and presented it at the Bank of England, where it was stopped. No fraud was imputed either to the plaintiff or the bankers at Paris, from whom he received the note, the only question being, whether such note was transferrable in France, under the provisions of the statute of Anne. Per Lord Tenterden, C. J.: "An inland bill of exchange was transerrable here before the statute of Anne by the custom of merchants, which was part of the common law introduced into this country in consequence of the practice in other countries. If an inland bill of exchange, drawn and accepted in England, gets to Paris, it is undoubtedly negotia-ble there by the custom of merchants; and if so, what is the effect of the statute of Anne as to promissory notes? It expressly recites, that it was passed to the intent to encourage trade and commerce, which would be much advanced if such notes should have the same effect as inland bills of exchange, and should be negotiated in like manner. The object clearly was to make promissory notes negotiable like English bills. If, therefore, English bills of exchange were negotiable when abroad, these notes ought to be so likewise, in order to satisfy the intention of the legislature; and I find nothing in the enacting part of the statute to restrain their negotiability to England. A note payable to bearer, therefore, is transferrable abroad just as an English bill of exchange drawn in England and remitted to a foreign country would be. It may be true that great injury has been suffered of late by the facility enjoyed of sending stolen notes abroad; but, on the other hand, the negetiability of English notes in foreign countries is a great convenience, as it saves the necessity of carrying abroad specie. The judgment of the court must be for the plaintiff." Littledale Parke and Pattern Is con-Littledale, Parke, and Patteson, Js. concurred. See the former case between the same parties, 9 Barn. & Cres. 209.

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ities required by the French law, although at the time of receiving the note I. Of rehe was resident in this country (s). And it has been held, that the forging a missorPy Scotch bank note was not an offence within the English statute 2 Geo. 2, c. 25, against forgery, the note being made payable locally, where it was Negotiabildrawn(t), though it is not necessary that a promissory note should be nego-ity of, &c. tiable in order to be a promissory note within the 2 Geo. 2, c. 25, so as to be the subject of *an indictment for forging it(u). The statute 48 Geo. 3, [*520] c. 149, s. 21, directs, that all promissory notes made out of Great Britain, or purporting to have been so made, shall not be negotiable, circulated, or paid in Great Britain, unless duly stamped as a promissory note made in Great Britain, and subjects the party offending to £20 penalty, with an exemption in favour of notes made payable only in Ireland. The more recent enactment in the statute 55 Geo. 3, c. 184, s. 29, seems only to apply a similar enactment to promissory notes, payable to bearer on demand.

Although the statute 3 & 4 Anne enacts, that all notes in writing, made How signand signed by the party making it, shall be valid and assignable in like man-ed. ner as an inland bill, yet it suffices if his name be written in any part of the note. And it has been held, that if a party write his promissory note thus:—"I, John Dobbins promise to pay," &c. this is as good as a note, "I promise to pay," and subscribed "J. Dobbins(x)." A banker's deposit note payable "with interest to the day of acceptance," does not require any acceptance or presentment otherwise than for payment, as the term " acceptance" means sight(y).

The above statute being a remedial law, and made for the encouragement Construcof trade and commerce, the Courts have construed it liberally (z). The stat4 Anne, c. ute places promissory notes on the same footing as bills of exchange, and con- 9. sequently the decisions and rules relating to the one are in general applicable to the other(a). Thus it has been decided, with respect to the time

4 Moore & S. 695, S. C.; ante, 225 note (a). (t) The King v. Dick, 1 Leach, Cro. Law, 4th edit. 68; 2 East, 925, S. C.

(u) Rex v. Box, 6 Taunt. 325; Russ. & R.

C. C. 300, (Chit. j. 941).

(x) Taylor v. Dobbins, 1 Stra. 339, (Chit. j. 243). In case upon a promissory note, the declaration ran, that the defendant made a note et manu sua propria scripsit. Exception was taken that since the statute he should have said that the defendant signed the note, but the court held it well enough, because laid to be written with his own hand, and there needs no subscription in that case, for it is sufficient if his name is in any part of it. "I, J. S. promise to pay," is as good as "I promise to pay," subscribed "J.S." See also Elliot r. Cowper, 1 Stra. 609; 2 Lord Raym. 1376, (Chit. j. 255); and Vin Abr. tit. Bills of Exchange, 11. (y) Sutton r. Toomer, 7 Barn & Cres. 416; 1 Man. & Ry. 125, (Chit. j. 1352). (z) Selw. N. P. 9th edit. 380; and see per

curiam, in Milne v. Graham, 2 Dowl. & Ryl. 293; 1 Barn. & Cres. 192, (Chit. j. 1168); and in De La Chaumette v. Bank of England, 2 Barn. & Ad. 385; ante, 519, note (r).

(a) Bishop v. Young, 2 Bos. & Pul. 80, 84, (Chit. j. 621); Hill v. Halford, 2 Bos. & Pul. 413, (Chit. j. 637); Colchan v. Cooke, Willes, 394, 399, note (b), (Chit. j. 298); Brown v.

(s) Trimbey v. Vignier, 1 Bing. N. C. 151; Harraden, 4 T. R. 152, (Chit. j. 470); Carlos v. Fancourt, 5 T. R. 486, (Chit. j. 515); Heylin v. Adamson, 2 Burr. 669; Bayl. 5th edit. 8; and see Smith v. Kendall, 6 T. R. 123, (Chit. j. 533)

In Heylin v. Adamson, 2 Burr. 669, (Chit. j. 349), the question was, whether the indorsee of a bill was bound to make a demand upon the drawer, as the indersee of a note must upon the maker; and per Lord Mansfield:-" While a note continues in its original shape of a promise from one man to another, it bears no similitude to a bill; but when it is indorsed, the resemblance begins, for then it is an order by the indorser upon the maker to pay the indorsee, which is the very definition of a a bill. The indorser is the drawer, the maker of the note the acceptor, and the indorsee the person to whom it is made payable; and all the authorities, and particularly Lord Hardwicke, in a case of Hamerton v. Mackarell, Mich. 10 Geo. 2, put promissory notes on the same footing with bills of of exchange.

In Brown v. Harraden, 4 T. R. 148, (Chit. j. 470), where the court decided that three days grace should be allowed on promissory notes, Lord Kenyon observed, that the effect of the statute was, that notes were wholly to assume the shape of bills; and Buller, J. added, that the cases cited in the argument shewed clearly that the courts of Westminster had thought the

Notes. Construction of 3 &

I. Of Pro- when a note is payable, that there is no *difference between bills and promissory notes; and that the latter, when payable at a stated time, are also entitled to three days of grace when payable to bearer or order(b). And in Carlos v. Fancourt, where the question was, whether or not a note, payable out of 4 Anne, c. a particular fund, could be declared on as a promissory note, it was decided in the negative, "because promissory notes must stand or fall on the same rules by which bills of exchange are governed(c)." In Heylin v. Adamson(d), Lord Mansfield declared, that though, while a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange, yet, when it is indorsed, the resemblance begins: for then it is an order by the indorser upon the maker of the note to pay to the indorsee: the indorser becomes, as it were, the drawer, the maker of the note the acceptor, and the indorsee the payee (e)(1). This point of resemblance once fixed, the law relative to bills becomes applicable to promissory notes. Hence it is only necessary to refer the reader Not affect to the prior parts of this work. It should be observed, that promissory notes are not mentioned in the act of 1 & 2 Geo. 4, c. 78, relative to the acceptance of bills at a particular place (f); and therefore, if in the body of a note it be made payable at a particular place by any words, a presentment there must be averred and proved, even in an action against the maker; but if the place of payment be only written or printed at the foot, then the place is considered as a mere memorandum, and no presentment there is necessary(g). The stamps upon promissory notes have already been considered(h).

ed by 1 & 2 Geo. 4. c. 78.

> analogy between bills and notes so strong, that to A. only. In addition to these authorities, I the rules established with respect to the one ought also to prevail as to the other; that the language of the preamble of the act was express; that it was the object of the legislature to put notes exactly on the same footing with bills; and that the enacting part pursued that intention. The same doctrine is to be found in Carlos v. Fancourt, 5 T. R. 482, (Chit. j 515); Edie v. East India Company, Burr. 1224, (Ch. j. 358)

In 2 Bla. Com. 470, and Bayl. 5th edit. 2, 3, it is said, that a note may be considered on comparison with a bill as accepted when it is-

(b) Brown v. Harraden, 4 T. R. 152, (Chit. 470). See the preceding note, and cases, Manning's Index, 65.

Smith v. Kendall, 6 T. R. 123, (Chit. j. 533). Three days grace are allowed on a promissory note payable to A., without adding, "or to his order," or "to bearer." Lord Kenyon, C. J. said, "If this were res integra, and there were no decision upon the subject, there would be a great deal of weight in the desendant's objection; but it was decided in a case in Lord Raymond (2 Ld. Raym. 1545) on demurrer, that a note payable to B. without adding, or to his order, or to bearer, was a legal note within the act of parliament. It is also said in Marius, that a note may be made payable either to A. or bearer, A. or order, or

have made inquiries among different merchants respecting the practice in allowing the three day's grace, the result of which is, that the Bank of England, and the merchants in London, allow the three days' grace on notes like the present. The opinion of merchants, indeed, would not govern this court in a question of law, but I am glad to find that the practice of the commercial world coinsides with the decision of a court of law. Therefore I think that it would be dangerous now to shake that practice, which is warranted by a solemn decision of this court, by any speculative reasoning on the subject; and consequently this rule must be made absolute to enter a verdict for the plaintiff."

(c) Carlos v. Fancourt, 5 T. R. 486, (Chit. j. 515); Hill v. Halford, 2 Bos. & Pal. 413, (Chit. j. 637).

(d) Heylin v. Adamson, 2 Burr. 676, (Chit. j. 349).

(e) In Bishop v. Young, 2 Bos. & Pul. 83, (Chit. j. 621), the court observed, that this resemblance, so far as regards the remedy by action of debt, does not hold.

(f) Ante, 153, 154, 379. (g) Id. ibid.; and Williams v. Waring, 10 Bar. & Cres. 2; 5 Man. & Ry. 9, (Chit. j. 1453).

(h) Ante, 102 to 125.

By this statute, bills of exchange and promissory notes are placed on the same footing, and

the law applicable to bills, is in general applicable to promissory notes. Ibid.

⁽¹⁾ The statute 3 & 4 Anne, ch. 9, declares that promissory notes shall be assignable or indorsable over in the same manner as inland bills of exchange are, or may be, according to the custom of merchants; and power is by the same statute given to indorsees, to maintain actions against the drawers, or prior indorsers of such notes, in the same manner as in cases of inland bills of exchange. Bowie ass. of Ladd v. Duvall, 1 Gill & John. 175.

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The statute of 3 Geo. 2, c. 26, relative to a particular description of I. Of Pronotes in the coal trade, is no longer in force, being repealed by the 47 Geo. missory 3, sess. 2, c. lxviii. s. 28(i).

Coal Notes repealed.

II. OF BANKERS' NOTES.

II. Of Bankers' Notes. Bankers' cash notes, formerly called goldsmiths' notes, are in effect

BANKERS cash notes, formerly called goldsmiths notes, are in effect promissory notes given by bankers, who are originally goldsmiths (k). *From Utility of. Lord Holt's judgment in the case of Buller v. Crips(l), it appears that these [*522] notes were attempted to be introduced by the goldsmiths about thirty years previously to the reign of Queen Anne, and were generally esteemed by the merchants as negotiable; but Lord Holt as strenuously opposed their negotiability as he did that of common promissory notes, and they were not generally settled to be negotiable until the statute of Anne was passed, which relates to these as well as to common promissory notes. They appear originally to have been given by bankers to their customers, as acknowledgments for having received money for their use(m): they may be and generally are payable to bearer. (n). At present, cash notes are seldom made except by country bankers, their use having been superseded by the introduction of checks(o). When formerly issued by London bankers, they were sometimes called shop notes. In point of form they are similar to common promissory notes, payable to bearer on demand, and are stated in pleading as By the 7 Geo. 4, c. 6, the circulation of bankers' or any notes payable to bearer on demand, under the amount of 51. has been put a stop to (with an exception as to those stamped before the 5th February, 1826, and

which could only be circulated till the 5th April, 1829(p). The 7 Geo. 4, Bank Re-

c. 6, 9 Geo. 4, c. 65, and 7 Geo. 4, c. 46, 3 & 4 Will. 4, c. 98, and atriction Acts. other acts, regulate such notes (q). By the 10th section of the 7 Geo. 4,

mand, they generally pass as cash, whether payable to order or bearer(r); but if presented in due time and dishonoured, they will not amount to payment(s). A tender of them is good, unless objected to on that account(t). Tender. If, however, any part of the consideration of an annuity be paid in country

c. 6, notes under 201., payable to bearer on demand, must be made payable at the bank or place where the same are issued; but such notes may be made payable at several places, provided one of such places be the bank or place where the same are issued. On account of their being payable on de-

(i) See Bayl. 5th edit. 401, 402; 3 Geo. 2, c. 26, s. 7, 8; Smith v. Wilson, And. 187, (Chit. j. 285, 286); Wigan v. Fowler, 1 Stark. 466, (Chit. j. 977, 983).

(k) Moore v. Warren, 1 Str. 415, (Chit. j. 249); Turner v. Mend, 1 Str. 415, (Chit. j. 248); Hayward and the Bank of England, 1 Str. 550, (Chit. j. 252); Smith's Wealth of Nations, vol. i. 445 to 448; but see Brook v. Middleton, 1 Campb. 449, (Chit. j. 757), where they were treated as checks; Selw. N. P. 9th edit. 386. A banker is a mere factor for money, 9 East, 12.

(1) Buller v. Crips, 6 Mod. 29, 30, (Chit. j. 222); Nicholson v. Sedgwick, Ld. Raym. 180, (Chit. j. 203); Horton v. Coggs, 3 Lev. 299,

(Chit. j. 185).
(m) Ford v. Hopkins, Holt, 119; 1 Salk.

(n) Grant v. Vaughan, 3 Burr. 1516, (Chit. j. **3**65).

(o) See Selw. N. P. 9th edit. 386. (p) Ante, 150. See also 9 Geo. 4, c. 65,

(q) See ante, 16, 17, 61 to 67, 150, 160;

and Bayl. 5th edit. 12 to 15.
(r) Tassal v. Lewis, 1 Ld. Raym. 744, (Chit. j. 192); Peacock r. Rhodes, Dougl. 635, (Chit. j. 408); Owenson v. Morse, 7 T. R. 64.

(s) Owenson v. Morse, 7 T. R. 64; Ward

v. Evans, Ld. Raym. 928, (Chit. j. 216, 218).
(1) Lockyer v. Jones, Peake, C. N. P. 3d edit. 239; 2 C. & J. 16, n. (a); Tiley v. Courtier, 2 C. & J. 16, n. (c), (overruling Mills v. Safford, Peake, 240, n.); Polglass v. Oliver, 2 C. & J. 15; 2 Tyrw. 89, S. C. On the same principle, it should seem, that a London banker's acceptance would be a good tender, if not objected to on that ground. As to the tender of Bank of England notes, see post, 524.

II. Of Bankers' Notes.

bank notes, the dates and times of payment must be set forth in the memorial(u); and if they are deposited with a stakeholder, they cannot be recovered from him as money had and received, unless he agreed to receive [*523] them as money (x). They, like bankers' checks, are generally *transferred from one person to another by delivery. They may, however, be negotiated by indorsement, in which case the act of indorsing will operate as the making of a bill of exchange, and the instrument may be declared on as such against the indorser(y). In other respects they are affected by the same rules as bills of exchange(z). The time when these notes should be presented for payment, is governed by the rules relating to other notes and checks payable on demand, which have already been stated, and to which part of the work the reader is referred (a). If the bankers who issued them should stop payment, the notes must nevertheless be presented in due time for payment, and due notice given to the persons who transferred them, or they must be offered to be returned to him(b). Since the 1 & 2 Vict. c. 110, s. 12, these notes are liable to be taken in execution.

Presentment.

III. OF BANK NOTES.

III. Of Bank Notes. Origin and Nature of.

BANK notes owe their origin to the 5 Wm. & Mary, c. 20, s. 19, 20, 29, and the 8 & 9 Wm. 3, c. 20, s. 30, by the first of which statutes power was given to the king to incorporate the persons subscribing towards the raising and paying into the receipt of the Exchequer the sum of 1,200-000l., by the name of "The Governor and Company of the Bank of England." This company, as already noticed, is protected from the effects of competition, by various subsequent statutes(c). These notes (excepting in the case of Bank Post Bills) are payable on demand(1): Lord Mansfield, in Miller v. Race(d), observed, "That these notes are not, like bills of exchange, mere securities, or documents, for debts, nor are so esteemed; but are treated as money in the ordinary course and transactions of business by the general consent of mankind; and on payment of them,

(u) Morris v. Wall, 1 Bos. & Pul. 208.

(x) Pickard v. Bankes, 13 East, 20, (Chit. j. 809). A stake-holder receiving country bank notes as money, and paying their over wrongfully to the original staker, after he had lost the wager, is answerable to the winner, in an action for money had and received to his use. It appeared that the deposit had been made in Hull bank notes, payable to bearer, and not in coin of the realm, and the payment over to the other party was in notes of the same descrip-tion. The learned judge who tried the cause, thought that these were to be considered as money, as between those parties, and therefore the plaintiff recovered a verdict for the amount. It was afterwards moved to set aside the verdict, and by leave to enter a nonsuit. Notes of this description, it was contended, were no more than common promissory notes, or bills of exchange. If these were payable at a future day, they could in no sense be considered as money, but the time of payment cannot alter the nature of the thing. The action should

rather have been trover, or upon a special assumpsit; and that Mr. Justice Lawrence, in a similar case, at Stafford, held, that money had and received would not lie. Lord Ellenborough, C. J. " Provincial notes are certainly not money; but if the defendant received them as ten guineas in money, and all parties agreed to treat them as such at the time, he should not now turn round, and say that they were only paper, and not money; as against him it is so much money received by him." Rule refused.

(y) Lovelass on Bills, 58; Mendez v. Carreroon, Lord Raym. 743, (Chit. j. 215); Hill v. Lewis, 1 Salk. 132, 133, (Chit. j. 187); Brown v. Harraden, 4 T. R. 149, (Chit. j. 470).

(z) Hill v. Lewis, 1 Salk. 132, (Ch. j. 187).

(a) Ante, 378 to 385. (b) Camidge v. Allenby, 6 Barn. & Cres. 373; 9 Dowl. & Ryl. 391, (Chit. j. 1319); and Henderson v. Appleton, ante, 384, 395.
(c) Ante, 16, 17, 61 to 67.

(d) Miller v. Race, 1 Burr. 457, (Ch. j. 346). See 3 Atk. 232.

^{(1) {} The rules in reference to demand and notice, applicable to promissory notes and bills of exchange, do not apply to the post-notes of a bank. Key v. Knott, 9 Gill & John. 342. }

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whenever a receipt is required, the receipts are always given as for money, III. Or not as for securities or notes." We have already seen, that by the late im- Bank portant act of 7 Geo. 4, c. 6, (made applicable to bills and notes under 51., payable to bearer on demand, issued in Scotland or Ireland, by 9 Geo. 4, c. 65), no Bank of England note under 51., payable to bearer on demand, can be circulated after the 10th of October, 1826, unless it was made out and bear date before that day; and no such note whatever can be circulated after the 5th of April, 1829(e). They are assignable by delivery (f), and pass by a will which bequeaths all the testator's money or $\cosh(g)$, or all his property in such a house; and they may *pass as a donatio mortis causa(h). [*524] In bankruptcies they cannot be followed as identical and distinguishable from money. If they be lost, an action of trover will not in general lie against the bon? fide holder by the true owner(i). In a case also on the Annuity Act, where the whole consideration was described in the memorial as money, and it appeared that only a part of it was money, and the residue in banknotes, it was decided on the above principle, that the consideration was well set out(k). It has, however, been adjudged, that an action for money had and received will not lie against a finder of them, to recover the value, unless money has actually been received for them (l), though, if not produced on the trial, the receipt of their value will be presumed (m). Formerly bank- May be notes could not be taken in execution(n); but the recent statute 1 & 2 Vict. taken in c. 110, s. 12, expressly authorizes their seizure. Nor was a tender of banknotes sufficient, if objected to at the time of the offer (o); and after the passing of the 59 Geo. 3, c. 149, s. 1, a creditor might arrest his debtor, notwithstanding such a tender, that act having superseded the necessity, in an affidavit to hold to bail, of alleging that no offer had been made to pay the debt in bank-notes payable on demand(p); but now by the late Bank Act, Tender. 3 & 4 Will. 4, c. 98, s. 6, such notes are declared to be a legal tender for all sums above 51., except by the Bank of England, or any branch bank thereof. A mode of enforcing payment of them was provided by 8 & 9 Will. 3, c. 20, s. 30, but now, when the right to receive payment is disputed, the course is to proceed by action against the bank, or by action of detinue or trover against the party withholding or converting the same.

Possession is prima facie evidence of property in a bank-note. fore, in trover for a bank-note, it is not a prima facie case for the plaintiff to prove that the note belonged to him, and that the defendant afterwards converted it; but the plaintiff must prove how he lost it, and that he took due precaution to advertise the loss, and then the defendant will be required to prove that he took it bona fide for adequate value (q). And in Lowndes r.

(e) Ante, 150.

(f) Francis v. Nash, Rep. Temp. Hardw. 58, (Chit. j. 277).

(g) Fleming v. Brook, 1 Scho. & Lefr. 318, 319; Stewart v. Marquis of Bute, 11 Ves. 662; ante, 8, note (k).

(h) Ante, 2, 3, notes (e) and (k); 1 Roper, 8 (i) Lowndes v. Anderson, 18 East, 130; ante, 256, note (a); and see present rule as to

holder's right in case of loss, &c., ante, 257.
(k) Wright v. Reed, 3 T. R. 554, (Chit. j. 461); Cousins v. Thompson, 6 T. R. 835. The former annuity act was 17 Geo. 3, c. 26; the present act is 53 Geo. 3, c. 141. See Chitty's

Col. Stat. tit. Annuities, page 25, in notes.
(1) Noyes v. Price and another, Sittings, London, post, Hilary Term, 16 Geo. 8, MS. Pelect Cases, 249.

(m) Longchamp v. Kenny, Doug. 138.

(n) Francis r. Nash, Rep T. Hardw. 58, (Chit. j. 277); Knight v. Criddle, 9 East, 48, (Chit. j. 738); Fieldhouse v. Croft, 4 East, 510; Armstead v. Fhilpot, Dougl. 236.

(o) Wright v. Reed, 3 T. R. 554, (Chit. j. 461); Grigby v. Oakes, 2 Bos. & Pul. 526, (Chit. j. 644). See the 56 Geo. 3, c. 68, s.

(p) By the Bank Acts, 38 Geo. 3, c. 1, s. 8; 48 Geo. 3, c. 18, s. 2, & c. passed for restraining cash payments, this allegation in the affidavit was required; but by the 59 Geo. 3, c. 149, s 1, the restrictions on payments in cash under these acts finally ceased.

(q) Ante, 253 to 271; King v. Milsom, 2 Campb. 8. (Chir. j. 701); Richard v. Care, 1 Campb 251.

III. Of Bank Notes.

Anderson(r) it was held, that bank-notes could not be followed by the legal owners into the hands of bon^2 fide holders for valuable consideration without notice. And in Solomons v. The bank of England(s), it was decided that the holder of a bank-note is primî facie entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, unless evidence be given to bring it home to his privity. And we [*525] have seen(t), that it is not now sufficient to defeat the claim of *the holder of a negotiable instrument, who has given value, to shew that he took it under circumstances which ought to have excited the suspicion of a prudent and careful man, but it must be shewn that he took it mala fide; and even gross negligence on the part of the holder, though it may be evidence of mala fides, The stealing of these notes is felony (u), and the is not tantamount thereto. forgery of them was also by different statutes, now consolidated into one, declared to be felony (x).

and Qualities of Promissory Notes, Bank Notes, &c.

IV. Form IV. FORM AND QUALITIES OF PROMISSORY NOTES, BANK NOTES, &c.

WE have seen that a formal set of words is, in general, no more essential to the validity of a promissory note, cash note, or Bank of England note, than it is to that of a bill of exchange (y). It is sufficient if a note amount to a promise to pay money. A note whereby a party promises "to pay or cause to be paid," 130l. is a promissory note, and may be declared on as such, and does not require an agreement stamp(z). And a note promising to account with another, or his order, for a certain sum, value received, is a valid promissory note, though it contain no formal promise to pay(a). So where the note set forth in the declaration was, "I acknowledge myself to be indebted to A. in £—, to be paid on demand, for value received;" on demurrer, the court held, that this was a good note within the statute; the words "to be paid" amounting to a promise to pay; observing, that the same words in a lease would amount to a covenant to pay rent(b). promissory note payable to B. (omitting the words "or order"), three months after date, was holden a good note within the statute(c). So where a note was in this form, "I do acknowledge that Sir A. C. has delivered to me all the bonds and notes for which 400l. were paid to him on account of Colonel S., and that Sir A. delivered to me Major G.'s receipt, and bill on me for 10l., which 10l. and 15l. 5s., a balance due to Sir A., I am still indebted, and do promise to pay;" on demurrer the note was adjudged good(d). So a note in this form: "December, 1814, received of Mr. D., &c. 1001., which I promise to pay on demand, with lawful interest," is a good

(r) Lowndes v. Anderson, 13 East, 130; 1

Rose, 99, S. C., 102, n. a., (Chit. j. 810).
(s) Solomons v. The Bank of England, 13

East, 135; ante, 256, note (d) (t) Ante, 257. The rule established by Goodman v. Harvey, 4 Ad. & El. 870; 6 Nev. & Man. 372, S. C., has since been recognized in Uther v. Rich, 2 Perry & Dav. 579, 585.

(u) 7 & 8 Geo. 4, c. 29, s. 5; post, Part III. Ch. II. Criminal Law—Larceny.
(x) 1 Will. 4, c. 66, s. 3. See former acts, 15 Geo. 2, c. 14, s. 11; 13 Geo. 3, c. 79, s. 1; 41 Geo. 3, c. 39; 2 East's P. C. 876, &c.; 3 Chitty's Crim. Law, 2d edit. 1031, &c. And see further, post, Part III. Ch. I. Criminal Law-Forgery.

(y) Ante, 128, 129,

(z) Lovell v. Hill, 6 Car. & P. 238.

(a) Morris v. Lee, S Mod. 362; 1 Strs. 629; Lord Raym. 1396, (Chit. j. 258); 2 Atk. 32; ante, 128, note (u)

(b) Casborne v. Dutton, Scacc. M. 1 Geo. 2; Selw. 9th ed. 381, note (f); ante, 129, note (u).

(c) Smith v. Kendal, 6 T. R. 123; 1 Esp. 231, (Chit. j. 533); ante, 159, note (i); Moore v. Pain, Rep. T. Hardw. 283, (Chit. j. 282), where Lord Hardwicke, C. J. said this point had been ruled often.

(d) Chadwick v. Allen, Stra. 706, (Chit. j. 263); ante, 129, note (u). See post, 819, (14) "an instrument in the following form, &c.

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promissory note(e). And where the promise was by A. to pay so much to IV. Form B., for a debt due from C. to B., it was holden, that it was within the stat- and Quali-B., for a debt due from C. to B., it was noticen, that it was within the statues of Proute, being an absolute promise, and as negotiable as if it had been generally missory for value received (f). Norwill an instrument be the less a promissory note Notes, because it contains also an agreement of another kind, and, therefore, an in-Bank Notes, &c. strument in the following form, "On demand, I promise to pay to A. B., or order, 1001., with lawful interest for the same, for value received, and I have deposited in his hands the title deeds to lands *purchased from, &c. as [*526] a collateral security for the same," is a promissory note assignable under the 3 & 4 Anne, c. 9, s. 1(g). We have seen, that where by the terms of the instrument it is ambiguous whether it is a bill or note, the holder has the option of treating it as one or the other as against the maker(h).

But the mere acknowledgment of a debt without some words from whence a promise to pay money can reasonably be inferred, has no other operation than being mere evidence of a debt(i); and therefore the common memorandum, "I. O. U. such a sum," does not amount to a promissory note, I. O. U. and need not be stamped (k); and the same may be given in evidence in support of a count upon an account stated(1). But an instrument in the following form, "11th October, 1831. I. O. U. 201., to be paid on the 22nd instant, W. B.," requires a stamp, either as a promissory note, or as an agreement for the payment of money of the value of 20l.(m)(1). And an instrument acknowledging the receipt of a draft for the payment of money, and promising to repay the money, is not a promissory note, but a special agreement for the re-payment, depending on the contingency of the draft's being honoured (n). It is advisable, but not necessary, to insert the words "value received(o)(1)."

Promissory notes given in pursuance of the Lords' Act, 32 Geo. 2, c. Repeal of 27, s. 13, in order to prevent the debtor's discharge, must have been given Lorde in a particular form, but that statute has been repealed by the 1 & 2 Vict. Act. c. 110, s. 119(p).

(e) Green v. Davies, 4 Barn. & Cres. 235; 6 Dowl. & Ryl. 306, (Chit. j. 1251). (f) Popplewell r. Wilson, 1 Stra. 264, on

error from C. P.; (Chit. j. 243).

(g) Wise v. Charlton, 6 Nev. & Man. 364; 4 Adol. & El. 786; 2 Har. & Wol. 49, S. C. If an instrument containing a mortgage be also a promissory note, it may still be stamped with a mortgage stamp, after the execution, provided it has a promissory note stamp on it at the time it is executed. *Id. ibid.* See ante, 119.

(h) Ante, 131, 132.

(i) See ante, 130. (k) Israel v. Israel, 1 Campb. 493; Fisher v. Leslie, 1 Esp. Rep. 426; Childers r. Boulnois, Dowl. N. P. C. 8; ante, 130, note (1), acc. But in Guy v. Harris, Sittings after Easter Term, 1800, at Guildhall, in the C. P. before Lord Eldon, such a note was attempted to be given in evidence by way of set-off, but his Lordship ruled that it could not be given in evidence, not being stamped, being a promissory note, though not negotiable. Mr. Serjeant Marshall for the plaintiff. Mr. Sergeant Best for the defendant. Manning's Ind. 215.
(1) Payne v. Jenkins, 4 Car. & P. 324. But

an I. O. U. bearing date before the bankruptcy of a trader constitutes no evidence of a petitioning creditor's debt, without some proof that it was in existence before the bankruptcy; Wright v. Lainson, 2 Mee. & Wels. 739; 6 Dowl. 146, S. C.; post, Part II. Ch. VIII. s. Bankruptcy - Petitioning Creditor's

(m) Brooks v. Elkins, 2 Mee & Wels. 74.

(n) Williamson v. Bennett, 2 Campb. 417. (Chit. j. 788); anle, 135, note (k); and see Horne v. Redfearn, 6 Scott, 460; 4 Bing. N. C. 423; S. C., ante, 109, note (g); 130, note (u), as to an Accountable Receipt.

(a) Bishop v. Young, 2 Bos. & Pul. 81, (Chit. j 621); ante, 160, 161. See Cresswell v. Crisp, 2 C. & M. 634.

(p) And note, before this statute, by 1 Will. 4, c. 38, s. 10, prisoners in execution were not entitled on their own petition to the benefit of

⁽¹⁾ See Post, 822, (48).

⁽²⁾ A promissory note for the payment of money, not expressed to be for value received, is not a specialty importing a consideration. Edgerton et al v. Edgerton, 8 Conn. Rep. 6.

IV. Form ties of Promissory Notes. Rank Notes, &c. Requisites of Promis-[*527]

Certain requisites are indispensable to the validity of all promissory and Quali- notes(q); thus they must be made payable at all events(r), and not out of a particular fund(s), which may or may not be productive, nor contingent as to the person by or to whom the payment is to be made(t). But a statement of the consideration for which a note is made will not vitiate it(u). Notes must also be for the payment of money only, and not for the performance of any other act(x); on the latter principle it was adjudged, that a written sory Notes promise to pay 300l. to B. or order, "in three good East India bonds," was not a promissory note (y); and that *an undertaking to "pay money, and deliver up horses and a wharf," on a particular day(z), or an engagement "to pay mon y on demand, or surrender the body of A. B. (a)" would ot operate as a note within the statute of Anne.

A promise by the defendant to pay to plaintiff 261. within a month after Michaelmas, if defendant did not pay the 261., for which the plaintiff stood engaged for his brother T. B., is not a promissory note (b). So a promise to pay A. B. \mathcal{L} , value received, on the death of C. D., provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it(c); and a promise to pay money within so many days after the maker of the note should marry, are not within the statute. So where the promise was to pay A. F. £-, out of the maker's money that should arise from his reversion of £-, when sold, and the declaration averred the sale of the reversion, yet it was holden that the note could not be declared on as a negotiable note under the statute, because the money was to be paid only And in a very recent case (e), the following instrument on a contingency (d). was held to be payable on a contingency, and therefore not a promissory note, "12 months after date I promise to pay A. and B. 500l., to be held by them as collateral security for any monies now owing to them by J. M., which they may be unable to recover on realizing the securities they now hold, and others which may be placed in their hands by him." promise was to pay £- on the sale or produce, immediately when sold, of the White Hart, St. Alban's, Herts, and the goods therein, although it was averred in the declaration that the house and goods were sold, yet the note was considered invalid (f). And a note, whereby the maker promised to pay to A. or to B. and C. a sum therein specified for value received, is not a promissory note within the meaning of the statute of Anne; for if a note is made payable to one or other of two persons, it is payable to either of them only on the contingency of its not being paid to the other(g). And where a note stated that J. S. promised to pay to A. B., or order, a certain sum,

the Lords' Act in courts at Westminster, but must have applied to the Insolvent Court; Tidd's Supp 30, note (d). (q) Ante, 132 to 145.

- (r) Ante, 134. (s) Ante, 187.
- (t) Ante, 139.
- (u) Ante, 139. (x) Ante, 132.
- (y) Bul. Ni. Pri. 272; ante, 132. (2) Bul. Ni. Pri. 272; Martin v. Chauntry,
- (2) But. Nt. Fit. 212; Martin r. Chauntry, 2 Strs. 1271; ante, 134, note (u).
 (a) Ante, 138; Jenny v. Herlo, 2 Lord Rsym. 1362, (Chit. J. 253); Smith v. Boehm, Gilb. Cas. L. & E. 93, (Chit. j. 234), cited Lord Raym. 1362; ante, 134; Williams v. Lucas, 1 P. W. 431, note 1.

 (A) Anglaby & Riddulph & Med 269.
- (b) Appleby v. Biddulph, S Mod. 368; ante. 134, note (a).

- (c) Roberts v. Peake, 1 Burr. 323, (Chit. 340); ante, 134, note (b); Beardsley v. Baldwin, Stra. 1351; 7 Mod. 417, (Chit. j. 293).
- (d) Carlos v. Fancourt, 5 T. R. 482, (Chit.
- j. 515); ante, 138, note (e).
 (e) Robins v. May, M. T. 1839, Q. B. 3
 Per. & Dav. ; 3 Jurist, 1188, S. C. Per
 Denman, C. J. "This instrument gives notice to all the world that it is payable on a contingency." And per Patteson, J. "This is the case of one man promising to pay if another does not." Williams and Coleridge, J.'s concurred. Judgment for defendant.
 - (f) Hill v. Halford, 2 Bos. & Pul. 413,
- (Chit. j. 637); ante, 135, note (i).
 (g) Blackenhagen v. Blundell, 2 Barn. & Ald. 417, (Chit. j. 1054), it was held also no action at common law would lie on such an instrument. .Ante, 140, note (g).

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and was signed J. S. or else J. G., it was held not to be a note within the IV. Form act(h). The same principle was recognized in the following cases, though and Qualities of Prothe notes were held good.

missory

A promissory note was given to an infant, puyable when he should come Notes, of age, viz. on such a day in such a year, this was holden good; for, per Bank Notes, &c. Denison, J. here is no condition or uncertainty, but it is to be paid certainly, and at all events, only the time of payment is postponed(i). So where the of Promisplaintiff declared in the first count on a promissory note, dated 27th May, sory Notes 1732, whereby defendant promised to pay to H. D., or order, 150 guineas, in general. ten days after the death of his *father, John Cooke, for value received; [*528] which note, after the death of the father (which was laid to be the 2d April, 1741) was duly indorsed by D. to plaintiff; and in the second count, on a promissory note, dated 15th July, 1732, whereby defendant promised to pay H. D. or order, six weeks after the death of his father, fifty guineas, for value received, the like indorsement laid after the death of the father as before; after a general verdict for plaintiff on both notes, it was insisted for defendant, in arrest of judgment, that these notes were not within the statute 3 & 4 Anne, c. 9. After three arguments, Willes, Chief Justice, delivered the opinion of the court in favour of the plaintiff, on the ground that the notes did not depend on any contingency: that there was a certain promise to pay at the time of giving the notes, and the money, by virtue thereof, would become due and payable at one time or other, though it was uncertain when that time would come; that there was not any weight in the objection, that the maker might have died before his father, in which case the notes would have been of no value, because the same might be said of any notes payable at a distant time, that the maker might die worth nothing before the note became payable; he added, that the Court thought that the averment of the death of the father before the indorsement did not make any alteration; because they were of opinion, that if the notes were not within the statute ab *initio*, they could not become valid by any subsequent event (k). So where the note was to pay within a certain time after a ship belonging to the Royal Navy should have been paid off, it was holden good; because the ship would certainly be paid off some time or other (l).

It has been said(m), that in the application of the rule relative to these instruments being payable at all events, there is a distinction between bills of exchange and promissory notes, and that a note may, in certain cases, be payable on a contingency (n); but it will appear that the cases (o) adduced in support of this distinction, are equally applicable to bills of exchange; and it is now settled, that in general, if a note be payable on a contingency, it will be as inoperative as a bill payable in the same manner (p). It has also been observed (q), that in the application of the principle that these instruments must not be payable out of a particular fund, there is a material dis-

(h) Ferris v. Bond, 4 B. & A. 679, (Chit. j. 1110); ante, 140, note (e).

(i) Goss v. Nelson, 1 Burr. 226, (Chit. j.

339); ante, 136, note (r).
(k) Colehan v. Cooke, Willes, 393, (Chit. j. 298), affirmed on error. Stra. 1217, ante, 136, note (p).

(1) Andrews v. Franklin, Hil. 3 Geo. 1, B. R. 1 Stra. 24, (Chit. j. 286). Sed quære, see ante, 137, and notes, as to this point.

(m) Kyd, 56.

(o) Cooke r. Colehan, 2 Stra. 1217, (Chit. j. 301); Andrews v. Franklin, 1 Stra. 24, (Chit. j. 286); Goss v. Nelson, 1 Burr. 227, (Chit. j. 339); Evans v. Underwood, 1 Wils. 262, (Chit.

(p) Carlos v. Fancourt, 5 T. R. 486, (Chit. . 515); ante, 188, note (e); Colehan r. Cooke, Willes, 388, 389, (Chit. j. 298); Williamson v. Bennett, 2 Campb. 417, (Chit. j. 788); ante, 135, note (k).

(q) Kvd, 53.

j. 326).

⁽n) Dawes v. Delorain, 2 Bls. Rcp. 782; 3 Wile. 207, (Chit. j. 882, 383); ante, 137,

IV. Form tinction between bills of exchange and promissory notes; but the case(r) adand Quali-duced in support of this opinion only shews that the statement in a bill or ties of Pronote, of the consideration for which it was made, will not vitiate it(s). It is missory Notes, also settled, that it is not necessary that a note, any more than a bill of ex-Bank change, should contain any words rendering it negotiable(t). In short, all Notes, &c. the rules relative to the qualities of a bill of exchange, are, for the most part, Requisites applicable to notes, and it would be an unnecessary repetition to enumerate sory Notes them. There is, however, one very important distinction between bills in general and notes, as regards the liability arising from an indorsement; with *respect [*529] to bills of exchange, we have seen(u) that every indorser is in the nature of a new drawer, but the indorser of a promissory note does not stand in the situation of maker relatively to his indorsee; nor can the indorsee of a note declare against his indorser as maker, even where the latter has indorsed a note not payable or indorsed to him, and where, consequently, his indorsee The distinction between the two cases cannot sue the original maker (x). is obvious: in allowing the indorser of a bill to be treated as a new drawer the indorser's liability is not altered, it still remains secondary or collateral only; but to suffer the indorser of a note to be charged as maker would be at once to render the indorser's liability primary and immediate, and to place him in the situation of the acceptor of a bill.

Joint and several Notes.

When a promissory note is made by several, and expressed "we promise to pay." it is a joint note only(1); but if a note be signed by several persons, and begin "I promise," &c. it is several as well as joint, and the parties may be sued jointly or severally (y)(2). And a member of a country bank signing for himself and partners notes beginning with the words "I pro.

(Chit. j. 267).

(s) Hausoullier v. Hartsink, 7 T. R. 723;

Anon. Sel. Ca. 39; et ante, 139, note (p).
(t) Smith v. Kendall, 6 T. R. 123; 1 Esp. 231, (Chit. j. 533); ante, 159, note (i).

(u) Ante, 196, 242.

(x) Gwinnell v. Herbert, 5 Ad. & El. 436; 6 Nev. & Man. 723, see antc, 196, note (0);

242, notes (g), (h), (i).

(y) See cases, ante, 58; Clarke r. Blackstock, Holt, C. N. P. 474, (Chit. j. 968); March v. Ward, Peake's R. 130, (Chit. j. 497); Butler v. Malissy, 1 Stra. 76, (Chit. j. 242); Ovington v. Neale, 2 Stra. 819; Rees v. Abbott, Cowp. 832, (Chit. j. 399); Rice r. Shute, 5 Burr. 2611; Com. Dig. tit. Obligation, F. G.; Cabell v. Vaughan, 1 Saund. 291 b, note 4; Abbott v. Smith, 2 Bla. Rep. 947; Holmer v. Viner, 1 Esp. Rep. 134, (Chit. j. 521); Selw. 9th edit. 386

Marsh v. Ward, Peake's Rep. 130, (Chit. j. 497) .- Assumpsit on a promissory note, made by the defendant and one Bowling, in the fol-

lowing words, viz -

"I promise to pay, three months after date,

(r) Burchell v. Slocock, Lord Raym 1545, to W. March, St. 5s. for value received in fix-

"ROBERT BOWLING. "THOMAS WARD."

It was objected that this promissory note was joint only and not several. Lord Kenyon: "I think this note beginning in the singular number is several as well as joint, and that the present action may be maintained on it. I remember a case tried before Mr. Moreton at Chester exactly similar to the present, wherein I was counsel for the defendant. I persuaded the judge that it was a joint note only, and the plaintiff was nonsuited; but on an application being afterwards made to this court, they were of a contrary opinion, and a new trial was granted; the letter '1' applies to each severally." Verdict for the plaintiff.

Roberts c. Peake, 1 Burr. 323, (Chit. j. 340). A note signed by the defendant alone, but importing in the body of it to have been made by the defendant and another person, was declared upon as the several note of the defendant, and it was agreed that it might be declared upon according to its legal operation; but judgment was given for the defendant upon

^{(1) {} Mayor of New Orleans v. Ripley et al. 5 Miller's Louis. Rep. 120. } (2) The same doctrine was held in Hunt v. Adams, 5 Mass. Rep. 358, and see Hemmenway

v. Stone, 7 Mass. Rep. 58. And a promissory note given by one member of a commercial company to another member, for the use of the company, will maintain an action at law by the promise in his own name against the maker. Van Ness v. Forrest, 8 Cranch, 30. { Karck c. Avinger, Riley's Law Cas. 201; Smith v. Clapp, 15 Pet. 125. }

mise to pay, &c." may be sued alone(z). But if a promissory not appear IV. Form on the face of it to be the separate note of A. only, it cannot be declared and Qualion as the note of A. and B., though given to secure a debt for which A. and missory B. were jointly liable (a). A note signed by the makers thus, "I. S. or Notes, else J. G." is not a good promissory note within the statute of Anne(b). Bank But in an action by A. against B. upon a promissory note, it was stated in Notes, &c. the declaration, that B. and another jointly or severally promised to pay it; Several and it was holden, that the declaration was good, for or was synonymous to Notes. and, and they both promised that they, or one of them, should pay, consequently both and each were liable in solidum(c). And it has been held, that if an action be brought on a *joint note, and some of the persons making [*530] the note are not made defendants, advantage can only be taken of the omission by plea in abatement(d). And if one of several makers of a promissory note be an infant, he should not be sued, nor should the declaration state that he was a party (e); and if there be a joint and several promissory note of two persons, and one of them was a surety only for the other, and that circumstance were known to the holder, and he accept a composition from the assignees of such principal, amounting to less than the dividend payable under his commission, it has been held that this conduct releases the surety from liability (f); but the propriety of that decision appears to be questionable (g).

When it is proposed that several persons, whether as principals only, or as principal and sureties, shall give a note to secure the payment of a debt, it is advisable that they should severally, as well as jointly, promise to pay; for if it be only a joint note, and one of them die, then there will be no remedy at law against his personal representative, and in case he was only a sure-

another ground. See Siffkin v. Walker, 2 promise to pay." Judgment affirmed. Campb. 308, (Chit. j. 780).

(d) Per Buller, J. in Rees v. Abbott, Cowp. Campb. 308, (Chit. j. 780).

(z) Hall v. Smith, 1 Barn. & Cress. 407; 2 Dowl & Ryl. 584, (Chit. j. 1172); ante, 58, note (c)

(a) Siffkin v. Walker, 2 Campb. 308, (Chit. j. 780); Emley v. Lye, 15 East, 7, (Chit. j. 849); ante, 58, note (d).

(b) Ferris v. Bond, 4 B. & Ald. 679, (Chit.

j. 1110); ante, 140, note (e).

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(c) Butler v. Malissy, 1 Stra. 76, (Chit. j. In an action on a note the declaration stated, that the defendant and another did jointly or severally promise to pay, and upon demurrer the court held it bad, and the plaintiff obtained leave to discontinue. And in Ovington v. Neale, 2 Stra. 819; Ld. Raym. 1544, the plaintiff declared upon a note by which the defendant and another jointly or severally promised to pay, and upon error the Court of King's Bench held it bad, because the plaintiff had not shewn a title to bring a separate action against the defendant, for he only says he has this or some other cause of action, and judgment for the plaintiff was reversed.

However, in Rees r. Abbott, Cowp. 832, (Chit. j. 399), the declaration upon a note stated, that the defendant and another made their note, by which they jointly or severally promised to pay, and upon error after judgment by default, Butler v. Malissy, and Ovington r. Neale, were cited as in point. Sed per Lord Mansfield:-" If 'or' is to be considered in this case as a disjunctive, the plaintiff is to elect, and by the action he has made his election to consider the note as several, but in this case it is synonymous to 'and,' and both and each

832, (Chit. j. 399); see ante, 529, note (y);

Selw. 9th edit. 387.

(e) Burgess v. Merrill, 4 Taunt. 468, (Chit. j. 869); but see Gibbs v. Merrill, 3 Taunt. 307. (f) Garrett v. Jull, B. R. Mich. 22 Geo. 3, MS. Selw. 9th edit. 387. An action was brought against defendant only, on a joint and several note, made by defendant and one Stoddart. Plea, non-assumpsit. Defendant gave in evidence an agreement in writing, entered into by plaintiff with the assignees of Stoddart, then a bankrupt, to receive from them 6001. in lieu of 8831., actually due from the bankrupt on this note, (which was for 1001.,) and on other transactions; and that defendant was only surety for Stoddart. Defendant obtained a verdict. On motion to set it aside, it was insisted, on the part of the defendant, on the ground that the agreement put an end to the plaintiff's recovery on the note, that the principal could not be discharged without discharging the surety also. On the part of the plaintiff it was urged, that it was not the meaning of the agreement that the defendant should be discharged. But per Lord Mansfield, C. J. "The plaintiff was party to the agreement, and we cannot receive parol evidence to explain it. Whatever might be the intention of the parties, the principal cannot be released without its operating for the benefit of the surety." Rule discharged. Sed quære, see Perfect r. Musgrave, 6 Price, 111, (Chit. j. 1041); and Price r. Edmunds, 10 Bar. & Cres. 578, (Chit. j. 1483). As to this point, see ante, 416.

(g) See cases, ante, 416.

ties of Promissory Notes, Bank Notes, &c.

IV. Form ty, a court of equity would not grant relief against his estate; whereas if the and Quali- note were several as well as joint, the executors of a deceased party may be sued at law(h); and it should seem, that if it was originally intended that a note should be several as well as joint, a court of equity would relieve as well

against a surety as a principal(i).

When a person signs a promissory note as a surety for others, and on a representation that another person is to join as a party, as well as the principal debtors, and the other person afterwards refuses to sign, the payees cannot recover in an action on the note against the person who so signed as a surety, unless the jury are satisfied that such person knowing the facts, and being aware of his rights, had consented to waive the objection; and per Tindal, C. J.: "The defendant was told that another person was to join, [*531] and therefore the obtaining the *signature of that person was a condition, which if not carried into execution would justify the defendant in withdraw-

ing(k).

The general liability of partners in respect of bills and notes given by a co-partner in the name of the firm, and the mode in which partners should sign so as to bind the firm, have already been considered (l). We have also seen(m) that a transfer by one partner in the name formerly used by the partnership will bind the existing firm. But in a very recent case, where a member of a company called the "Newcastle and Sunderland Wallsend Coal Company," made a note in the name of the "Newcastle Coal Company," and payable at a bank with which they had no account, it was held, that it was not to be presumed that the note was made with the authority of the firm, and that it was properly left to the jury to say whether the note was so made or not(n).

Btamps.

The amount of the stamp duties imposed on notes until the 10th October, A. D. 1804, was regulated by the 44 Geo. 3, c. 98, schedule A. amount of the duties from that time until the 10th October, A. D. 1808, were regulated by the statute 48 Geo. 3, c. 149. The present stamp duties on notes are regulated by the 55 Geo. 3, c. 184, and these are the same as the stamps on bills, except as to notes reissuable after payment by the ma-By the 1 & 2 Vict. c. 58, stamps denoting duties payable in one part of the united kingdom may be used for instruments liable to stamp duties payable in any other part.

The regulations with respect to the stamps on notes in general, and in particular to re-issuable notes, and the licensing bankers to draw and re-issue

the same, have already been fully considered(o).

Bank notes are exempted from the stamp duty by the 23 Geo. 3, c. 49, s. 9, and other subsequent statutes, in consideration of the payment of the annual sum of 12,000l. in the receipt of his Majesty's Exchequer.

(h) See cases, 1 Chit. on Plead. 6th edit. 44. (i) Rawstone v. Parr, 3 Russ. 424; id. 529; Chitty's Equity Index, 1468, and id. tit. Mistake; ante, 166, 167.

(k) Leufe v. Gibbs, 4 Car. & P. 466, (Chit.

j. 1520).

(1) Ante, 89, 57.

(m) Ante, 228, note (g).

(n) Faith v. Richmond and others, H. T., 1840, Q. B., 3 Per. & Dav. Per Littledale, J. "The question in this case was whether the note was made by the defendants, who were in partnership together. Richmond did not sign it in the name of the firm, and there was no evidence that they had ever recognised any other

than the real name of the firm. In the case cited of Williamson v. Johnson, 1 Bar. & Cres. 146, (ante, 228, note(g),) the name put to the bill had been the name of the firm until a change of partnership took place, and had since been used on other occasions. I think there was no misdirection." Per Coleridge, J. "In ordinary cases where a bill is signed in the name of a firm the only question is, whether all the parties whom it is sought to charge are members of it; but where a different name from that of the firm is used, then the question arises whether what has been done was authorised by the partners.

(v) A ite, 107 to 118, &c

decisions on the former and present Stamp Acts already stated are here ap- IV. Form

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cable(p).

We have seen(q) that the alteration of a bill or note for the mere purmissory pose of correcting a mistake, does not render a fresh stamp necessary; and Notes. in a very late case, where a promissory note was altered several months af-Bank ter the making of it by the defendant, who introduced the words " or order," Notes, &c. saying at the same time, "It is my omission," it was held, that a new stamp But in these cases *it is the duty of the plaintiff to was not necessary (r). prove the time when or the circumstances under which the alteration took place, and unless he gives some evidence in explanation thereof, it is not competent to the jury to decide upon a bare inspection of the instrument(s).

In all points in which a distinction between bills of exchange and promissory notes has not been pointed out, the rules relative to the one equally apply to the other, and therefore it will not be necessary to make any further observations in the present Chapter.

(p) Ante, 107 to 125.

(q) Ante, 184.

(r) Byrom v. Thompson, M. T. 1839, Q. B., 3 Perry & Dav.; 3 Jurist. 1121, S. C. Per Patteson, J. "The case of Kershaw v. Cox (3 Esp. 246; ante, 184, note (e),) went upon the ground that the alteration was the correction of a mistake, and in furtherance of the original intention of the parties, and not a mere after-thought. In Knight v. Clements, (8 Nev. & P. 875; 8 Ad. & El. 215, S. C. post, 532, note (s)) the simple question was, whether the jury was at liberty to inquire when the alteration was made: and it was held that they could not be allowed to decide the inquiry by conjecture. In this case the defendant, when he made the alteration, said ' it is my omission, which brings it within the authority of Kershaw v. Cox."

(a) Knight v. Clements, 3 Nev. & P. 375; 8 Ad. & El. 215; more fully, post, Part II. Ch. V. s. i. Evidence; and see last note. Semble, this case overrules Taylor v. Moseley, 6 C. & P. 273; ante, 190, 191, note (y).

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PART SECOND.

THE REMEDIES ON A BILL, NOTE, OR CHECK.

In the preceding part of this Work, we have endeavoured to point out the nature of the Right which may be acquired by the instruments which are the subject of this Treatise. The Remedy which the law affords the parties to enforce payment will now be considered. In this part of the Work, no distinct observations on bills and notes will be necessary, as the same remedies are given by law on both species of instruments, except that in some cases debt is not sustainable on a promissory note, and which distinction will be pointed out. The means of enforcing payment, are, in general, either by action of assumpsit or debt, or where the party is a bankrupt, by proof under the commission. In the consideration of the above-mentioned actions, the pleas and defences, and the evidence to be adduced by each party, will also be considered.

*CHAPTER I.

BY AND AGAINST WHOM AN ACTION OF ASSUMP-SIT ON A BILL, CHECK, OR NOTE, MAY BE SUPPORTED.

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I. WHEN Assumpsit the proper Remedy(a).

I. When Assumpsit the proper Remedy.

An action of ABSUMPSIT is by far the most usual remedy on bills, checks, and notes; and indeed it appears to be the only remedy where no privity of contract exists between the parties, as between the indorsee and the acceptor of a bill, and a remote indorsee and maker of a note, when an action of debt is not maintainable(b). And before the recent statute 3 & 4 Will. 4, c. 42, assumpsit was the usual form of remedy when the action was against an executor or administrator, against whom debt on simple contract was not in general sustainable(c); but by the 14th section of that act it is enacted, that an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator (d).

II. By and against whom Action sustainable.

II. By and tion spstainable.

With respect to the persons by or against whom this action may be against whom Ac- brought(e), we have seen that in some cases particular statutes direct, that where corporations or co-partnerships of bankers or persons in trade have issued bills or notes, they may sue and be sued in the name of one of their

> (a) See as to the action of Debt, post, Ch. VII., and as to the action of Delinue or Trover to recover bill or proceeds, see ante, 250, 251. Separate actions of trover may sometimes be maintained by two distinct plaintiffs against a defendant in respect of the conversion of the same thing, as where the plaintiffs and P. and Co., having each a separate lien on a bill in the hands of the plaintiffs for advances, and the defendant, the acceptor, having improperly possessed himself of it, P. and Co. sued him in trover, and recovered by the award of an arbitrator to the extent of their claim, and the plain-

tiffs afterwards sued the defendant also in trover; it was held, that notwithstanding the former recovery by P. and Co., the plaintiffs were entitled to recover for the amount of their lien; Knight v. Legh, 6 Law J. 128, C. P.; 4 Bing. 589; 1 M. & P. 528, S. C.

(b) Bishop v. Young, 2 B. & P. 78, (Chit. j. 621); see ante, 161, post, Ch. VII. (c) Barry v. Robinson, 1 New R. 293.

(d) See Chit. & H. Stat. 24, note (1). (e) Poth. tit. Contrat de Change, part 1, chap. 5, art. 2, per totum.

public officers (f) (1), but, in general, the common law prescribes, that when- II. By and ever a legal right is created, or liability impoed in favor of or upon one or more against ever a *legal* right is created, or nability imposed in layor of or upon one of more whom Ac-persons, through the medium of these "instruments, that right may be inserted tion susand that liability enforced, by this action, by and against all those persons (2). tainable. Therefore a person may sue on a note payable to him, though in trust for a Legal third party(g). And the wife may join in an action on a note made payable Rights and to her during the coverture (h)(3); but the husband may sue alone (i). this country (though it seems to be otherwise in France(k),) when there are Need not several indorsers, it is not necessary that the action should be brought in the of actual name of the actual holder (l) at the time of the dishonour, or of the last in-Holder. dorser: but the parties to the instrument may arrange the matter among [*535] themselves, and any one indorser may sue the acceptor or drawer instead of the preceding indorser, though it is said that before the trial, all the names below his own, (the tplaintiff's) must, in that case, be struck out(m)(4).

In Liabilities.

(f) Ante, 17, 18, 64 to 67.

(g) Smith v. Kendall, 1 Esp. Rep. 231; 6 T. R. 123, (Chit. j. 533); Randall v. Bell, 1 Maule & Selw. 728.

(A) Philliskirk et Ux. v. Pluckwell, 2 Maule & S. 393, (Chit. j. 903); ante, 22.

(i) Ante, 23, note (p).

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(k) 1 Pardess, 439, 440.

(1) See Stones v. Butt, 2 Cromp. & M 416; 2 Dowl. 335, S. C.; infra, note (o).
(m) Per Eyre, C. J. in Walwyn v. St.

Quintin, 1 Bos. & Pul. 658; 2 Esp. 514. (Chit. j. 578). This doctrine was recognised in Parnell v. Townend, Trinity Term, 58 Geo. 3, on demurrer; see post, 571, 572. But if a hill were really the property of another, and put into the hands of a defendant purposely to set off against a claim on him, that might present a different question. Per Lord Ellenborough in Cornforth v. Revetts, 2 Maule & S.

(1) { Assumpsit will not lie upon a note of a corporation, to which the corporate seal is affixed; and if a count upon such note be joined with the money counts in assumpsit, the judgment will be arrested. Steele v. The Oswego Cotton Man. Co., 15 Wend. 265.

(2) The same practice is recognized in the United States. Livingston r. Clinton, 3 John. Cas. 264. Baker v. Arnold, 1 Caines' Rep. 269, 271. So also, assumpsit for money had and received, or for money lent, may be maintained by the indorsee of a promissory note against the maker or indorser. Eagle Bank r. Smith, 5 Con. Rep. 71. And where the plaintiff is in possession of the bill, when he commences the action, the simple act of indorsing it may be done af-terwards. Ibid. See Ritchie v. Moore, 5 Munf. 388.

Where an action against an indorser was commenced on the same day that the note became due, but after the notice was put into the post-office, and the writ was served before the notice could be received by the course of the mail, it was held that the action was not commenced too soon. Shed v. Brei, 1 Pick. 401. Bills of exchange and negotiable promissory notes should be paid on presentment, on the day when due, if presented at a reasonable hour; and if not then paid, the acceptor or maker, and also the indorser, or drawer, may be sued on that day, after notice given or duly forwarded. Greely v. Thurston, 4 Greenl. 479.

But where notice to an indorser who lived at another place, of non-payment and protest of a promissory note, was put into the post-office on the 13th, and by the course of the mail could not reach him before the 19th, it was held that a suit commenced against him on the 16th was too

on. Smith v. Bank of Washington, 5 Serg. & Rawle, 318. Sherwood v. Roys, 14 Pick. 172. But a person holding a note as a mere depositary and agent, must bring an action upon it in the name of his principal. Ibid }

(5) { But she cannot maintain an action against her husband upon a note executed by him to her during coverture. Sweat v. Hall, 8 Verm. 187. Nor can it be enforced, even for the benefit and in the name of a third person, to whom the husband has afterwards promised to pay it.

(4) When a bill of exchange is indorsed in full, all the legal interest is transferred to the indorsee, and having the legal interest, he alone is qualified to maintain an action on such bill. He cannot use the name of the payee, because the payee, having transferred his interest, can have no competency to maintain an action.

{ Bowie c. Daval, 1 Gill & John. 175. }

So where it appeared that the note of the defendant, payable to B. or order, had been indersed as follows, "I assign the within for value received to L.;" signed B, but which indersement was crased just before the jury was sworn; it was held, that an action in the name of B., originally instituted for the use of [L., could not be maintained upon the note, as there was no evidence from which the jury could infer that the payee and plaintiff was the holder of the note, neither could an action be maintained on the money counts, although there was proof of an express promise to pay the sam demanded in such suit, as that must be considered as enuring to the benefit of him who had a right to the note. Ib.

If a note duly indersed in full, should in the regular course of commercial dealing come back

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11. By and And where in an action for the price of goods, for which the plaintiff had received bills from the defendant, it appeared that the bills had been transferred to a third person, and remained in his hands dishonoured until just before the trial, and were then handed to the plaintiff, it was held he might recov-So where the plaintiff was not, at the time when the defendant was arrested, in possession of the bill of exchange on which the action was brought, it being in the possession of persons to whom the plaintiff was indebted, and to whom he had indorsed it over, but it appeared that those persons only held the bill as trustees for the plaintiff, and that they were ready to give up possession of the bill to the plaintiff for the purposes of the suit; it was held, that the defendant was not entitled to be discharged out of cus-Where a merchant, carrying on trade on his own separate account, introduced into his firm the name of a clerk, who had no participation in profit or loss, but continued to receive a fixed salary, it was held, that in an action on a bill of exchange payable to the order of this firm, the clerk must be joined as a plaintiff (p), unless it be distinctly proved that be had no interest (q). But where a bill or note is indorsed in blank, any number of persons may sue on it, though not in partnership together; and so if the bill or note be indorsed in blank to a partnership, the whole members thereof need not join in the action; nor, if one of them die, need the rest sue as surviving partners, for the indorsement in blank conveys a joint right of action to as many as agree in suing jointly on the bill(r). So if several persons, not partners, separately indorse, for the accommodation of the drawer, a bill of exchange which has been previously indorsed by another in blank,

Several Plaintiffs.

that the declaration states an indorsement and delivery immediately from the [*536] defendant to *the plaintiffs(s). But where a bill had been specially indorsed, or specifically delivered to A. B. and Co. who were bankers, on the account of the estate of an insolvent, it was held, that two of the firm could not, conjointly with a trustee who was not a partner in the bank, join in an action against the acceptor, without some evidence of the actual transfer of the bill to them as trustees, by the firm, by delivery or otherwise (t)(1). party, who has commenced an action on a bill, deposit it afterwards as a security in the hands of a third person, he may still proceed in the action if the latter knew that the action was commenced; and if such third person, having had this notice, commence another action against the same defendant, the court will stay his proceedings (u)(2). And the drawer of a bill, after tak-

and, on the bill being dishonoured, pay the then holder in equal portions, they may strike out their own indorsements and bring a joint action against such first indorsers to recover the amount of the bill; and it is no variance

(n) Burden v. Halton, 4 Bing 454; 1 Moo. & P. 223; 3 Car. & P. 174, (Chit. j. 1374).

(a) Stones v. Butt, 2 Crom. & M. 416; 2

Dowl. 335, S. C. (p) Guidon v. Robson, 2 Campb. 302,

(Chit. j. 779). (q) 1 Chitty on Pleading, 6th edit. 11, 12. (r) Attwood v. Rattenbury, 6 Moore, 579. (Chit. j. 1131); Ord v. Portal, 3 Campb. 239, (Chit. j. 861); Rordosnz v. Leach, 1 Stark. R. 446, (Chit. j. 977); post, Ch. V. s. 1, Evi-

dence-Plaintiff's Interest. (s) Low and others v. Copestake, 3 Car. &

P. 300, (Chit. j. 1376). (t) Machel and others v. Kinnear, 1 Stark.

Rep. 499, (Chit. j. 981), sed quære.
(u) Marsh v. Newell, 1 Taunt. 109, (Chit. 745); ante, 224, note (r); Jones r. Lane, 3 Jurist, 265; ante, 219, note (a); Columbier v. Slim, 2 Chit. R. 637; ante, 217, note (l) And see the observations of Abbott, J. in Randall v. Bell, 1 Maule & S. 723.

to the hands of a prior indorser, or of the payee, it would be competent for such person as the holder to strike out the indersement and sue in his own name. Ib.

ance of the suit. Hall v. Gentry, 1 Marsh. 555.

^{(1) {} Where an instrument is jointly executed to several, one of the joint payees, or his assignee, may sue in the name of all without their consent. Wright r. M'Lemore, 10 Yerg. 286. } (2) An assignment of a note made during the pendency of a suit, operates as a discontinu-

ing it up, may sue a bankrupt acceptor, who has not obtained his certificate, II. By and although a previous holder has proved under the commission (x).

whom Action may

The bona fide holder of a bill, check, or note, claiming under a regular in- be sustain-, dorsement or transfer, may, in general, maintain an action thereon against all ed. the parties whose names are to it, and who became so previously to him- Holder self(y)(1), but not against any subsequent party(z). Thus the payee may, in may sue all default of payment, sue the acceptor, whether he accepted as drawee, or ties. merely for the honour of the drawer; and he may also in such case sue the An indorsee may, in general, not only sue the acceptor and drawer, but also all the prior indorsers; and an assignee by mere delivery may sue the acceptor, drawer, and indorsers, but he cannot maintain an action against any person whose name is not on the bill, except the person who transferred it to him(a), and then only when the consideration of the transfer was a precedent debt, or a debt arising at the time, and not when he became the holder, by discounting the bill upon a purchase thereof, as sometimes occurs(b). An intended indorsee, when a bill has by neglect been transferred to him, without a regular indorsement, may sue in the name of the payee(c). A person to whom the drawer of a bill, accepted for value, had indorsed it after dishonour, and after it had been paid by such drawer, may sue the acceptor in his own name (d). But where a bill was drawn by the plaintiffs upon J. W. and indorsed by the plaintiffs to the defendant, and re-indorsed by him to the plaintiffs to secure the payment by J. W., it was held that the plaintiffs had no remedy on the bill as such, and that the declaration must be special, showing the consideration and special contract, and there not appearing any consideration for the defendant's undertaking to indorse, &c. he could not be sued thereon(e).

*The drawer may maintain an action on the bill against the acceptor, in Drawer's case of a refusal to pay a bill already accepted, but not on a refusal to accept, right of Action. in which latter case the action by him must be special on the contract to ac- [*537] cept(f); and any party who has given value for the bill, and has been obliged to pay in consequence of the default of the acceptor, may maintain an action thereon against all the parties antecedent to himself, and in this case he is said to hold the bill in his original capacity (g); and the drawer of a bill, payable to the order of a third person, may, when the bill has been returned to him, and he has paid it, sue the acceptor(h). So an indorser, who has

(x) Mead v. Braham, 3 Maule & S. 91, (Chit. j. 911).

(y) Bishop v. Hayward, 4 T. R. 471, (Chit. j. 492); ante, 26, note (0); see Knight v. Legh, 6 Law J. 128, C. P.; ante, 534, note (a), S. P.; Britten v. Webb, 2 Bar. & Cres. 483; 8 Dowl. & Ryl. 650, (Chit. j. 1198); ante, 26, note (o); Bayl. 5th ed. 330; Roscoe on Bills, 383.

(z) Id. ibid.

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(a) Ante, 244, 245. (b) Id. ibid.

(c) Pearse v. Hirst, 10 Barn. & Cres. 122; 5 Man. & Ryl. 88, (Chit. j. 1456).

(d) See Callow v. Lawrence, 3 Maule & S. 97, (Chit. j. 911); ante, 223, which explains Bacon v. Searles, 1 Hen. Bla. 88, (Chit. j.

(e) Britten v. Webb, 2 B. & C. 483; 3 Dow. & Ryl. 650, (Chit. j. 1198); and Bishop r. Hayward, ante, 26, note (o), 241, 242, note (f); sed vide Penny v. lunes, 1 C., M. & R. 439; 5 Tyr. 107, S. C.; ante, 242, note(g); see also, post, 537, note (s).

(f) Ante, 281. (g) Cowley v. Dunlop, 7 T. R. 571, (Chit. j. 598); Death r. Serwonters, Lutw. 885, 888, (Chit. j. 167); Bosanquet v. Dudman, 1 Stark. Rep. 2, 3, (Chit. j. 904).

(h) Symonds v. Parminter, 1 Wils. 185; 4 Bro. P. C. 604; S. C. Louviere v. Laubray, 10 Mod. 36, (Chit. j. 230).

^{(1) {} The holder of negotiable paper may bring an action upon it in the name of a person having no interest in it; and it is no defence that the suit be thus brought without the knowledge, assent, or authority of the nominal plaintiff. Gage v. Kendall, 15 Wend. 640. }

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II. By and been obliged to pay a part, may sue the acceptor for it, although the bill is not in his hands, but remains outstanding, and although the acceptor remains liable to an action for the balance at the suit of the holder(i).

Remedy of accommodation Acceptor. &c.

Where the holder of a bill sued the acceptor, and charged him in execution, and the latter having obtained his discharge under the Lords' Act(k), the holder then sued the drawer, who, after paying the bill sued the acceptor, and charged him in execution, this was held to be regular (1). In the case of an acceptance for the accommodation of the drawer, such acceptor, if he has been obliged to pay, may sue the drawer on his implied contract to indemnify him, but not on the bill itself(m)(1) though we have seen that he may retain money in his hands as an indemnity (n); and a person not originally party to a bill, having paid it supra protest, may maintain an action against all or any of the parties to it, except the person whom he paid, or a person subsequent to the party for whose particular honour he paid(o); but the bail of the maker of a promissory note, who have paid it, cannot sue the indorsers (p), and a banker who pays the acceptance of a customer, who has made it payable at his banking-house, but who has no funds there, cannot sue thereon, as he does not stand in the situation of a party paying supra protest(q)(2).

Non-liability of subsequent Parties.

It has been held that, except under circumstances, which must be specially stated on the record, no action can be maintained on a bill or note against a person who became party to it subsequently to the holder or plaintiff, for if it were otherwise, the defendant in such action might, as an indorsee deriving from the plaintiff, be entitled to recover back again, in another action against the plaintiff, the identical sum which he, the plaintiff, had previously recovered from him, which would introduce a circuity of action, which the law will not permit; and therefore where A. declared against B. on a promissory note made by C. to A. and indorsed by him to B., and by B. again indorsed to A., and A. obtained a verdict, the judgment was arrested (r). But according to a more recent authority it seems, that in the [*538] case of *a bill, such second indorser is chargeable in the character of a new drawer(s); though it is otherwise in the case of a promissory note(t). It is also a general rule, that each party to a bill is bound to perform his own en-

(i) Pownall v. Ferrand, 6 Barn. & Cres. 489; Ryan & Moo. 407; 9 Dowl. & Ryl. 603, (Ch. j. 1827)

(k) Now repealed by 1 & 2 Vict. c. 110, s.

(1) Macdonald v. Bovington, 4 T. R. 825, (Chit. j. 497); and Mead v. Braham, 8 Maule & S. 91, (Chit. j. 911).

(m) Young v. Hockley, 3 Wils. 346.

(n) Ante, 318.

(o) Ante, 544; 1 Pardess. 441; Mertens v.

Winnington, 1 Esp. R. 112, (Chit. j. 523).
(p) Hall v. Pitfield, 1 Wils. 46; Bayl. 5th edit. 329.

(q) Holroyd v. Whitehead, 5 Taunt. 444; 1 Marsh. 128; 3 Campb. 580, (Chit. j. 905). (r) Bishop v. Hayward, 4 T. R. 470, (Chit.

j. 492); Mainwaring v. Newman, 2 B. & P. 125, (Chit. j. 623); Britten v. Webb, 2 B. & C. 483; 3 Dowl. & Ryl. 650, (Chit. j. 1198); ante, 26, note (o). See also Carr v. Stevens, ante, 26, note (o). See also Carr v. Stevens, 9 B. & C. 758; 4 Man. Ryl. 591, (Chit. j. 1444).

(s) Penny v. Innes, 1 C., M. & R. 439; 5 Tyr. 107, S. C.; ante, 242, note (g).

(t) Gwinnell v. Herbert, 5 Ad. & El. 486; 6 Nev. & Man. 723, S. C.; ante, 242, note (h).

The drawes of an accommodation bill may sustain an action on the bill against the drawer, if he pays the same, the drawer not having funds in his hands, &c. Bacchus v. Richmond, 5

Yerger's Rep. 109.

(2) The acceptor of a bill of exchange, who, at the time of acceptance, had no funds in his hands belonging to the drawer, although he has not paid the bill, may sue the drawer, if he has done something equivalent to payment; as if he is in confinement under a ca. sa. at the suit of the holder. Parker v. The United States, Peters' Rep. 262. See as to the right of the acceptor of a bill of exchange to sue, ib. 267.

gagement, and consequently a drawer or indorser cannot sue any other par- II. By and ty for the costs he has incurred, unless there has been a special contract of against indemnity (u). Nor can a party, in general, maintain an action against the tion susperson from whom he received the bill, unless he gave him a valuable con-tainable. sideration for it(x).

We have before seen what objections may be taken in an action at the suit of a person attempting to derive an interest in a bill by a transfer after it was due or paid (y); and what *laches* in the holder of a bill will operate as a forfeiture of his right of action(z).

If the holder of a bill make the acceptor his executor, and die, the right Effect of of action at law against all the parties is extinguished, unless the executor Acceptor And where the payee and holder of a note appoint- or Maker formally renounces (a). ed the maker his executor, it was, we have seen, holden that the debt was Executor. so completely discharged, that an action could not be maintained on the note, even by the person to whom the executor indorsed it(b). But it would be otherwise if the maker were merely appointed an administrator(c).

Where a note made by more than one party is joint and several, it is ad- Joint and visable to proceed in separate actions, if there be any doubt in proving the several joint liability of all(d), or they be not all solvent persons, or one is likely shortly to die.

Whenever the holder of a bill, &c. has a remedy against several parties Several acto it, he may commence and proceed in several actions against each of those par-tions at ties at the same time(e); and an action commenced against one will not preclude any other remedy against the others(1); but as the different persons liable on the bill are debtors to the holder in respect of the same debt, satisfaction by any one will discharge the others from liability as to the principal sum due on the bill (f), and if *the holder reject an offer by a drawer or indors- [*539]

(u) Dawson v. Morgan, 9 B. & C. 618, (Ch. j 1440). Sed quære, in an action by the drawer against the acceptor; Stovin v. Taylor, 1 Nev. & Man. 250, 251; in Dawson v. Morgan the action was by an indorser against the ac-

(x) Ante, 69, 70, 74, 75; Mitchinson v. Hewson, 7 T. R. 850; Cowley v. Dunlop, id. 571, (Chit. j. 598); Death v. Serwonters, 1 Lutw. 886, (Chit. j. 167); Simmonds v. Parminter, 1 Wils. 185, (Chit. j. 321); 4 Bro. P. C. 704, acc.; 2 Bla. Com. 446, contra; but see Mr. Christian's note, and Chitty's edition.

(y) Ante, 213 to 224

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(z) Ante, 325, 342, 389, 499.

(a) Freakley v. Fox, 9 Barn. & Cres. 180; 4 Man. & Ryl. 18, (Chit. j. 1418); infra, note (b); Poth. pl. 191; 1 Rol. Abr. 922; Woodward v. Lord Darcey, Plowd. 184; Para-mour v. Yardley, id. 542; Wankford v. Wank-

ford, 1 Salk. 299; 2 Bla. Com. 511, 512; 3 Bla. Com. 18; Mainwaring v. Newman, 2 B. & P. 124, 125, (Chit. j. 628).

(b) Freakley v. Fox, 9 Barn. & Cres. 130; 4 Man. & Ry. 18, (Chit. j. 1418); ante, 201, 213; 2 Bla. Com. 512, note 45. A bill or note which has been once paid and re-delivered to the maker, cannot be negotiated so as to give a title even to a bond fide holder; 55 Geo. 3, c. 184, s. 19; Bartrum v. Caddy, 1 Perry & Dav.

207; ante, 108, note (e).
(c) Sir John Needham's case, 8 Co. 184, cited in last case. See ante. 313.

(d) Gray v. Palmer, 1 Esp. R. 135, 136.

(Chit. j. 525).

(c) The same law prevails in France; and there all the parties may be sued jointly, or each separately; 1 Pardess. 453.

(f) Windham v. Withers, 1 Stra. 515; Po-

thier, pl. 160; Burgess v. Merrell, 4 Taunt.

And in any such action any person or persons sued, is entitled to set off his or their demands against the plaintiff, in the same manner as though such defendant or defendants had been sued

in the form formerly used. 2 R. S. 2d ed. 274, 5, §§, 6, 9. }

^{(1) {} In the State of New York, it is provided by Statute, that the holder of any bill of exchange or promissory note, may, instead of bringing separate suits against the drawers, makers, indorsers and acceptors of such bill or note, include all or any of the said parties to the bill or note in one action, and proceed to judgment and execution in the same manner as though all the defendants were joint contractors.

against whom Action sustainable. Several Actions at same Time.

II. By and er of a bill to pay debt and costs of the action against him, the court will make an order to restrain the holder from taking out execution; though if the money be paid pending several actions against other parties to the bill, the plaintiff may, without reserving any part of the principal money, proceed in the actions for the recovery of the costs(g). Formerly, the acceptor of a bill or maker of a note could not, before judgment, stay proceedings on payment of the debt and of the costs of the action against himself, without also paying the costs of other actions against different parties to the same bill or note, but now, since the rule of Trinity Term, 1 Vict. 1838, he is at liberty to stay proceedings on payment of the debt and of the costs of the action against himself only (h). Where a party was sued jointly with others as drawers, and separately as acceptor of a bill, the court considering him liable in the two characters, which could not be comprised in the same declaration, and the plaintiff entitled to the remedies, refused to stay the proceedings in one as vexatious(i). A fieri facias sued out and afterwards waived does not discharge other parties (k).

Satisfaction by One of several Parties.

It is settled, that when two persons are severally as well as jointly bound in a bond, and one of them be taken in execution in a separate action, the other may nevertheless be sued, because the taking another's person in execution is but the mere security for the payment of a debt, and not a valuable satisfaction of it(l). It was made a question in the last century how far this doctrine was applicable to bills of exchange; but it is now settled that a judgment(m), or even an execution, against the person of any one of the parties to the bill, will not discharge the others, though with respect to him it is a full satisfaction of the debt(n). It is also settled, that the holder's letting a subsequent indorser in execution out of prison on a letter of license, will not discharge a prior indorser from his liability to pay the bill(0); and that if an acceptor be discharged under an Insolvent Debtors' Act, such discharge will not operate in favour of any other person(p). er of a bill accept a bond from the drawer, or any other party, in satisfaction of it, such act will discharge other subsequent parties (q); and we have

468, (Chit. j. 869); Ex parte Wildman, 2 Ves. sen. 115, (Chit. j. 330). Lord Hardwicke: "In cases of bills of exchange or promissory notes, where there is a drawer and indorser, perhaps there may be more than one judgment against all, but there can be but one satisfaction."

Windham v. Withers, 1 Stra. 515. The plaintiff having obtained judgment against the drawer and indorser of a note, the principal in one and the costs in both were offered him, which he refused, and the court granted a rule to restrain him from taking out execution, and intimated that they would have punished him, had he taken out execution upon both judg-

Claxton v. Swift, 2 Show. 441, 494; Lutw. 882, (Chit. j. 167, 168, 171). To an action against the indorser of a bill, the defendant pleaded, that the plaintiff had recovered a judgment against the drawer, and that the judgment was still in force, and upon demurrer the Court of King's Bench held the plea good, but the Court of Exchequer Chamber held otherwise, and the judgment was reversed.

(g) Toms v. Powell, 7 East, 536; 6 Esp. Rep. 40, S. C.; 3 East, 316; 3 Campb. 331; Holt, C. N. P. 6.

(h) See post, Ch. III. s. ii. As to the Motion to stay Proceedings on Payment of Debt and Costs.

(i) Wise v. Prowse, 9 Price, 393, (Chit. j. 1111).

(k) Pole v. Ford, 2 Chit. Rep. 125, (Chit. j. 958).

(1) Blemfield's case, 5 Co. 86; Clerk r. Withers, Lord Raym. 1072; 1 Salk. 322, S. C.; Claxton v. Swift, 2 Show. 494, (Chit. j. 167, 168, 171); Foster v. Jackson, Hob. 59.

(m) Ayrey v. Davenport, 2 New R. 474, (Chit. j. 736); Claxton v. Swift, 3 Mod. 87; 2 Show. 494; Lutw. 878, 882, (Chit. j. 167, 168, 171); ante, 538, note (f); Tarleton v. Alhusen, 2 Ad. & El. 32; ante, 401, note (b).

(a) Id. ibid.; Macdonald v. Bovington, 4

T. R. 823, (Chit. j. 497).

(o) Ante, 418; Hayling v. Mulhall, 2 Bla. Rep. 1235, (Chit. j. 400); English v. Darley, 2 Bos. & Pul. 61; 3 Esp. 49, (Chit. j. 620); Clark r. Clement, 6 T. R. 525.

(p) Macdonald v. Bovington, 4 T. R. 825,
(Chit. j. 457); Nadin v. Battie, 5 East, 147.

(q) Anle, 409; Claxton e. Swift, 8 Mod. 87, (Chit. j. 167, 168, 171); English e. Darley, 2 Bos. & Pul. 61; 3 Esp. 49, (Chit. j. 620).

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R 😘 ¢ 14° $\ln 5$ before seen (r), that compromising with the acceptor, without the assent of II. By and the drawer or indorsers, will sometimes *release them from their engage- against Actual payment of what is due will, of course, discharge the parties; and though the holder of a bill may issue execution against the person tainable. of all the parties, he cannot, after levying the full amount of the debt on the [*540] goods of one, issue a fieri facias to affect the goods of another, except as to costs in the action against the latter(s). The right to sue in the case of a renewed bill has already been considered (t).

If a party sue on a bill, and after the action is commenced another bill Consolidataccepted, by the same defendant, of which the plaintiff is the holder, is dishonoured, and he bring a second action on that, a judge at chambers will, at least when the last action is by serviceable process, on application being made, direct the two actions to be consolidated (u).

(r) Ante, 408, 409, &c. (t) Ante, 180, 181. (u) Oldershaw v. Tregwell, 3 Car. & P. 58, (s) Windham v. Withers, 1 Stra. 515; ante, 538, note (f). See as to Part Payment ante, (Chit. j. 1367). 417, 418.



*CHAPTER II.

OF THE AFFIDAVIT TO HOLD TO BAIL-ARREST-BAIL ABOVE, AND DECLARATION ON A BILL, &c.

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I. OF THE AFFIDAVIT TO HOLD TO BAIL.

I. Of the hold to Bail. Requisites of.

Action.

Before the 1 and 2 Vict. c. 110, for abolishing arrest on mesne process Affidavit to in civil actions, except in certain cases, in order to arrest a party in an action on a bill of exchange or promissory note, the statutes 12 Geo. 1, c. 29, and 7 & 8 Geo. 4, c. 71, required that an affidurit should be made and filed of the cause of action, and by the terms of the latter act, the sum due on the This affidavit must have been cerinstrument must have amounted to 201. Statement of tain and explicit, and so positive as to a substituting and continuing debt, that in case it were untrue, the party making it would have been liable to an indictment for perjury (a). It was well observed, that the strictness required in these affidavits was not only to guard defendants against consequences of perjury but also those who made the affidavit against any misconception of the law; and that the leaning should always be to great strictness of construction, where one party was to be deprived of his liberty by the act of another(b). There had been some contradiction in the cases in the King's Bench

> (a) Tidd, 9th edit. 182; Tucker v. Francis, 4 Bing. 142. Therefore an affidavit by a bank-rupt that defendant was indebted to deponent before his bankruptcy, and, as he believes, is still indebted to his assignees on a bill accepted by defendant, and indorsed by the drawer to the deponent, and, as he believes, is still unpaid, is insufficient, as a payment to the assign-ees may have taken place; id. ibid. But an affidavit that defendant was indebted to plain-

tiff in 201., for money lent on a bill of exchange drawn by S., accepted by defendant, and overdue and unpaid, was held sufficient, without saying "lent to defendant;" Bennett v. Dawson, 4 Bing. 609; and 1 Moore & P. 594, (Chit. j. 1386).

(b) Per Lord Ellenborough, in Taylor r.

Forbes, 11 East, 316; and see Bradshaw v. Saddington, 7 East, 94; 3 Smith, 117, S. C.

Common Pleas(c), but from the more recent *cases it appears that and I. Of the

the practice of both the courts had become uniform (d).

In the first place, it was necessary that the affidavit on a bill should describe it as a bill, and not as "an instrument called a bill(e)." And though at Requisites one time it was considered unnecessary to state the sum for which the bill or of note was drawn(f), and it sufficed to swear "that the defendant was indebt-Statement ed to the deponent in the sum of £ upon the balance of a bill, drawn by the of cause of drawer upon and accepted by the defendant, and due at a day past(g); yet Action. it was afterwards settled, that the amount for which the bill or note was drawn must be specified in the affidavit, on the ground that otherwise part of the sum sworn to might consist of interest, for which a party could not legally be arrested(h). Nor, it seems, was it sufficient to swear that the defendant was indebted in "principal monies" due on a bill of exchange, without also stating the amount for which the bill was drawn(i); although it sufficed to state that the defendant was indebted in £— on a promissory note "drawn and made payable for the like sum(k)." In an action against the maker of a note, or the acceptor of a bill, who are primarily liable, it was necessary to state in the affidavit that it was due, or at least to shew the date, and when it was payable, for, otherwise, the party being primarily liable, the affidavis that he was indebted might be true, and yet the note or bill might not be due at the time of swearing the affidavit, inasmuch as the maker of a promissory note, or the acceptor of a bill, becomes debtor immediately, though the instrument be payable at a future day, it being debitum in paæsenti solvendum in futuro(1). And the same point was determined in the Court of Common Pless, in an action against the acceptor of a bill(m). And though in an action against the indorser of a bill or note, who can only be liable in default of the acceptor or maker, and whose liability is only collateral and conditional, it had been decided not to be necessary to shew that the bill or note was overdue, because this case was distinguishable from the former, on the ground that the party being described as an indorser, and as such only a collateral security, could not be indebted, unless the bill had become due and been dishonoured (n); yet it was afterwards settled that an affidavit to hold to bail, which stated that the defendant was indebted to the plaintiff as the drawer of a

bill, was not sufficient, unless it also stated that the bill was due(o). *And [*543]

(c) Tidd, 9th edit. 148.

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(d) See Machu v. Fraser, 7 Taunt. 171, 173, (Chit. j. 791).

(e) Dewsbury v. Willis, M'Clel. 366, (Chit. j. 1226).

(f) Hanley v. Morgan, 2 C. & J. 331; 1 Dowl. P. C. 322; 10 Law J. 79, Exch.; Lewis v. Gompertz, 2 C. & J. 352; 1 Dowl. P. C. 319, S. C.

(g) Walmesley v. Dibdin, 4 Moore & P. 10.
(h) Brook v. Coleman, 2 Dowl. P. C. 7;
Westmacott v. Cook, 2 Dowl. P. C. 519; Molineux r. Dorman, 3 Dowl. P. C. 662; and see Latreille v. Hoepner, 2 Dowl. P. C. 758; 3 Moore & S. 801, S. C. (i) Fowell v. Petre, 5 Dowl. P. C. 276. (k) Daley v. Mahon, 6 Dowl. P. C. 192.

Semble, where a claim was made for principal and interest, and a sum and date were mentioned, from which interest could be computed, it was sufficient; Rogers r. Godbold, 8 Dowl.

(1) Per Bayley, J. in Jackson v. Yate, 2 Maule & S. 149, (Chit. j. 896); Kirk v. Al-mond, 2 C. & J. 354; 1 Dowl. P. C. 318, S.

C.; and see Holcombe v. Lambkin, 2 Maule & S. 475; and Edwards v. Dick, 3 Bar. & Ald. 495, (Chit. j. 1079); 1 D. & R. 148. Stating that defendant was indebted to plaintiff as acceptor of a bill of exchange, was too general; Perks v. Severn, 7 East, 194; 8 Smith, 339, S. C.

(m) Machu r. Fraser, 7 Taunt. 174, (Chit.

(n) Per Bayley, J. in Jackson v. Yate, 2 Maule & S. 149; Davison v. March, 1 New Rep. 157, (Chit j 713); Holcombs r. Lambkin, 2 Maule & S. 475.

(o) Edwards v. Dick, 3 Bar. & Ald. 495, (Chit. j. 1079); and see Sands v. Graham, 4 Moore, 18; Machu v. Fraser, 7 Taunt. 171; Holcombe v. Lambkin, 2 Maule & S. 475. Semble, an affidavit stating that defendant was indebted to plaintiff on a bill of exchange, payable to a third person at a day then past, was sufficient, without stating at what day the bill was payable, or shewing the connection between the payee and the plaintiff; Elston v. Mortlake, 1 Chit. Rep. 648; and see Sands v Graham, 4 Moore, 18; Lamb v. Newcombe, I. Of the Atlidavit to hold to Bail.

Requisites of.

where the affidavit setting out a bill of exchange gave wrong dates, which shewed that the bill was not actually due, the court refused to assist the plaintiff, and ordered the defendant to be discharged out of custody(p). But an affidavit stating that a bill was over-due, without stating that it was still unpaid, was held to be sufficiently certain that a debt existed (q). In an affidavit against the drawer or indorser, the default of the acceptor must also have been alleged (r); although where the default of the acceptor was alleged, it was unnecessary to state a presentment or notice(s). And in order to hold to bail in trover for a bill of exchange, it was necessary to state in the affidavit that such bill remained unpaid, as well as the value (t).

Must shew to Bill.

The affidavit must also have shewn in what character the defendant becharacter in came a party to the bill or note, whether as drawer, acceptor, or indorser, which De-fendant be- for otherwise he might not be hable on the bill, but merely as a guarantee, came Party in which case the nature of his engagement must have been stated, as the statute required an affidavit of the cause of action, and the distinction was between the omission of the plaintiff's title to sue, and the character in which the defendant stood(u). And, therefore, an affidavit stating that the desendant was indebted to the plaintist in the sum of 951., as the indorsee of a certain bill of exchange, drawn by one T. Winslow, without stating how the defendant became liable, whether as acceptor or indorser, was held insufficient(v); the term indorsee being descriptive of the relation of the plaintiff to the bill, and not of the defendant (x). So an affidavit that the defendant was indebted to deponent upon a promissory note for 10,000l., in favour of Elbree, and duly indorsed, without saying by him, was insufficient(y). So it was irregular in an affidavit to hold to bail to say that a bill of exchange purported to be indorsed by a party (z).

But charac-Plaintiff sues need not be sbewn.

But it was not necessary for the affidavit to shew that the bill or note was ter in which negotiable (a), or to specify in what particular character the debt was due to the plaintiff, whether he claimed as payee or indorsee, for if he had no interest in the bill on which he could sue the defendant, he would have been guilty of perjury, and would have been liable to an action for maliciously holding the defendant to bail(b); and though it was once decided otherwise in the Court of Common Pleas(c), yet it was afterwards observed by that court, that such decision took place without the case of Bradshaw v. Sad-

> Moore, 14; Warmsley r. Macy, 5 Moore,
> 52; 2 Brod. & Bing. 338, 343, S. C.; 2 D. & R. 148. Not necessary to give date of bill when stated to be over-due; Shirley v. Jacobs, 8 Dowl. P. C. 101, 103; Irving v. Heaton, 4 Dowl. P. C. 638.

(p) Jadis v. Williams, 5 Law J. 136, K. B., (q) Morgan's case, 1 Law J. 156, K. B.; and see Phillips v. Turner, 3 Dowl. P. C. 163.

(r) Buckworth v. Levy, 7 Bing. 251; 5 M. & P. 23; 9 Law J. 69, C. P.; 5 Car. & P. 23; 1 Dowl. 211, S. C.; Cross v. Morgan, 1 Dowl. 122; Banting v. Jadis, 1 Dowl. 445; Simpson v. Dick, 3 Dowl. P. C. 731; Crosby v. Clark, 5 Dowl. 62; Jones v. Collins, 5 Dowl. P. C. 526. Tamen vide Weedon v. Medley, 2 Dowl. P. C. 689; Irving v. Heaton, 4 Dowl. P.

(s) Witham v. Gompertz, 2 C., M. & R. 736; 4 Dowl. P. C. 382; and see Crosby v. Clark, 1 M. & W. 296 to 299; 5 Dowl. 62 to 84. Tamen vide Caunce v. Rigby, 3 M. & W. 67.

(t) Clark v. Cawthorn, 7 T. R. 321, (Chit. j. 586).

(u) Humphries v. Williams, 2 Marsh. 231; 6 Taunt 531, S. C.

(v) Id. ibid.

(x) Note, in Machu v. Fraser, 7 Taunt. 172,

(Chit. j. 794).

(y) M'Taggart v. Ellice, 4 Bing. 114; 12
Moore, 326, S. C.; Lewis v. Gompertz, 2 C.
& J. 352; 1 Dowl. P. C. 319, S. C. But an affidavit that defendant was indebted on a bill drawn and accepted by him, was sufficient; Harrison v. Rigby, 3 M. & W. 66; 6 Dowl. P.

(z) Lorie v. Longster, 3 Law J. 55, K. B. (a) Hughes v. Brett, 6 Bing. 239; 3 Moore & P. 566; 8 Law J. 39, C. P., (Chit. j. 1446).
(b) Per curiam, in Bradshaw v. Saddington.

7 East, 94; 3 Smith, 117, S. C: (c) Balb v. Batley, 1 March. 424; 6 Taunt.

25, (Chit. j. 923).

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dington having been cited; and in a subsequent case that court determined to I. Of the adopt the practice of the *Court of King's Bench(d). So an affidavit of Affidavit to debt, that the plaintiff accepted a bill for the honour of the defendant, and Bail that he was obliged to pay it himself, was sufficiently certain; and in such a Requisites case it was not at variance to declare simply on the money count(e). How- of. ever, an affidavit stating that the defendant was indebted to deponent as li- [*544] quidator, duly appointed by the law of France, of the estate of V. and T. by virtue of a promissory note drawn in France by defendant, was irregular, unless it were shewn that by the law of France such a liquidator was entitled to sue(f).

Where a party to a bill had signed his christian name only with initials, Misnomer, and application had been made to him for his name, and he had refused to &c. when disclose it, and all possible inquiries had been made to ascertain it without effect, it was held, that the affidavit and proceedings might state only his initials, and that the court would not discharge him on common bail, or set aside the proceedings (g). And although in a subsequent case that doctrine was over-ruled(h), yet it was afterwards provided by rule of court, that if after diligent inquiry the full name or proper name of an intended defendant could not be ascertained, he might be arrested and sued by his initials or wrong name(i). It was also enacted by the 3 & 4 Will. 4, c. 42, s. 12, that it should be sufficient, as well in the affidavit to hold to bail as in the process or declaration, to describe the defendant in the same manner as that in which he had signed the bill or note.

The courts would not in general receive a contradictory affidavit on the part of the defendant(k). But this was discretionary in the courts, and instances have occured of late where the court has interfered to relieve the defendant either from prison, or from the necessity for justifying bail in a suspicious case (l).

Since the 1 & 2 Vict. c. 110, no party can be arrested except upon a Provisions judge's order, founded on an affidavit stating, in addition to the cause of action Vict. c. as above-mentioned, that such party is about to quit England. That stat- 110. ute, after enacting, sect. 1, that from and after the 1st October, 1838, no person shall be arrested upon mesne process in any civil action in any inferior court whatsoever, or (except in the cases and in the manner thereinafter provided for) in any superior court; and, sect. 2, that all personal actions in the superior courts shall be commenced by writ of summons; enacts, sect. 3, "That if a plaintiff in any action in any of her Majesty's superior courts Judge's of law at Westminster, in which the defendant is now liable to arrest, hold to whether upon the order of a judge or without such order, shall, by the affidavit of himself or some other person, shew, to the satisfaction of a judge of one of the said superior courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of twenty pounds or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant or any one or *more of the defend- [*545]

R. 18; Tidd, 9th edit. 183,

(g) Howell r. Coleman, 2 B. & P. 466.

(h) Reynolds v. Hankin, 4 B. & Ald. 536; 2 D. & R. 73, 237.

(i) See Rule H. T. 2 W. 4, 1832, s. 32 (k) Tidd, 9th edit. 189. See Isaacs r. Silver, 11 Moore, 348, (Chit. j. 1292).

(1) Chambers v. Bernasconi and another, 6 Bing. 498; 4 Moo. & P. 218; Tidd, 9th edit. 189; Hutt r. Capelin, 5 Scott, 415.

⁽d) Machu v. Fraser, 7 Taunt. 171, (Chit. j. 794); Lamb v. Newcombe, 5 Moore, 14; 2 B. & B. 338, 345, (Chit. j. 1094); James c. Trevanion, 5 Dowl. P. C. 275; and see Humphries v. Williams, 2 Marsh. 231; 6 Taunt. 531, in which Gibbs, C. J. adverted to the distinction between the plaintiff's title and the defendant's liability.

⁽e) Brookes r. Clarke, I Law J. 29, K. B.; 2 D. & R. 148, S. C.

⁽f) Tenon v. Mars, 8 B. & C. 638; 4 D. &

Bail.

c. 110.

I. Of the ants is or about to quit England, unless he or they be forthwith apprehend-Affidavit to ed, it shall be lawful for such judge, by a special order, to direct that such defendant or defendants so about to quit England shall be held to bail for 1 & 2 Vict. such sum as such judge shall think fit, not exceeding the amount of the debt or damages: and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of capias into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of capias shall be in the form contained in the schedule to this act annexed (m), and shall bear date on the day on which the same shall be issued: provided always, that the said writ of capias and all writs of exe-

Arrest.

Defendant or make Deposit.

At what Time Order may be made.

Defendant with." may apply to be Discharged.

Costs of Application. Appeal.

Prisoners discharged on Commencement of Act may be again arested. [*546]

cution to be issued out of the superior courts of law at Westminster, into the counties palatine of Lancaster and Durham, shall be directed to the chancellor of the county palatine of Lancaster, or his deputy there, or to the chancellor of the county palatine of Durham, or his deputy there." Sect. 4 enacts. "That the sheriff or other officer to whom any such writ of capias shall be directed, shall, within one calendar month after the date thereof, including the day of such date, but not afterwards, proceed to arrest the defendant thereupon; and such defendant when so arrested shall remain in custo find Bail tody until he shall have given a bail-bond to the sheriff, or shall have made deposit of the sum indorsed on such writ of capias, together with ten pounds for costs, according to the present practice of the said superior courts; and all subsequent proceedings as to the putting in and perfecting special bail, or of making deposit and payment of money into court, instead of putting in and perfecting special bail, shall be according to the like practice of the said superior courts, or as near thereto as the circumstances of the case will admit." Sect. 5 enacts, "That any such special order may be made and the defendant arrested in pursuance thereof at any time after the commencement of such action, and before final judgment shall have been obtained therein; and that a defendant in custody upon any such arrest, and not previously served with a copy of the writ of summons, may be lawfully served there-Sect. 6 enacts, "That it shall be lawful for any person arrested upon any such writ of capias to apply at any time after such arrest to a judge of one of the superior courts at Westminster, or to the court in which the action shall have been commenced, for an order or rule on the plaintiff in such action, to shew cause why the person arrested should not be discharged out of custody (n); and that it shall be lawful for such judge or court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such judge or court shall seem fit; provided that any such order made by a judge may be discharged or varied by the court, on application made thereto by either party dissatisfied with such order." Sect. 7 enacts, "That every prisoner who at the time appointed for the commencement of this act(0) shall be in custody(p) upon mesne process(q) for any debt or demand, and shall not have filed a petition to be discharged under the *laws now in force for the relief of insolvent debtors, shall be entitled to his discharge upon entering a common appearance to the action: provided nevertheless, that every

⁽m) See Chitty's Forms, 228, 5th edit.
(n) See Boddington v. Woodley, 8 Ad. & El. 925, 931.

⁽o) See Nias v. Milton, 7 Dowl. P. C. 90; 4 M. & W. 359, S. C.

⁽p) See Bateman v. Dunn, 7 Dowl. P. C. 105; 6 Scott, 739; 5 Bing. N. C. 49, S. C.; Dalton v. Gib, 6 Scott, 751; 5 Bing. N. C.

^{113; 7} Dowl. P. C. 143, S. C.; Harrison v. . Dickinson, 7 Dowl. P. C. 6; 4 M. & W. 355, S. C.; Lewis v. Ford, 7 Dowl. P. C. 85; 4 M. & W. 361, S. C.

⁽q) See Jackson v. Cooper, 7 Dowl. P. C. 5; 4 M. & W. 355, S. C.; Reynolds r. Simmonds, 7 Dowl. P. C. 85.

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such prisoner shall be liable to be detained, or after such discharge to be I. Of the again arrested, by virtue of any such special order as aforesaid, at the suit Affidavit to of such plaintiff at whose suit he was previously arrested, or of any other Bail. plaintiff."

Under this statute it has been held, that the 3d section applies to every Decisions case of absence from England; which will delay the plaintiff from obtaining on Act. execution in the ordinary course; but not where the defendant is about to leave England for a mere temporary purpose, and will return in sufficient time to enable the plaintiff to proceed to judgment and execution (r). affidavit upon which to found an application for an order to arrest or detain a party must be such as to shew, to the satisfaction of the judge, that there is probable cause for believing that he is about to quit England unless he be forthwith apprehended, and must also state the grounds upon which such belief is founded(s).

II. OF THE ARREST.

II. Of the Arres.

WE have just seen, in treating of the affidavit to hold to bail, that no person can now be arrested except under the special order of a judge, and that such order can only be granted where it is sworn that the party intended to be arrested is about to quit the country.

But the 1 & 2 Vict. c. 110, after providing for the relief of insolvent debt- An Insolors, enacts, sect, 85, "That in all cases where it shall have been adjudged vent adthat any such prisoner shall be so discharged, and so entitled as aforesaid(t), be disat some future period, such prisoner shall be subject and liable to be detain- charged at ed in prison, and to be arrested and charged in custody at the suit of any one a future or more of his or her creditors with respect to whom it shall have been so be detainadjudged, at any time before such period shall have arrived, in the same man-ed or arner as he would have been subject and liable thereto if this act had not passed: rested, &c. provided nevertheless, that when such period shall have arrived, such prison-riod arer shall be entitled to the benefit and protection of this act, notwithstanding rives. that he may have been out of actual custody during all or any part of the time subsequent to such adjudication, by reason of such prisoner not having been arrested or detained during such time or any part thereof." der this section it has been held, that a prisoner declared by the Insolvent Debtors' Court to be entitled to his discharge after he shall have undergone a certain term of imprisonment, may, notwithstanding the first three sections of that act, be taken or detained in custody by a writ of capias or detainer, issued according to the Uniformity of Process Act, 2 Will. 4, c. 39, without either a writ of summons having been issued, or a judge's order obtained for the arrest(u). A judge has no authority, under the 7th *section of [*547]

(r) Larchin v. Willan, 7 Dowl. 11; 4 M. & W. 351, S. C.

(a) Bateman r. Dunn, 6 Scott, 739; 5 Bing. N. C. 49; 7 Dowl. 105, S. C.; and see Harvey v. O'Meara, 7 Dowl. P. C. 725; 3 Jurist, 629, T. T. 1839, Bail Court, Coleridge, J. See Form of Assidavit under this statute, 'Tidd's Forms, 8th ed. 65; T. Chitty's Forms, 5th edit.

(1) See as. 75 to 78.

(u) Turnor v. Darnell, 7 Dowl. P. C. 346; 5 M. & W. 28; 3 Jur. 408, S. C. Per Parke, B. "The enactment in the first section, that no person shall be arrested on mesne process, except in the cases and in the manner provided for by the act, includes two cases, namely, that of a party about to leave the country which is provided for by the third section, and that of a party seeking to detain an insolvent under the 85th section. This is not a case in II. Of the that act, to make an order for the detention of a prisoner in custody, "until he shall give bail, or until further order(v)." And a doubt seems to have Arrest. 1 & 2 Viet. been entertained whether in any case a judge's order, without a capias or c. 110. other process, would be sufficient to authorise the detention of a prisoner(w); but as the keeper of a gaol is not bound to accept a capias issued under the Judge's order. third section of that act(x), and the writ of detainer given by the Uniformity of Process Act, 2 Will. 4, c. 39, is not mentioned in the recent statute, it should seem that a judge's order must of itself operate as a sufficient authority for the prisoner's detention, provided the order be properly framed. An application to the court, under the 6th section of the above statute, to set

aside an arrest under a judge's order must be made promptly, and as it seems within the time for putting in bail (y). And to support a rule by a defendant to rescind a judge's order authorising an arrest, he must swear positively that "he is not about to leave England;" and the court will not allow the defendant's affidavit to be amended after cause shewn against the rule (z). a defendant has been arrested upon a capias issued under this act, and the order for the capias has been made on an insufficient affidavit, the application to the court should be to set aside the judge's order, and not the writ on which he was arrested(a).

Fema Covert.

Before the late act, when a married woman had been arrested as the acceptor of a bill, at the suit of an indorsee, the court would not order the bailbond to be cancelled, on an affidavit that the drawer, when he drew the bill, knew the defendant to be a married woman, because her so accepting a negotiable security, and enabling the drawer to impose upon a third person, was in effect representing herself as a single woman to the injury of a third person; and she was obliged to find special bail, and plead her coverture, or bring a writ But where a married woman had been arrested as acceptor of a bill of exchange, at the suit of an administratrix, to whose intestate the bill was indorsed, the court ordered the bail-bond to be delivered up to be cancelled, on affidavits that the drawer and intestate knew, at the time the bill. was drawn, accepted, and indorsed, that the defendant was married (c). where a married woman was arrested upon a bill of exchange which she had given for the education of children by a former husband, and the plaintiff had been apprised of the second marriage, *the court discharged her upon a

which a judge could make on order, inasmuch as the defendant is not about to leave the kingdom. Then comes the question as to whether a writ of summons is necessary? I think the effect of the 85th section is to controul the general words of the second, and engraft this case as an exception; and if it be, it follows that no writ of summons is requisite.

As to prisoners in custody under Insolvent Act not being supersedable, see 7 Geo. 4, c. 57, s. 15; 1 & 2 Vict. c. 110, s. 41; Buzzard v. Bromfield, 4 M. & W. 368; 7 Dowl. P. C. 1, S. C.; but see Chew r. Lye, 7 Dowl. P. C. 465.

- (v) Boddington v. Woodley, 1 Perry & Dav. 159; 8 Ad. & El. 925, S. C.
 - (w) Id. ibid.

(x) Edwards v. Roberson, 7 Dowl. P. C. 857.

(y) Sugars v. Concanen, 5 M. & W. 30; 7 Dowl. P. C. 391, S. C. In order to excuse the delay, on the ground of a previous application at chambers, the rule must be drawn up

on reading the summons, or it must be shewn by affidavit. Id. ibid.

(z) Robinson v. Gardner, 7 Dowl. 716.

(a) Hopkins v. Salembier, 5 M. & W. 423; 7 Dowl. P. C. 493; 3 Jurist, 538, S. C. In an action by the indorsee against the drawer of a bill of exchange, on affidavit made by the plaintiff of the nature and amount of the bill, " and that it still remains due and unpaid," is insufficient for the purpose of obtaining a judge's order for the arrest of the defendant under the above statute: it should further show a default by the acceptor. Id. ibid. See the cases, anter 543, note (τ) . And see the usual forms of affidavits upon bills, notes, and checks, Tidd's Forms, 8th edit. 71, 72; T. Chitty's Forms, 5th edit. 218 to 220.

(b) Prichard v. Cowlam, 2 Marsh. 40; Welsh v. Gibbs, 4 Dowl. P. C. 683; Tidd, 9th edit. 194; Jones v. Lewis, 2 Marsh. 385; 7 Taunt. 55, (Chit. j. 965).

(c) Holloway v. Lee, 2 Moore, 211, (Chit. j. 1026); see Tidd, 9th edit. 194.

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summary application, although she had given out that she had property of her II. Of the own, and that the bill would be duly paid (d). Where, however, a woman Arrest. was arrested as the drawer of a bill of exchange, at the suit of an indorser, Feme Cothe court refused to discharge her, on the affidavit of a third person, that she vert. was a married woman; and in all cases it should seem that a feme covert, applying to be discharged from arrest, must have founded her application upon her own personal oath of the fact of coverture, and not upon the affidavit of another(e).

III. OF BAIL ABOVE.

III. Of Bail above.

In those cases in which an arrest is still allowed, the practice as to putting in and perfecting special bail, or bail above, remains the same as before (f).

With respect to the parties who may become special bail, it has been Who may held that an indorser of a bill of exchange may be bail for the drawer, in an beaction against him upon the same bill, though it be objected that he is inadmissible, inasmuch as the plaintiff's security will not be increased by the recognizance of the indorser, who is already liable to the plaintiff on the bill(g). So the drawer of a bill of exchange may be bail in an action against the ac-But it is said to be a general rule, that so long as there are outstanding dishonoured bills, which are not renewed, nor the right of proceeding upon them suspended, a person liable thereon cannot justify as bail(i). Nor can the acceptor of a dishonoured bill justify as bail in an action against the drawer (k).

Before the rule of court H. T. 2 Will. 4, s. 19, it was determined that if Amount. a party become bail in two separate actions against different parties on the same bill, it was sufficient for him to swear that he was worth double the amount of the sum sworn to in one action, and that it was not necessary for the bail to swear to double the amount in both actions (l), or 1000l., beyond And where senarate actions the sum sworn to, if it exceeded 1000l.(m). had been brought against two parties to a bill, and one of them had paid the amount into the hands of the prothonotary in pursuance of the 7 & 8 Geo. 4, c. 71, together with 201. for costs, the court allowed the defendant in the second action to pay into court a sum for costs in lieu of special bail(n). But that rule makes it necessary that the bail should swear that he is worth the amount required by the practice of the courts, over and above what will

(d) Slater v. Mills, 7 Bing. 606; 4 Moore & P. 603; 5 Car. P. 603, S. C.

(e) Jones v. Lewis, 2 Marsh. 385; 7 Taunt. 55, (Chit. j. 965); See Harvey v. Cooke, 5 B. & Ald. 747.

(f) See 1 & 2 Vict. c. 110, s. 4, ante, 545;

and see the practice, 1 Arch. Prac. by Thomas Chitty, 7th edit. p. 573 to 617. (g) Harris v. Manley, 2 Bos. & Pul. 526; Mitchell's Bail, 1 Chit. R. 287; Stephen's Bail, 1 Chit. R. 305; Tidd, 9th edit. 270; but see Jones v. Ripley, 3 Price, 561.

(h) Prime v. Beasley, 8 Bing. N. C. 391; 4 Scott, 87; 5 Dowl. 477; 8 Hodges, 15, S. C.

(i) Barnesdall v. Stretton, 2 Chit. R. 79. In this case the bail was rejected as the drawer of dishonoured bills other than the bill on which the defendant was sued. See Prime v. Beas-ley, 3 Bing. N. C. 391, supra, note (h).

(k) Anon. 1 Dowl. P. C. 183.

(1) Reid v. Ellis, 1 Moore, 29; 7 Taunt. 324, S. C.; and see Tidd, 9th edit. 270; but see Field r. Wainewright, 3 Bos. & Pul. 39.

(m) R. M. 51 Geo. 3, K. B.; 13 East, 62; R. M. 51 Geo. 3, C. P.; 3 Taunt. 341; 2 Chit. R. 378.

(n) Grace v. Hutchins, 6 Law J. 121, C.P. April 28, 1929.

III. Of pay his just debts, and over and above every other sum for which he is then Bail above bail(o).

2 Will. 4, s. 21.

Liability

*As regards the extent to which the bail are liable, the rule of court H. T. of to what 2 Will. 4, s. 21, declares, that bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit; not exceeding in the whole Rule H. T. the amount of their recognizance. Under this rule it has been held, that the bail are liable only to the extent of the single amount of one recogniz-*549] ance, although the sum recovered, with costs of suit, amounts to more(p). And before this rule, where the affidavit was for a sum certain on a bill of exchange, and the plaintiff recovered a larger sum as well on the bill as for the goods sold, the bail were holden to be liable only for so much as was recovered on the bill(q).

IV. Of the Declaration.

IV. OF THE DECLARATION.

tion.

In an action on a bill of exchange, check, or promissory note, if bewe near tween the original parties, it is at the option of the plaintiff to declare either may be on the Instru- upon the instrument itself, or upon the consideration for which it was given; ment or the but in the case of remote parties, as the indorsee against the acceptor of a bill, or the maker of a note, and where, independently of the bill, there is no privity of contract between the parties, the instrument itself must be declared on, adding such of the common counts as the evidence may proba-But it is always advisable to declare on the instrument itself, as then in case of a judgment by default, the amount of the damages are referred to the Master, to be computed by him; and if the declaration do not state the bill, the plaintiff must, in an action of assumpsit, execute a writ of inquiry (r).

How entit-8 Will. 4,

Before the rule of court M. T. 3 Will. 4, s. 15, if the bill or note fell led. Rule M. T. due after the first day of term, it was necessary to entitle the declaration specially, and if it were entitled generally, the defendant might demur specially(s); though where a declaration upon a bill of exchange, drawn on the 20th November, 1829, payable two months after date, was entitled generally of Hilary Term, 1828, it was held, that it was quite competent for the plaintiff to prove by the writ(t), or even by the parol evidence of the attorney (without producing the writ), that the action was commenced after the time when the bill became due(u); and no writ of error would lie on the ground that the declaration had been entituled generally, when the cause of action appeared upon the record to have arisen after the first day of the term, so that the court could see that the declaration was delivered after the cause of

p) Vansandau v. Nash, 2 Dowl. P. C. 767;

(r) Osborne v. Noad, 8 T. R. 648. (s) Pugh v. Robinson, 1 T. R. 116; Brazier

⁽o) This seems to have been the previous practice in the Exchange; 1 Chit. Rep. 306, note; but the practice in K. B. was otherwise, and similar to that in C. P., id. ibid.; and Stevens's Bail, 1 Chit. Rep. 805.

³ Moore & S. 834; 10 Bing. 329, S. C.
(q) Wheelwright v. Jutting, 7 Taunt. 304;
1 Moore, 51, S. C. Bail in error not liable for interest on note, Anon. 6 Price, 338.

v. Jones, 6 Bar. & Cres. 196. (t) See Granger v. George, 5 Bar. & Cres. 149.

⁽u) Lester v. Jenkins, 8 Bar. & Cres. 339; 2 Man. & Ry. 429, (Chit. j. 1395). In Howe v. Croker, 3 Stark. Rep. 138, where a note became due on the 22d June, and notice of dishonour was given on the 23d, and the declaration was filed senerally 23d, and the first time was filed senerally 23d, and the first time was filed senerally 23d, and the first time was filed senerally 23d, and the first time was filed senerally 23d. tion was filed generally on the 30th, the first day of the term being the 22d, Abbott, C. J. considered it sufficient.

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action accrued (x). Since the rule, every declaration must be entitled spe- IV. Of the cially of the day of the month and year on which it is filed or delivered(y). Declara-

The declaration, or count, in which the bill, check or note is set forth, ne- Count statcessarily varies in point of form, according to the parties by and against whom Bill, &c. the action is brought.

[***550**]

With respect to the venue, as bills of exchange and promissory notes are Venue. simple contracts, and follow the person of the holder, and in case of his death are bona notabilia where he dies(z), the plaintiff has a right to lay his venue in any county; and the court will not, at the instance of the defendant. change it, upon an affidavit that it was really made in a different county (a), unless upon a special ground(b). And if an action be bona fide brought on a bill or note, the plaintiff may retain the venue, though the action be also for other causes; and the court will not restrain the plaintiff from proceeding in the county he has elected for the other causes (c). So although a promissory note is not made payable to order, the court will not grant a rule to change the venue on the common affidavit(d). And if in an action on a bill of exchange drawn in London, where the witnesses and parties all reside, the plaintiff lay the venue in Surrey, he is entitled, unless a case of oppression be made out, to the costs of going to the assizes, notwithstanding the cause might have been tried at less expense in London(e). But it would not suffice to retain the venue, that the plaintiff should introduce a count upon a promissory note, which either did not exist, or in respect of which there was no subsisting cause of action(f). And as in the case of an action on a bond, if very special grounds for changing the venue be laid before the court by affidavit, as that there are several material and necessary witnesses, who reside at a great distance from the county where the venue is laid, the court will change the venue, especially if the desendant admit a particular fact, which in point of form, existed in the original county (g). application, however, to change the venue on special grounds must be made the subject of a distinct motion; and where the venue has been improperly changed on the common affidavit, in a case where part of the demand is on a bill of exchange, such special circumstances furnish no answer to an application to discharge the rule for changing the venue(h). And in these cases, the rule to change the venue being grantable on special grounds only, cannot

(x) Ruston r. Owston, 2 Bing. 469; M'Clel. & Y. 202; 10 Moore, 194, S. C.; Tidd, 9th edit. 426.

(y) And see rule H. T. 4 Will. 4, 1834, r. 2, s. 1. But semble, that the neglect to entitle the declaration of the proper day, month, and year, is a mere irregularity to be taken advantage of by summons or motion, and no ground of demurrer. Neal v. Richardson, 2 Dowl. P. C. 89; 3 Chit. Gen. Prac. 463, 464.

(z) Ante, 2, note (d) (a) Tidd, 9th edit. 604.

(b) In Keys v. Smith, 10 Bing. 1; 8 Moore

& S. 338, S. C., the court changed the venue in an action on a bill of exchange, upon terms,

to favour the discharge of a prisoner.

In an action on an I. O. U. the vanue may be changed upon the usual affidavit, Roberts v. Wright, I Dowl. P. C. 294. In cases where the application for a rule to change the venue is made upon the usual affidavit only, the rule is absolute in the first instance; and the venue

cannot be brought back except upon the plaintiff's undertaking to give material evidence in the county in which the venue was originally

laid. Rule H. T. 2 Will. 4, s. 103.
(c) Shepherd v. Green, 5 Taunt. 576, (Ch. j. 910); Hart v. Taylor, 2 Dowl. & Ry. 164; Arden v. Moraington, 4 Tyrw. 56; Tidd, 9th edit. 604; Walthew v. Syers, 1 C., M. & R. 596; 8 Dowl. P. C. 160, S. C.; overruling Greenway v. Carrington, 7 Price, 564. And see Dawson v. Bowman, 1 C., M. & R. 594; 3 Dowl. P. C. 160, S. C.

(d) Smith v. Elkins, 1 Dowl. P. C. 426. (e) Vero v. Moore, 3 Bing. N. C. 261; 3 Scott, 646; 5 Dowl. 367, S. C

(f) Per curium in Shepperd v. Green, 5 Taunt. 576.

(g) Tidd, 9th edit. 605; 2 Chit. Rep. 418,

(h) Dawson v. Bowman, 1 C., M. & R. 594; 3 Dowl. P. C. 160, S. C.

IV. Of the be moved for until after plea pleaded, because it cannot previously be known Declaration.

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Rule H. T.
4 Will. 4, r. 2, s. 8.

T. 4 Will. 4, r. 2, s. 8, declares, that the name of a county shall in all cases be stated in the margin of the declaration, and shall be taken to be the venue intended by the plaintiff, and that no venue shall be stated in the body of the declaration, or in any subsequent pleading (m).

seem necessary that the defendant should swear to merits(1).

Forms of Declarations on Bills and Notes, regulated by Rule of Court. Rule T. T. 1 Will. 4. Recital.

The following rule of court, T. T. 1 Will. 4, 1831, made in pursuance of the statute 11 Geo. 4, and 1 Will. 4, c. 70, s. 11, prescribes concise forms of declarations upon promissory notes and bills of exchange, whether inland or foreign, and which must be observed:—

Whereas declarations in actions upon bills of exchange, promissory notes, and the counts, usually called the common counts, occasion unnecessary expense to parties by reason of their length, and the same may be drawn in a more concise form; now for the prevention of such expense, it is ordered, that if any declaration in assumpsit hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions annexed to this order, or demands of a like nature(n), shall exceed in length such of the said forms set forth or directed in the said schedule, as may be applicable to the case; or, if any declaration in debt to be so filed or delivered for similar causes of action, and for which the action of assumpsit would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeeds in the cause; and such costs of the excess as have been incurred by the defendant, shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff. And it is further ordered, that on the taxation of costs, as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the plaintiff to the defendant on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

(i) Parmeter v. Otway, 3 Dowl. P. C. 66; see Cotterill v. Dixon, 3 Tyrw. 705; Weatherby v. Goring, 3 Bar. & Cres. 552.

(j) Haythorn v. Bush, 2 Dowl. P. C. 240; see Nun v. Taylor, 1 Bing. 186; 7 Moore, 598,

(k) Parmeter v. Otway, 3 Dowl. P. C. 66; see Ladbury v. Richards, 7 Moore, 82.

(1) See per Littledale, J. in Parmeter v. Otway, 3 Dowl. P. C. 69.

(m) This is one of the several general rules and regulations made under the authority of the 3 & 4 Will. 4, c. 42, s. I.

(n) The words "or demands of a like nature," and the direction as to drawing foreign bills, seem to establish that these particular forms are merely given as a few instances, and that in all other cases of common debts it is intended that the pleadings may and ought to be framed in the like concise manner. It may be collected, that the quantum meruit and valebant counts ought no longer to be inserted. It seems that the indebitatus count was always sufficient. See 1 Chitty on Pleading, 6th edit. 27; 2 Saund. 122 a, note (2).

SCHEDULE OF FORMS AND DIRECTIONS (o).

IV. Of the Declaration.

For that whereas the defendant, on the —— day of ——, in the "year 1. Count on of our Lord —— at London(q), (or "in the county of ——") made his a Promissory Note promissory note in writing, and delivered the same to the plaintiff, and against the thereby promised to pay to the plaintiff £—,— days (or "weeks," or Maker, by "months,") after the date thereof, (or as the fact may be,) which period has indorsee. now elapsed(r), or if the note be payable to A. B.) and then and there(q) as the case delivered the same to A. B., and thereby promised to pay to the said A. B. may be(p). or order, £—, -— days (or "weeks," or "months,") after the date [*552] thereof, (or as the fact may be,) which period has now elapsed(r), and the said A. B. then and there(q) indorsed the same to the plaintiff, whereof the defendant then and there (q) had notice, and then and there (q), in considera-

(o) It will be found that the following forms considerably diminish the usual length of counts of this nature, by omitting the long-used formal modes of stating each fact; such as in stating an acceptance, "and which said bill of exchange the said defendant afterwards, to wit, on the day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, upon sight thereof accepted, according to the said usage and custom of merchants from time immemorial used and approved of;" and which is now to be thus shortly stated, "and the defendant then and there accepted the said bill," and so on. The concise mode of stating an indorsement. which has long been recommended, and partially used, (see Chitty on Bills, 7th edit. 794, and post, 553,) is now enjoined.

But even in some of these prescribed forms there are unnecessary allegations; as in the 1st, 8d, 5th, 8th, and 11th forms, which state unnecessarily the delivery of the note or bill to the payee; Churchill v. Gardner, 7 T. R. 596; Smith r. M Clure, 5 East, 476; and in the 1st and 6th forms the statement of the notice to the defendant of the indorsements is unnecessary; Reynolds v. Davies, in error, 1 Bos. & Pul. 625; and in the 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th forms, and consequently in the directions relative to declarations on foreign bills, the statements that the bill was directed to the drawee or acceptor are clearly unnecessary, Gray v. Milner, 3 Moore, 91; 2 Stark. Rep. 336. The allegation, "which period has now elapsed," though otherwise unobjectionable, seems also unnecessary where the bill or note has been shown to have been payable after date, or where there is an averment that it was presented for payment when due. In the 4th, 5th, 7th, and 8th counts against the acceptor, where a general unqualified acceptance is stated, it would suffice to state the promise to pay according to the tenor of the bill, omitting "and of his acceptance thereof.

In the common indebitatus forms also, it is submitted, that some of the words printed in italics might be omitted, viz. " price and value," and "then," and some other words not adopted even in the ancient forms. The objection as to the statement of place has since been removed by the rule H. T. 4 Will. 4, r. 2, s. 8, anle, 551.

These observations are not made in disparagement of this excellent rule, but merely to show how much the pleadings may be contracted where there is a disposition to save expense.

It is clearly intended by these rules that the use of the quantum meruit and quantum rale-bant counts should be abandoned as being certainly unnecessary; and that all debts, however numerous, shall be comprised, as they always might have been, in one count, and that separate formal commencements and conclusions in the description of each debt shall no longer be adopted. See note to Webber v. Tivill, 2 Wms. Saund. 122; Rooke r. Rooke, Cro. Jac. 245: Power r. Butcher, 10 Bar. & Cres. 329, 342.

See the comprehensive collection of the different descriptions of almost every possible demand recoverable under an indebitatus count. in 2 Chitty on Pleading, 34 to 74, 6th edit.; and in debt, 248 to 250, 6th edit.

(p) See forms of declarations on promissory notes, inland and foreign bills, and checks on bankers, 2 Chitty on Pleading, 75 to 102, 6th edit.; and in debt, 251, 252, 6th edit.; see also Chitty jun. Precedents in Pleading, 75, 100, 152, 420, 435.

(q) Since the rule H. T. 4 Will. 4, r. 2, s. 8, ante, 551, the venue in the body of the declaration is to be admitted; its improper introduction, however, is no cause of demurrer, or for setting aside the declaration, but of application to a judge at chambers to strike it out. r. Champneys, 1 C., M. & R. 369; 2 Dowl. P. C. 680, S. C.; Townsend r. Gurney, 1 C., M. & R. 590; S. C. 5 Tyrw. 214; 3 Dowl. P. C. 168; Fisher r. Snow, 3 Dowl. P. C. 27.

(r) In Abbott v. Aslett, 1 Mee. & Wels. 209; 1 Tyrw. & G. 448; 4 Dowl. P. C. 759, the court inclined to think this allegation insufficient, since the Uniformity of Process Act. 2 Will 4, c. 39, which makes the issuing of the writ the commencement of the action; but in the subsequent case of Owen r. Waters, 2 Mee. & Wels. 91; 5 Dowl. P. C. 324, such allegation was held sufficient, where upon the face of the declaration it does not necessarily appear that the action was commenced before the bill became due. In practice, however, it is usual to aver that the period elapsed before the commencement of the suit.

IV. Of the tion of the premises, promised to pay the amount of the said note to the plaintiff according to the tenor and effect thereof(s)(1). tion.

2. Count on a Promisseory Note against payee by an Indorsee(u).

Whereas(t) one C. D., on the —— day of ——, in the year of our *Lord —, at London(x), (or "in the county of ——,") made his promissory note in writing, and thereby promised to pay the defendant, or order, £-- days (or "weeks," or "months,") after the date thereof, (or as the fact may be,) which period has now elapsed(v), and the defendant then and there(x) indorsed the same to the plaintiff, (or, " and the defendant then and [*553] there(x), indersed the same to X. Y., and the said X. Y. then and there(x) indorsed the same to the plaintiff,") and the said C. D. did not pay the amount thereof, although the same was there (x) presented to him on the day when it became due, of all which the defendant then and there(x) had due notice.

3. Count on a Promissory Note against Indorser by Indorsee.

Whereas one C. D. on —, at London(x), (or "in the county of made his promissory note in writing, and thereby promised to pay to X. Y., or order, £---, --- days (or "weeks," or "months,") after the date thereof, (or as the fact may be,) which period has now elapsed(v), and then and there (x) delivered the said note to the said X. Y. and the said X. Y. and there(x) indorsed the same to the defendant, and the defendant then and there(x) indorsed the same to the plaintiff, (or, "and the defendant then and there(x) indorsed the same to Q. R., and the said Q. R. then and there(x) indorsed the same to the plaintiff,") and the said C. D. did not pay the amount thereof, although the same was there (x) presented to him on the day when it became due, of all which the defendant then and there(x) had due notice.

4. Count on an Inland Bill of Exchange Acceptor by the Drawer, being also Payec(y).

Whereas the plaintiff, on ---, at London(x) (or "in the county of -,") made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £---, - days (or "weeks," or "months,") after the date (or "sight") thereof, against the which period has now elapsed (v), and the defendant then and there (x) accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his said acceptance thereof, but did not

- (s) This is sufficient without stating the promise to have been made to the plaintiff, Banks r. Camp, 2 Moore & S. 734; 9 Bing. 604, S.
- (t) If either this or the subsequent forms should constitute the first count of the declaration, then insert, "For that;" so that it will read, "For that whereas one C. D." &c. If it be a second or subsequent count, then insert, "And," "also," so that it will read, "And whereas also one C. D." &c.
- (u) In Hedger v. Stevenson, 2 Mee. & Wels 799; 5 Dowl. 771, S. C., the declaration stated that one S. T. on, &c. made his promissory note in writing, and thereby promised to pay to the order of the defendant, at Messrs. B., T., and B.'s, London, 991. 18s., two months after date, for value received, which period had, at the time of the commencement of this suit, elapsed, and then delivered the said note to the defendant, and the defendant then indorsed the said note to the

plaintiff, and promised to pay the same according to the tenor and effect thereof; but the said Messrs. B., T., and B. did not, nor did the said S. T., nor the defendant, or any other person, pay the said note, although the said note was presented at Messrs. B., T., and B.'s on the day when it became due, of which the defendant then had notice: it was held on motion in arrest of judgment, on the ground that the promise stated in the declaration was an absolute promise to pay, whereas the obligation of the defendant as payee and indorser was conditional only, and that the breach only alleged a non-payment by the defendant on the day the note became due, and did not aver that it had not been paid afterwards, that the promise was properly stated, and that the breach was sufficient. Quære, whether it would have been bad on special demurrer.

(v) See ante, 552, note (r).

(x) Omit venue, see ante, 552, note (q).

(1) See post, 827, (55).

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pay the same when due, (or, "at any time before or since," should be in- IV. Of the

Whereas the plaintiff, on ---, at London(x) (or "in the county of 5. Count -,") made his bill of exchange in writing, and directed the same to the de- on an Infendant, and thereby required the defendant to pay to O. P., or order, Exchange £--, -- days (or "weeks," or "months,") after the date (or "sight") against the thereof, which period has now elapsed(v), and then and *there(z) delivered Acceptor the same to the said O. P. and the said defendant then and there(z) Drawer, accepted the same, and promised the plaintiff to pay the same, according to not being the tenor and effect thereof, and of his acceptance thereof, yet he did not the Payce. pay the amount thereof, although the said bill was there(z) presented to him [*554] on the day when it became due, and thereupon the same was then and there (z) returned to the plaintiff, of all which the defendant then and there(z) had notice.

Whereas one E. F., on —, at London(z) (or "in the county of —,") 6. Count made his bill of exchange in writing, and directed the same to the defendant, on an Inand thereby required the desendant to pay to the said E. F. (or to "H. Exchange G.,") or order(b), £___, ___ days (or "weeks," or "months,") after against the sight (or "date") thereof, which period is now elapsed(c), and the defend- Acceptor by Indorsant then and there(z) accepted the said bill, and the said E. F. (or "the ee(a). said G. H.") then and there(z) indorsed the same to the plaintiff, (or "and the said E. F.," or "the said H. G. then and there(z) indorsed the same to K. J., and the said K. J. then and there(z) indorsed(d) the same to the plaintiff,") of all which the defendant then and there(z) had due notice, and then and there(z) promised the plaintiff to pay the amount thereof, according to the tenor and effect thereof, and of his acceptance thereof.

Whereas one E. F., on —, at London(z) (or "in the county of —,") 7. Count made his bill of exchange in writing, and directed the same to the defendant, and Bill of and thereby required the defendant to pay to the plaintiff £---, --- days Exchange (or "weeks," or "months,") after the sight for "date,") thereof, which against the period has now elapsed(c), and the descendant then and there(z) accepted the Acceptor by the Paysame, and promised the plaintiff to pay the same, according to the tenor and ee. effect thereof, and of his acceptance thereof.

Whereas the defendant, on —, at London(z) (or "in the county of 8. Count on an In,") made his bill of exchange in writing, and directed the same to J. K., land Bill of and thereby required the said J. K. to pay to the plaintiff £, ____, ___ Exchange days (or "weeks," or "months,") after the sight (or "date") thereof, and against the then and there(z) delivered the same to the said plaintiff, and the same was Payee on then and there(z) presented to the said J. K. for acceptance, and the said Non-ac J. K. then and there(z) refused to accept the same, of all which the defend- ceptance. ant then and there(z) had due notice.

⁽y) The forms here given apply as well to the action of debt as to assumpsit, and this count may, therefore, be properly joined with indebitatus counts in debt, provided the declaration conclude in the usual form in debt. Compton v. Taylor, 4 M. & W. 138; sec Cloves v. Williams, 5 Scott, 68; 3 Bing. N. C. 868, S. C.; post, 554, note (a), see post, W. 138; ante, 553, note (y). 822, (49).

⁽z) Omit venue, see ante, 552, note (q). (a) If this count be concluded in the usual form of a declaration in debt, it will amount to a count in debt, and as such be bad, debt not being maintainable by indorsee against acceptor. Cloves r. Williams, 5 Scott, 68; 3 Bing. N. C. 868, S. C.; see Compton r. Taylor, 4 M. &

IV. Of the Declaraon an In-[*555 l

Whereas the defendant, on —, at London'z) (or "in the county of -,") made his bill of exchange in writing, and directed the same to J. K., and thereby required the said J. K. to pay to the order of the said defendant £___, __ days (or "weeks," or "months,") after the sight (or and Bill of "date") thereof, and the said defendant then and there(z) indorsed the same to the plaintiff, (or "and the said defendant then *and there indorsed the against Drawer by same to L. M., and the said L. M. then and there(e) indorsed the same to indorsee on the plaintiff,") and the same was then and there(e) presented to the said J. Non-accept K. for acceptance, and the said J. K. then and there(e) refused to accept the same, of all which the defendant then and there(e) had due notice(f).

10. Count on an Inland Bill of Exchange against Indorser by Indorsee on Non-acceptance.

And whereas one N. O., on —, at London(e) (or "in the county of -,") made his bill of exchange in writing, and directed the same to P. Q. and thereby required the said P. Q. to pay to his order £____, ___ days (or "weeks," or "months,") after the date (or "sight") thereof, and the said N. O. then and there(e) indorsed the said bill to the defendant, (or "to R. S., and the said R. S. then and there(e) indorsed the same to the defendant,") and the defendant then and there(e) indorsed the same to the plaintiff, and the same was then and there(e) presented to the said P. Q. for acceptance, and the said P. Q. then and there(e) refused to accept the same, of all which the defendant then and there(e) had due notice.

11. Count on an Iuland Bill of Exchange against Payee by Indorsee on Non-acceptance.

Whereas one N. O., on —, at London(e) (or "in the county of -,") made his bill of exchange in writing, and directed the same to P. Q. and thereby required the said P. Q. to pay to the defendant or order, £---, - days (or "weeks," or "months,") after the sight (or "date") thereof, and then and there delivered the same to the defendant, and the defendant then and there(e) indorsed the said bill to the plaintiff, (or "to R. S., and the said R. S. then and there(e) indorsed the same to the plaintiff,") and the same was then and there(e) presented to the said P. Q. for acceptance, and the said P. Q. then and there(e) refused to accept the same, of all which the defendant then and there(e) had due notice.

12. Directions for Declarations on Bills, where Action brought after time of Payment expired. 1st, On Bills Paya-

ble after Date. 2d, On

ble after

Sight.

If the declaration be against any party to the bill, except the drawee or acceptor, and the bill be payable at any time after date, and the action not brought till the time is expired, it will be necessary to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following words, viz. which period has now elapsed(g), and instead of averring that the bill was presented to the drawee for acceptance, and that he refused to accept the same, to allege that the drawee (naming him) did not pay the said bill, although the same was there(e) presented to him on the day when it became due.

And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time after sight, it will be necessary to insert after the words denoting the time appointed for payment, the following Bills Payawords, viz. and the said drawee (naming him) then and there(e) saw and ac-

> (b) In Spyer v. Thelwell, 2 C., M. & R. 692; 4 Dowl. 509; 1 Gale, 348, S. C., where the declaration stated the bill to have been drawn by N. on the defendant, whereby N. required the defendant to pay "to his order" the sum therein mentioned, accepted by the defendant, and indorsed by N. to the plaintiff; it was held, that the court could not but see that

the word "his" referred to the drawer, and therefore there was no fatal ambiguity.

(c) See ante, 552, note (r). (d) Not sufficient to aver a delivery to the plaintiff. Cunliffe v. Whitehead, 5 Scott, 31; 3 Bing. N. C. S28; 6 Dowl. P. C. 63, S. C. (e) Omit venue, see ante, 552, note (q).

(f) If there was excusable delay in giving

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cepted the same, and the said period has now elapsed(g), and instead of al- IV. Of the leging that the bill was presented for acceptance and refused, to allege that Declarathe drawee (naming him) did not pay the said bill, although the same was presented to him on the day when it became due.

*If a note or bill be payable at sight, the form of the declaration must be 3d, On varied so as to suit the case, which may be easily done.

Notes Pay-

Declarations on foreign bills may be drawn according to the principle of Sight. these forms, with the necessary variations.

4th, On Foreign Bills. [*556]

COMMON COUNTS.

Whereas the defendant on — at London(i) (or "in the county of 1. Goods -,") was indebted to the plaintiff in £---, for the price and value of goods then(j) and there(i) bargained (or "sold") and sold (or "delivered") by the plaintiff to the defendant at his request.

And in £--- for the price and value of work then(j) and there(i) done, 2. Work and materials for the same provided by the plaintiff for the defendant at his risks. request.

And in £— for money then (j) and there (i) lent by the plaintiff to the 3. Money defendant at his request.

And in £—for money then(j) and there(i) paid by the plaintiff for the 4. Money Paid. use of the defendant at his request.

And in £— for money then (j) and there (i) received by the defendant 5. Money the way of the plaintiff for the use of the plaintiff. (k).

And in £--- for money found to be due from the defendant to the plain- 6. Account tiff on an account then (j) and there (i) stated between them (l).

And thereupon the defendant afterwards on, &c. in consideration of the 7. General premises respectively, then and there(i) promised to pay the said several Conclusion

notice, it is not necessary to shew special facts accounting for such delay in giving notice. Firth v. Thrush, 8 Bar. & Cres. 895; see post, 576, note (s).

(g) See ante, 552, note (r).
(h) The common quantum valebant and quantum meruit counts are no longer to be inserted, ante, 552, note (o). See the comprehensive form in 2 Chitty on Pleuding, 6th edit. 60, 66. As to joinder of counts in debt, see Compton v. Taylor, 4 M. & W. 138; ante, 553, note (y).

(i) Omit venue, see ante, 552, note (q). (j) The statement of time by the introduction of the word "then" has been held unnecessary in an action for goods sold and delivered. Lane v. Thelwell, 1 M. & W. 140; 1 Tyrw. & G. 352, S. C. And semble that it is equally unnecessary in an account stated. Webb v. Baker, 7 Ad. & El. S41; 8 N. & P. 87, S. C.; Bingley v. Durham, 8 Ad. & El. 775; 1 P. & D. 58, S. C.; Ferguson v. Mitchell, 2 C., M. & R. 687; 1 Tyrw. x. G. 179, S. C. At

all events it is sufficient to allege the account to have been "before then" stated. Bingley v. Durham, 8 Ad. & El. 775; Leaf v. Lees, 4 M. & W. 579; 7 Dowl. P. C. 189, S. C. And in the latter case, although the count contained the words "before then," the court treated the statement of time as altogether unnecessary.

(k) As to interest, see 3 & 4 Will. 4, c. 42, s. 28; see form of count for, 2 Chitty on Pleading, 6th edit. 60. Where goods are sold and delivered, to be paid for by a bill at a certain date, if the bill be not given, interest on the price, from the time when the bill would have become due, may be recovered as part of the estimated value of the goods on the common count for goods sold and delivered. Farr v. Ward, 3 M. & W. 25; 6 Dowl. P. C. 168; Marshall v. Poole, 13 East, 98. And see Harrison v. Allen, 2 Bing 4; 9 Moore, 28, S. C.; Arnott v. Redfern, 3 Bing. 353; 11 Moore, 209,

(1) Sufficient, without saying "by and between them." Debenham v. Chambers, 3 M.

IV. Of the monies respectively to the plaintiff on request, YET he hath disregarded his Declarasaid promises, and hath not paid any of the said monies, or any part thereof m), to the plaintiff's damage of £---, and thereupon he brings suit, &c.(1).

S. Directions as to general Conclusion. [*557]

*If the declaration contain one or more counts against the maker of a note or acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then in the general conclusion to say, " promised to pay the said last-mentioned several monies respectively(n).

Several Counts for same Demand not allowed,

By the rule of court, H. T. 4 Will. 4, 1834, made in pursuance of the 3 & 4 Will. 4, c. 42, s. 1, it is ordered(s 5), that several counts shall not be allowed, unless a distinct subject matter of complaint is intended to be established in respect of each. And, therefore, counts founded on one and Rule H. T. the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed. But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject matters of complaint; for the debt and security are different contracts, and such counts are to be allowed.

4 Will. 4, s. 5. Exception

as to Bills

and Notes.

Indebitatus

Where several debts are alleged in indebitatus assumpsit to be due in re-Assumpsit. spect of several matters, ex. gr., for wages, work and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts(0). But it is provided, that a count for money due on an account stated, may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject matter of complaint in respect of each of such counts. And also, that the rule which forbids the use of several

Account stated.

Several Breaches.

& W. 128; overruling Hooper v. Vestris, 5 Dowl. P. C. 710.

(m) Although there be several plaintiffs this statement of the breach will suffice, without going on to aver a non-payment to any or either of them. Debenham v. Chambers, 3 M. & W.

(n) This applies only where there are several common counts. Wainwright r. Johnson, 5 Dowl. P. C. 317.

In an action by an indorsee against the draw-er of a bill of exchange, the declaration contained a count on the bill, and on an account stated, with one promise to pay the last mentioned several monies on request; the defendant having demurred specially, on the ground that there was no promise to the count on the bill, the court set aside the demurrer as frivolous, because the declaration containing but one sum besides the amount of the bill, the promise in terms applied to both counts. Chevers v. Parkington, 6 Dowl. 75. And it seems exceedingly doubtful whether the averment of a promise in a count on the bill is at all material; as against an acceptor it clearly is unnecessary,

the acceptance being in itself a promise to pay; and as against a drawer the want of such an averment would be cured after verdict or judgment; and although in Henry v. Burbidge, 3 Bing. N. C. 501; 4 Scott, 296; 5 Dowl. P. C. 484; 3 Hodges, 16, such an objection, in an action against a drawer, was held fatal on special demurrer, yet in the subsequent case of Griffith v. Roxbrough, 2 M. & W. 734; 6 Dowl. P. C. 133, which was an action by indorsee against indorser, the court seemed to be of opinion that as, since the new rules of pleading, a defendant is no longer at liberty to plead non assumpsit to a count on a bill or note, it cannot be necessary that the declaration should allege a promise; it became, however, unnecessary to decide the case on this ground, the question having arisen after verdict, and the court being clearly of opinion that the objection could only be taken on special demurrer.

(o) These are to be treated as separate counts for the purposes of pleading as well as for the purposes of costs. Jourdain v. Johnson, 2 C., M. & R. 564; 3 Dowl. P. C. 534, S. C. ar ·

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counts is not to be considered as precluding the plaintiff from alleging more IV. Of the breaches that one of the same contract in the same count.

The sixth section of the same rule orders, that where more than one count Departure shall have been used in apparent violation of the preceding rule, the opposite Rules, how party shall be at liberty to apply to a judge, suggesting that two or more of taken Adthe counts are founded on the same subject matter of complaint, for an or- vantage of der that all the counts introduced in violation of the rule be struck out at the Rule H. T. cost of the party pleading, whereupon the judge shall order accordingly, un- 4 Will. 4, less he shall be satisfied, *upon cause shewn, that some distinct subject mat- s. 6. ter of complaint is bonû fide intended to be established in respect of each of [*558] such counts, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is satisfied; and shall also specify the counts mentioned in such application, which shall be allowed(p). seventh section orders, that upon the trial, where there is more than one count Sect. 7. upon the record, and the party pleading fails to establish a distinct subject matter of complaint in respect of each count, a verdict and judgment shall priss against him upon each count which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, including those of the evidence as well as those of the pleading: and further, that in all cases in which an application to a judge has been made under the preceding rule, and any count allowed as aforesaid, upon the ground that some distinct subject matter of complaint was bond fide intended to be established at the trial in respect of each count so allowed, if the court or judge, before whom the trial is had, shall be of opinion that no such distinct subject matter of complaint was bona fide intended to be established in respect of each count so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds arising out of any count with respect to which the judge shall so certify (q).

The sixth section of the rule of court T. T. 1 Will. 4, relating to prac- Particulars tice, orders, that with every declaration, if delivered, or with the notice of of Dedeclaration, if filed, containing counts in indebitatus assumpsit, or debt on Rules T. simple contract, the plaintiff shall deliver full particulars of his demand un- T. 1 Will. der those counts, where the particulars can be comprised within three folios; 4, s. 6. and and where the same cannot be comprised within three folios, he shall deliv- H. T. 2 er such a statement of the nature of his claim, and the amount of the sum or s. 47. balance which he claims to be due, as may be comprised within that number And to secure the delivery of particulars in all such cases, it is further ordered, that if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. And that a copy of the particulars of demand, and also particulars (if any) of the defendant's set off, shall be annexed by the plaintiff's attorney to every record, at the time it is entered

⁽p) The xourt will not entertain a motion for striking out counts until an application has been made to a judge at chambers; Ward v. Graystock, 4 Dowl. P. C. 717; and the rule must be drawn up on reading the declaration, or on an affidavit that the counts are identical; Roy v. Bristow, 5 Dowl. P. C. 152; 2 M. & W. 242, S. C

⁽q) By the previous rule of H. T. 2 Will 4, s. 74, it is ordered, that no costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and that the costs of all issues found for the defendant shall be deducted from the plaintiff's

1V. Of the with the judge's marshal. And the rule H. T. 2 Will. 4, s. 47, orders, that a summons for particulars and order thereon may be obtained by defendtion. ant before appearance, and may be made, if the judge think fit, without the production of any affidavit.

Particulars of Demand.

Where the particulars of the plaintiff's demand exceed three folios, the court will order the plaintiff to deliver to the defendant full particulars of his demand, the defendant paying the costs of the particulars, and, if necessary, taking short notice of trial, even though the defendant has had full particulars [*559] of the amount before action brought(r). *But in an action upon a bill of exchange or promissory note, where the declaration is confined to the count upon the bill or note, the defendant is not, except under very special circumstances, entitled to demand particulars, because in such case the declaration itself sufficiently discloses the nature of the demand.

> The forms of declaration prescribed by the above rule of T. T. 1 Will. 4, being intended as examples only, and framed merely with a view to the curtailment of the declaration by the rejection of unnecessary averments, it will still be necessary to attend to the previous decisions.

Statement of the Cuson Statute of Anne.

It was formerly usual to commence the declaration on a bill of exchange tom of mer- with a statement setting out the custom of merchants relative to the validity of bills of exchange, and that the parties to it were persons within the custom; but this mode of declaring had long been disused, and is improper(s); and though it was usual to state that the bill was drawn and accepted "according to the usage and custom of merchants, from time immemorial used and approved of," yet even this reference to the custom in any part of the declaration was unnecessary (t). In declarations on promissory notes made in England, it was usual to state that the defendant became liable to pay by force of the statute of Anne, which rendered these instruments available(u); but this was unnecessary. And if the note were made out of England, it would have been informal to state that the note was made according to the statute(v); though the allegation might have been rejected as surplusage.

Unnecessary Counts.

Before the above rule of H. T. 4 Will. 4, ss. 6, 7, if any unnecessary counts were inserted in the declaration, the courts would order them to be expunged, and make the party pay the costs of the application (x). where the declaration consisted of 286 counts, upon as many bankers' notes, for a guinea each, payable to bearer, with the common counts for money lent, and money had and received, the court refused to strike out the counts upon the notes, as it might have put the plaintiff to unnecessary difficulty of proof at the trial, or made it necessary for him to have a writ of inquiry on a judgment of default(y); though in a similar case, the court made a rule by consent, to strike out all the counts but one, the defendant undertaking to

(r) James v. Child, 2 C. & J. 252. These particulars are not considered as part of the declaration. Booth v. Howard, 5 Dowl. 438.

(a) Soper r. Dible, 1 Ld. Raym. 175, (Chit.

201); Bromwich v. Loyd, 2 Lutw. 1585, (Chit. j. 193); Co. Lit. 89 a, n. 7.

Soper v. Dible, 1 Ld. Raym. 175, (Chit. j. 201). In an action upon a bill, the defendant demurred, because the declaration did not set out the custom, and the court held it unneces-

sary, and that the better way was to omit it.

(t) Hussey v. Jacob, 1 Ld. Raym. 88,

(Chit. j. 189, 191); Ereskin v. Murra y, 2 Ld. Raym. 1542, (Chit j. 268); Carter r. Dowrish,

Carth. 83, (Chit. j. 176, 178); Williams v. Williams, Carth. 269, (Chit. j. 197); Mannin

v. Cary, 1 Lutw. 279, (Chit. j. 194).
This was determined in Ereskin r. Murray, 2 Ld. Raym. 1542, (Chit. j. 268). On error after judgment by default, see Ld. Raym. 88; Carth. 83; Lutw. 279.

(u) Brown v. Harraden, 4 T. R. 155, (Chit. j. 470).

(v) Carr v. Shaw, ante, 519, in notes.

(x) Tidd, 9th edit. 616.

(y) Lane v. Smith, Tidd, 9th edit. 617; 3 Smith Rep. 113, S. C.

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permit all the other notes to be given in evidence either before the master or IV. Of the a jury, under the count upon an account stated(z). In a declaration also on Declaraa bill, the court refused to strike out the count for interest as unnecessary, though, besides the counts on the bill, there were the common counts(a).

In stating the cause of action, there are four points principally to *be at- [*560] tended to. First, the description of the bill, promissory note, or check. Secondly, How the defendant became party to it; and his subsequent con-Thirdly, The mode by which the plaintiff derived his interest in, and right of action on, the instrument; and Lastly, The breach of the defendant's contract.

These will suffice, without any statement of a consideration which is implied(b)(1).

And first, the bill, promissory note, or check (of which a profert is not to First, On he made(c),) should, like all other contracts, be stated in the declaration as the Bill, Note, or it was really made in terms, or according to its legal operation (d). If it be Check. ambiguous in its terms, whether it he a bill or a note, it may be declared upon as either (e). And if there be a rariance in any material point, it will ment of the be fatal(f)(2), though stated under a videlicet(g)(3). But a variance aris- Instruing in consequence of any artifice in framing the bill, as by the introduction ment. of some words in small characters, or by the use of illegible marks, for the purpose of deceit, is immaterial (h).

A variance as to the names of parties is in general fatal where it operates Names of as a description of the bill, but otherwise as it seems where it relates merely

(z) Carmack v. Gundry, 8 B. & Ald. 272; 1 Chit. R. 709, (Chit. j. 1074); Tidd, 9th edit. 617.

(a) Brindley r. Dennett, 2 Bing. 184; 9 Moore, 358, S. C.

(b) Ante, 9, 10, &c.; Bishop v. Young, 2 Bos. & Pul. 81, (Chit. j. 621). When necessary to support debt, post, Ch. VII.

(c) Master r. Miller, 4 T. R. 338, (Chit. j. 482, 490); Adams v. The Duke of Grafton, Bunb. 243, (Chit. j. 266); Suister r. Coel, I Sid. 386; 1 Sulk. 215; Com. Dig. tit. Pleader, O. 3; Tidd, 9th edit. 618.

(d) Per Gibbs, C. J. in Waugh v. Russel, 1 Marsh. 217; 5 Taunt. 707; Heys v. Hesseltine, 2 Campb. 604, (Chit. j. 825); Selw. 9th edit. 368; 1 Chitty on Pleading, 4th edit. 265; 5th edit. 333, 334.

(e) Ante, 181, 182.

(f) Bristow v. Wright, Dougl. 667; Gordon v. Austen, Dougl. 667; 4 T. R. 611, (Chit. j. 494). As to variances in general, see 1 Chitty on Pleading, 4th edit. 271, &c. 5th edit. 333, 334; but see Rose v. Sims, 1 B. &

Adol. 522, note (b), (Chit. j. 1510).
(g) White v. Wilson, 2 Bos. & Pul. 116; 1 Chitty on Pleading, 4th edit. 276; 5th edit.

333, 334.

(h) Allan v. Mawson, 4 Campb. 115, (Chit. 920); Shuttleworth v. Stevens, 1 Campb. 407, (Chit. j. 755); Dougl. 651; ante, 25, 181.

(i) See post, 561.

(2) A variance in the date, or in the substance of a note offered in evidence, from that set out in the statement, is a fatal objection to such evidence. Church v. Feterow, 2 Penn.

Rep 301.

Where the declaration averred that a negotiable note was indorsed, before it fell due, and it appeared upon the production of the note, that it was indorsed after maturity, this was held to

be no material variance. Penn v. Flack et al., 3 Gill and Johns. Rep. 369.

(3) In a declaration on a promissory note, the omission of the place where it is payable is fatal. Secree v. Dorr, 9 Wheat. 558. But where a bill or note is made payable at a particular Bank, and the bank itself is the holder, the averment and proof of the place where payable, as against the maker or acceptor, may be dispensed with; but as against the indorser such averment and proof is, in general, necessary. Bank of the U.S. v. Smith, 11 Wheat. 171.

It is not necessary, in case of a lost note, that there should be a special count stating such loss.

Renner v. Bank of Columbia, 9 Wheat. 557.

The payee of a note declared on it as payable to himself, but it appeared to be payable to himself or his order. Held that this was not a material variance. Fay v. Goulding, 10 Pick. 122.

⁽¹⁾ A declaration upon an order, averring that it was drawn in consideration of a debt due by the drawer to the plaintiff, and accepted by the defendant, is good, without avorring any other consideration. Bradley v. M'Cellan, 3 Yerger's Rep. 300.

tion.

1. State-Instrument Names of

Parties.

IV. Of the to the names of the parties to the action, who, (before the 3 & 4 Will. 4, c. 42, s. 11, or who, since that act, might have applied to a judge at chambers to have the declaration amended at the plaintiff's cost(i),) might have ment of the pleaded the misnomer in abatement, provided the identity be proved (k). Thus where in an action on a note made by the firm of Austin, Strobell, and Shirtliff, in those names, the declaration was against them by the names of Austin, Strobell, and Shutliffe, and stated that such defendants made the note, the variance was holden fatal (l); and if a bill drawn by the name of Couch be declared upon, in an action against a third person, as drawn by Crouch, such variance is also fatal(m). And under a count for usury, in discounting bills, one of which was described as drawn on a certain person, to wit, John K., and the bill produced appeared to be drawn on Abraham K., it was held a fatal variance (n). So where in an action by the indorsee against the acceptor, the declaration described the bill as drawn by one William Turner, and indorsed by the said William Turner to the *plaintiff, and the bill produced in evidence was drawn by Wingfield Turner, the variance was held fatal(o).

But where the promissory note was signed "for Bowes, Hodgsons, Key, and Co." and they were sued, and one of them was declared against by the name of Thomas Key, (but whose real name was John Key, commonly pronounced Kay,) the judge was of opinion, that the misnomer was no objection, it being proved that the real partner had been sued, and served with the process, though under a mistaken christian name; and that the variance between Key and Kay was immaterial, they being idem sonans(p). another case, where the plaintiff declared in the name of Edward Boughton, upon a bill of exchange drawn by him, payable to his own order, and accepted by the defendant, and also upon the common counts, and it appeared that the plaintiff's real name was Edmund, and that in that name he had drawn the bill, yet the plaintiff recovered (q). And where an action was brought by Willis, as the payee of a note, and on production the note was payable to Willison, and the declaration alleged the promise to pay Willis by the name of Willison, evidence was admitted on the part of the plaintiff to shew she was the party really meant, and to explain the mistake(r). It has been recently held, that a variance between the real name of an indorser, and that which is alleged in the declaration, and appears on the bill, is ma-But this seems questionable if it be necessary to prove the indorsement to support the action. Where a declaration stated that the bill was indorsed by certain persons trading under the firm of H. and F. by procuration of J. D., it was held, that this allegation was supported by evidence of J. D.'s hand-writing, and that he being the managing partner in a firm which carried on all business of buying and selling, under the designation of H. and Co., was in the habit of indorsing bills in the manner above stated, although there was no such person as F. in the firm of H. and Co., and no

(k) Stark. on Evidence, 241, (Chit. j. 494). (1) Gordon v. Austen, 4 T. R. 611. N. B. There is a singular difference between the folio and octave editions in the statement of this case, the last does not notice the mistake in the surname, which was the material objection.

(m) Whitwell v. Bennett, 3 Bos. & Pul. 559, (Chit. j. 685). In Fancourt v. Turner, 1 Jurist, 72, the declaration stated that the defendant made his bill of exchange and directed the same to Newton Pocklington, and thereby requested Newton Pilkington to pay, &c.:

held, that a demurrer to this was not frivolous.

(n) Hutchinson r. Piper, 4 Taunt. 810.
(o) Le Sage v. Johnson, Forrest's R. 23.

(p) Dickenson r. Bowes, 16 East, 110, (Chit j, 863).

(q) Boughton v. Frere, 3 Campb. 29; but note, it does not appear from the report whether the plaintiff only recovered upon the com-

(r) Willis v. Barrett, 2 Stark. Rep. 29, (Chit. j. 989).

(s) Forman v. Jacob, 1 Stark. Rep. 47.

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direct proof that J. D.'s partners were privy to those transactions(t). description of the plaintiffs, as executors and trustees of A. B. is mere sur- Declaraplussage, the bill being payable to them in name of the firm which they had tion. assumed (u).

And now by the 3 & 4 Will. 4, c. 42, s. 11, it is enacted, that no plea Misnomer in abatement for a misnomer shall be allowed in any personal action, but that not pleadain all cases in which a misnomer would but for this act have been by law Abatepleadable in abatement in such actions, the defendant shall be at liberty to ment cause the declaration to be amended, at the cost of the plaintiff, by inserting 3 & 4 Will. the right name, upon a judge's summons founded on an affidavit of the right. the right name, upon a judge's summons founded on an affidavit of the right 11. name; and in case such summons shall be discharged, the cost of such application shall be paid by the party applying, if the judge shall think fit. twelfth section also enacts, "That in all actions upon bills of exchange or When Inpromissory notes, or other written instruments, any of the parties to which itials may are designated by the initial letter or letters, or some contraction of the be used. christian or first name or names, it shall be sufficient in every affidavit to 4, c. 42, hold to bail, and in the process (x) or declaration, to designate such persons \bullet . 12. by the same initial letter or letters, or contraction of the christian or first [*562] name or names, instead of stating the christian or first name or names in full." It was doubted whether the former section, taken alone, did not extend as well to the case of a misnomer of a plaintiff as of a defendant, but it was held, that coupling that section with the twelfth, it was clear that the eleventh section applied only to the case of a defendant(y). Where, therefore, in an action upon a bill of exchange, the declaration described the plaintiff as Henry H. Lindsay, the court refused to set aside the declaration, or to order it to be amended at the plaintiff's cost by the insertion of the full christian name(z).

If one of several persons, acceptors of a bill, were an infant, the holder Number of may declare on it, as accepted by the adult only, in the names of both; and Parties. if the defendant pleads in abatement, that the other partner ought also to have been sued, the plaintiff may reply his infancy; and it is no departure, and it is most proper, not to state that the infant was a party to the instru-And if a bill of exchange purport to have been drawn by a firm consisting of several persons (as by "Ellis, Needham, jun. and Co.") in an action by an indorsee against the acceptor, the declaration may aver in the plural that certain persons using the firm, drew and indorsed the bill, although in point of fact the firm consisted only of a single individual, the acceptor being estopped from disputing the fact(b)(1). So where a declaration described a bill of exchange as directed to the three defendants, and accepted by them, and it was proved to have been directed to and accepted by a fourth

(u) Aguttar v. Moses, 2 Stark. Rep. 499, (Chit. j. 1069).

(x) See as to the process and affidavit to hold to bail, rule H. T. 2 Will. 4. s. 32; Lyon v. Walls, 2 Moore & S. 393; ante, 544, note

(y) Lindsny r. Wells, 4 Scott, 471; S. C.

3 Bing. N. C. 777; 5 Dowl. P. C. 618.

(z) Id. ibid.; see Moody v. Aslett, 1 C., M. & R. 771; S. C. 5 Tyrw. 492; 3 Dowl. P. C.

(a) Burgess v. Merrill, 4 Taunt. 468, (Chit. j. 869); 1 Chitty on Pleading, 4th edit. 35; 5th edit. 49; but see Gibbs v. Merrill, 3 Taunt.

(b) Bass v. Clive, 4 Camp. 78; 4 Maule & S. 18, (Chit. j. 935).

⁽t) Williamson v. Johnson, 1 Bar. & Cres. 146; 2 D. & R. 281, (Chit. j. 1163); see Faith v. Richmond, ante, 531, note (n).

⁽¹⁾ In declaring on a note as the indorsee of a firm, it is not necessary to set forth the names of the members of the firm. Cochran v. Scott, 5 Wend. Rep. 229.

tion.

Instrument.

IV. Of the party also, who was dead, this was held no variance (c); and in an action against one of several makers of a joint and several promissory note, the describing it as the separate note of the defendant, without noticing the other 1. Statement of the parties, is no variance (d)(1). So the nonjoinder of one of two joint drawers of a bill, is no variance in an action by one indorsee against the other(e).

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In an action by executors on a promissory note, where the defendant plead-Number of ed in abatement the non-joinder of one executor (who had not proved), the court allowed the proceedings to be amended on payment of costs, as the statute of limitations would have been a bar to a fresh action(f). In future, no amendment will be allowed except to avoid the operation of the statute of limitations(g). But a declaration alleging a note to have been made by A. and B. is not satisfied by evidence of a note given by A. alone to secure a partnership debt(h), though it would be otherwise if A. prefixed to his signature, "for A. and B. (i)." If a bill be accepted, payable to —— (blank) or order, and a bon î fide holder insert his name as the payee, the bill may be described as payable to him, without noticing the blank (k).

Time.

With respect to time, if it be alleged in the declaration, that defendant on such a day (without laying it under a videlicet), drew a bill of exchange, without alleging that it bore date on that day, a mistake of the day will not be material, but if the words "bearing date the same day and year aforesaid," be inserted, then a variance would be fatal(l); and the mis-statement of a day in the note payable by instalments, is fatal(m). In general, the date of a bill or note should be stated, and if there be no date, then the day it was made, and if that cannot be ascertained, then the first day it can be proved to have existed(n). And where in an action on a foreign bill payable at double usance from the date thereof, the declaration stated the bill to have been drawn on such a day, but did not state the date, the court held it sufficient, and that they would intend that it was dated at the time of drawing it(o). And where, when several counts were allowed, a second count

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(d) Per Lord Ellenborough, C. J. id. 1 B. & Ald. 226, and ante, 529.

(e) Evans v. Lewis, 1 Wms. Saund. 291, note (d); Wilson v. Reddall, Gow, 161. In these cases the defendant's course, if the other party be living, is to plead in abatement. Certain restrictions, however, have been imposed upon pleas in abatement for non-joinder, by the recent statute of 3 & 4 Will. 4, c. 42: thus the 8th section of that act enacts, that no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person be stated with convenient certainty in an affidavit versifying such And the 9th section enables the plaintiff to reply the bankruptcy or insolvency of the party so omitted. The 10th section also ena-bles the plaintiff to enter up judgment against the original defendant, in case it shall appear

(c) Mountstephen v. Brooke, 1 B. & Ald. that the party named in the plea in abatement But it has been held that the Sth section applies only to those cases where the plaintiff can go on against the party pleading in abatement, and, therefore, that it does not extend to a plea of defendant's coverture. Jones v. Smith, 6 Dowl. P. C. 557.

f) Lakin v. Watson, 2 Dowl. P. C. 633; Tyrw. 839, S. C.; 2 Crom. & Mee. 685, S.

(g) Id. ibid.(h) Siffkin r. Walker, 2 Campb. 308; Emly v. Lye, 15 East, 7.

(i) Galway v. Mathews, 1 Campb. 403. (k) Atwood r. Griffin, Ryan & Mood. Rep. 425; 2 Car. & P. 368, (Chit. j. 1305); post, 564, note (d.)

(l) Coxon v. Lyon, 2 Campb. 307, 308, (cited Chit. j. 780); Fitzgib. 130.
(m) Wella v. Girling, 3 Moore, 79; Gow,

Rep. 21, (Chit. j. 1051).

(n) Ante, 148; Bayl. 5th edit. 379.

(o) De la Courtier v. Bellamy, 2 Show. 422, (Chit. j. 167); ante, 149, note (3);

25th. Stephens r. Graham, 1 Serg. & Rawle, 505.

⁽¹⁾ If a bill be addressed to W. S. by mistake, for I. S., and it is presented to the right person, it is sufficient, and in the declaration it may be stated that the bill was drawn on W. S. meaning the said I. S. Sterry v. Robinson, 1 Day's Rep. 11.

Proof of a note dated the 26th July, does not support a declaration stating a note dated on the

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stated that afterwards, to wit, on the day and year aforesaid, the defendant IV. Of the drew a certain other bill of exchange, payable two months after the date there- Declaraof, without mentioning any express date in either count, the last count was tion. held sufficient, the court intending the date to have been the day on which 1. Statethe bill was alleged to have been made(p). If a bill or note by mistake has ment of the been dated contrary to the intention of the parties, the declaration may run ment. thus, "on, &c. (the time intended), made, &c. bearing date by mistake, Time. on, &c. but meant and intended by the said A. B. and C. D. to be dated on the said, &c. and then delivered, &c. by which said note he the said C. D. then promised to pay, two months after the date thereof, (that is to say, after the said, &c. when the said note was so made and intended to be dated as aforesaid), to the said A. B." &c. It has been held, that in a declararation upon a bill or note importing to be payable within a limited time after the date, and dated on a particular day, the precise day must be stated, and that if a day upwards of six years before the commencement of the action be stated, and the defendant plead actio non accrevit, the plaintiff cannot recover(q), but this doctrine may be questionable(r).

*It was usual also, before the late rule of court H. T. 4 Will. 4, r. 2, s. Place. 8(s), to state the place at which the bill or note was drawn, as thus, "that { *564] the drawer, on, &c. at Liverpool, to wit, at London, &c. (the venue)." And it has been considered, that in a declaration on a foreign bill, the place at which it bears date must be stated, and that some place in England or Wales should be subjoined, by way of venue, under a videlicet, thus, "at Venice, in Italy, to wit, at London," &c. 't). But where a promissory note, dated and made at Paris, was declared upon in an action by the payee against the maker, as made in London, it was decided to be no variance, because the contract evidenced by a promissory note is transitory, and the place where it purports to have been made is immaterial(u); and it is laid down, that inland bills and notes, though they may bear date at a particular placer, may be alleged to have been made any where in England or Wales(x)(1). Though in a more recent case, where a bill was drawn at Doublin, in Ireland, for Irish currency, and the declaration stated that the bill was drawn "at Dublin," to wit, at Westminster, &c. without alleging that Dublin was in Ireland, nor stating the bill to be for Irish currency, it was held a variance, inasmuch as the bill must be taken to be drawn for

approved of in Hague v. French, 3 Bos. & Pul. 173; and see Owen v. Waters, 2 M. & W. 91, 93, et seq.; 5 Dowl. P. C. 324. See also Hunt v. Massey, 5 B. & Ad. 902; 3 N. & M. 109, S. P.; Selw. N. P. 9th edit. 315, 316.

(p) Hague v. French, 3 Bos. & Pul. 173, (Chit. j. 652); and see Giles r. Bourne, 6 Maule & S. 73, S. P. ante, 148, note (l).

(q) Stafford v. Forcer, 10 Mod. 311; cited 1 Stra. 22. In an action on a note dated in 1704, defendant pleaded that the cause of action did not accrue within six years, the plaintiff replied a bill filed in 1714; and that the cause of action accrued within six years of that time; and after verdict for the plaintiff, the court arrested the judgment, because it was stated that the note

was made and dated in 1704, and then the cause of action must have accrued above six years before 1714; but see Lesper v. Tutton, 16 East, 420, (Chit. j. 876).

(r) In Trinity Term, 1818, K. B., the court held, that on a guarantee of the debt of another, the plaintiff might give in evidence a verbal promise to revive the original undertaking in writing, so as to defeat a plea of actio non accrevit infra zex annos; (libbons v. M. Casland, 1 Bar. & Ald. 690.

(s) Ante, 551.

(1) Salk. 669; Cowp. 177, 178; 6 Mod. 228; Com. Dig. tit. Action, N. 7.

(u) Per Lord Ellenborough, in Houriet v. Morris, 3 Campb. 804, (Chit. j. 878).

(x) Bayl. 5th edit. 380.

^{(1) {} Unless damages are claimed; then the place where the draft was drawn becomes material, and must be set forth and proved. See Fairfield v. Adams, 16 Pick. 381. }

IV. Of the English currency (y). This decision, however, was before the passing of the act which assimilates the money and currency between Great Britain tion. and Ireland(z).

1. Statement of the Instrument. must be stated in Terms, or according to the legal

Effect.

The instrument itself must be stated in terms, or according to the legal ef-If it be in foreign language it may nevertheless be stated as if it were Instrument in English, without noticing the foreign language(a). If the bill be payable at usances, the length of them should be averred thus, "at two usances, that is to say, at two months after the date thereof," and the omission will be fatal on demurrer(b).

A bill or note payable to the order of the plaintiff, may be stated in the declaration to be payable to him, and there is no occasion to insert any averment that he made no order(c). And where a bill has been drawn with a blank for the payee's name, and the holder afterwards insert his own name, the declaration may describe the bill as if it had been drawn payable to him(d).

Money Payable.

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With respect to the description of the money payable by the bill or note, a variance in stating the amount would be fatal. When the money in which the bill is payable is foreign it is necessary to shew *in the declaration that it Where the declaration stated that a promissory note was is foreign money. made at Dublin, payable at Dublin, without stating it was in Ireland, or that the money payable was Irish, it was held fatal(e), and so where the bill was drawn only at Dublin(f). And, it should seem, that an averment in a declaration on a bill of exchange, drawn in Ireland, and made payable in England, treating the sum mentioned in the bill as Irish currency, and stating it to be of a certain value in lawful money of Great Britain, is material, and will prevent the plaintiff from recovering more than that sum; though without such an averment he would be entitled to treat the bill as for English And a bill drawn in Ireland for £--- sterling, payable in currency(g). **England**, will be taken to mean English money(h). But those decisions were before the passing of the act for assimilating the currency between Ire-The omission of the word "sterling" is immateriland and England(i). And the statement in a declaration on a foreign bill of the value of the foreign money seems unnecessary, if it otherwise appear the money was foreign(l).

Consideration.

It should seem that it was not necessary to state in the declaration that

(y) Kearney v. King, 2 Bar. & Ald. 301; 1 Chit. R. 23, (Chit. j. 1046); 1 Chit. R. 60 a; and see Sprowle v. Legge, 1 Bar. & Cres. 16; 2 Dow. & Ry. 15; 3 Stark. Rep. 156, (Chit. j. 1152, 1154).
(z) 6 Geo. 4, c. 79.
(a) Attorney-General v. Valabreque, Wight.

9. But an indictment for forging a Prussian v. Goldstein, 3 B. & B. 201; 7 Moore, 1; Russ. & Ry. C. C. 473, (Chit. j. 1139.)

(b) Buckley v. Campbell, 1 Salk. 131, (Ch.

j. 228); Smart v. Dean, 3 Keb. 645, (Chit. j.

163).

(c) Frederick v. Cotton, 2 Show. 8, (Chit. j. 165); Fisher v. Pomfret, Carth. 403, (Chit. 203); Smith r. M'Clure, 5 East, 476; 2 Smith, 43, (Chit. j. 699).
(d) Cruchley v. Clarence, 2 Maule & S. 90,

(Chit. j. 895); Cruchley r. Mann, 5 Taunt. 529; 1 Marsh. 29, (Chit. j. 908); Atwood v. Griffin, Ryan & Mood. 425; 2 Car. & P. 368, (Chit. j. 908).

(Chit. j. 1305). (e) Sprowle v. Legge, 1 Bar. & Cres. 16; 2 Dow. & Ry. 15; 3 Stark. R. 156, (Chit. j. 1152).

f) Kearney v. King, 2 Bar. & Ald. 301; 1 Chit. R. 28, (Chit. j. 1046).
(g) Taylor v. Booth, 1 Car. & P. 286.

(h) Id. ibid.

(i) 6 Geo. 4, c. 79. (k) Kearney v. King, 2 Bar. & Ald. 301; 1 Chit. R. 28, (Chit. j. 1046); Glossop v. Jacob, 1 Stark. Rep. 69; 4 Campb. 227, (Chit. j.

(1) Simmonds v. Parminter, 1 Wils. 185; 4 Bro. Parl. Cas. 604.

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part of the bill which relates to the consideration (m); but that if the plain- IV. Of the tiff professed to state the instrument accurately, and misstated it in this re- Declaraspect, such a variance would have been fatal(n). A note described to be tion. "for value received" generally was held not to be disproved by evidence of 1. Statea note payable to plaintiff's order, "for value received in Mrs. L.'s es-ment of the tate(o)." And a bill of exchange, expressed on the face of it to be "for ment. value delivered in leather," might be stated in pleading to have been for value received in leather(p). And it was considered, that a bill of exchange in this form, "pay to F. G. B. or order, 3151. value received," and subscribed by the drawer, might be alleged in pleading to be a bill of exchange for value received by the drawer from the payee (q). But if a bill were drawn in the usual form for value received (which means by the drawee), and the declaration alleged it as value received by the drawer, the variance was ma-Since the rule of court T. T. 1 Will. 4, this statement of the consideration should be altogether omitted(s).

With respect to the place of payment, we have seen, that if the legal ef- Place of fect of the instrument be that it be payable only at a particular *place, it $\frac{Payment}{must}$ be so described in the declaration(t), when, on the other hand, if according to the legal effect it be payable generally, it would be a misdescription to describe it as payable only at the particular place(u); though if the declaration merely state that the maker of a note made it payable at the particular place, omitting the word thereby, the statement will be rejected as surplusage (x).

It is advisable not to state more of the bill or note declared on than is nec- How much essary to enable the plaintiff to recover (y). The formal description of the $\frac{\text{of Instrument to be}}{\text{ment to be}}$ direction to the drawee should in general be omitted, for fear of a variance(z); stated. and where a bill is not addressed to any person by name, but accepted by the defendant, the declaration should merely state that the drawer drew the bill, and thereby required the payment of such a sum, and that the defendant accepted, without stating any address(a). If a bill is directed to Messrs. A. B. and Co. it is no variance in setting out the bill, according to its tenor, to put Mess. A. B. and Co. without the "r" instead of Mess. with it (b). So where in an action on a note made in Prussia, payable seven days after sight, it appeared that the words "accepted on myself, payable everywhere." were written in the margin; and it was insisted, that the omission of these

- (m) Grant v. Da Costa, 3 Maule & S. 357, (Chit. j. 920); White v. Ledwick, MS. ante, 160, note (a); Bayley on Bills, 5th edit. 20, note 83; Coombs v. Ingram, 4 D. & R. 211, (Chit. j. 1206), acc.
- (n) Sed quare, why not rejected as superfluous as in the case of an allegation " his own proper hand being thereunto subscribed." See post, 570.
- (o) Bond v. Stockdale, 7 D. & R. 140, (Chit. j. 1273).
- (p) Jones v. Mars, 2 Campb. 307, in notes, (Chit. j. 779); White v. Ledwick, MS. supra, note (m); and Highmore v. Primrose, 5 Maule & S. 65; 2 Chit. R. 333, (Chit. j. 956). But a bill described to have been "for value received" is not proved by producing a bill "for value in wheat," for it does not import that the wheat was delivered. Per Lord Tenterden, C. J. Hil. Vac. 1827.
 - (q) Grant v Da Costa, 3 Maule & S. 351,

- (Chit. j. 920); and see Clayton v. Gosling, 5 Bar. & Cres. 360; 8 Dow. & Ry. 110, (Chit. j. 1287); ante, 160, 161.
- (r) Highmore v. Primrose, 5 Maule & S. 65; 2 Chit. R. 333, (Chit. j. 956).
 - (s) See forms, ante, 551, &c.
 - (t) Ante, 153.
- (u) Ante, 154, note (k); but may be amended, Higgins v. Nicholls, 7 Dowl. P. C. 551; post, 569 note (a).
- (x) Antc, 154, note (l); 362, note (l).
 (y) Bristow v. Wright, Dougl 667; Dundas Lord Weymouth, Cowp. 665; Price v.
- Fletcher, Cowp. 727.
 (2) It will be observed, however, that this direction is contained in the forms given by the rale T. T. 1 Will. 4, ante, 553.
- (a) Gray v. Milner, 3 Moore, 91; 2 Stark. Rep. 336; 8 Taunt. 379, (Chit. j. 1022, 1052.)
 - (b) Oldfield's case, 2 Russ. 2d edit. 860.

IV. Of the words in the declaration was a variance; but it was considered no part of the original instrument, their effect being merely to supply an acknowledgtion. ment of the sight of the bill; and that, although the entry was in fact con-1. Statetemporaneous with the note itself, in point of law its effect was subsement of the quent(c). Instru-

Informality in Bill or Note bow to be stated.

ment.

If the bill or note were informal, it may be stated in its terms with an innuendo of its meaning, which seems the safest course (d). If the rules of law prevent the instrument declared on from operating according to the words of it, it may ut res magis valeat quam pereat be stated to have been made in such a manner as the law will give effect to it, though there may be a verbal variation between that statement and the instrument itself(e). Therefore, in the case before-mentioned of a note, by which a man promised never to pay a sum of money, it was holden that it might be declared on as a promise to pay(f); and bills payable to the order of fictitious persons, may be declared on as payable to bearer against every party aware of the fact(g). where a note has, through mistake, been made payable to a wrong person, it may be stated to have been made payable to the proper one(h).

When Plaintiff may recover on Common Count. *567]

In some cases of variance the instrument itself may be read in evidence in support of one of the common counts, or of the count upon an account These cases will be presently considered(i); and where there is a debt due to the plaintiff from the defendant, in respect of which the former becomes the holder of the bill, he is, in case of *variance, still at liberty to resort to such debt, if there be a count in the declaration adapted to it.

Of Amendments in Case of Variance. 1 Geo. 4, c. 55, s. 5.

By recent acts powers are given to the judge, who tries a cause, to amend prior to or even pending the trial. The 1 Geo. 4, c. 55, s. 5, gives a judge of any court, though different to that in which the action is pending, power to amend at any time immediately before the commencement of the rial; and, in assumpsit on the money counts, the judge, a few minutes before the trial commenced, allowed special counts on bills alleged to have been paid supra protest (and the draft only of which counts were produced to him) to be considered as then added to the record, and the cause was immediately afterwards tried(k). This power was extended by the 9 Geo. 4, c. 15, intituled, "An act to prevent a failure of justice, by reason of variances between records and writings produced in evidence in support thereof," and which enables a judge even after the jury have been sworn, and the trial has commenced, to amend in certain cases. The statute enactes, that it shall be lawful for every court of record, and any judge sitting at nisi prius, if such court or judge shall see fit so to do(1), to cause the record on which any trial may be pending before any such judge or court, when any variance shall appear between any matter in writing or in print, m) produced in evidence, and the recital or setting forth thereof upon the record, to be forthwith

9 Geo. 4. c. 15.

> (c) Splitgerber v. Kolm, 1 Stark. Rep. 125, (Chit. j. 947).

(d) Waugh v. Russel, 1 Marsh. 215; 5 Taunt. 707.

(e) Rolleston v. Mageston, 4 T. R. 166; Burr. 823, 2611; Cowp. 832; Willis r. Barrett, 2 Stark. Rep. 29, (Chit. j. 989).

(f) Ante, 131. (g) Ante, 157, 158. (h) Id. ibid.

(i) See post, 578 to 593.

(k) Reid v. Smart, Chit. Col. Stat. 735.

note(b); and see Murphy v. Marlow, 1 Camp b.

(1) It is therefore not compulsory, and where the blunder has arisen from gross want of care in the attorney, amendments have been refused, see post, 568, note (t) and (u).

(m) Only applies to written or printed contracts, and where the written instrument is professed to be set out or recited in the pleading; Ryder v. Malbron, 3 Car. & P. 594; and see Webb v. Hill, Mood. & M. 253; 3 Car. & P. 485, S. C.

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amended in such particular, and thereupon the trial shall proceed as if no IV. Of the such variance had appeared(n), &c. But the principal and most important Declaraact is the 3 & 4 Will. 4, c. 42, s. 23(o), which, after reciting that great fion. expense is often incurred, and delay or failure of justice takes place, at tri- 3 & 4 als, by reason of variances as to some particular between the proof and the Will. 4, c. record or setting forth, on the record, &c. on which the trial is had, of contracts, &c. names, and other matters or circumstances not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record, enacts, that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at nisi prius, if such court or judge shall see fit so to do(p), to cause the record, writ(q), or document on which any trial may be pending before any such court or judge, in any civil action, &c. when any variance shall appear between the proof and the recital or setting forth, on the record, &c. on which the trial is proceeding, of any contract, &c. name, or other matter, in any particular not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, &c. or defence, to be forthwith amended, &c. and in case such variance shall be in some particular not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, &c. or defence, then such court or judge shall have power to *cause the same to be amended upon payment of costs, &c.: and after any such amendment the trial shall proceed in the same manner in all respects as if no such variance had appeared, &c.; provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at nisi prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a new trial upon that ground, and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as such court shall think fit, or the court shall make such other order as to them may seem meet. And the 24th 3 & 4 section enacts, that the said court or judge shall and may, if they or he think Will. 4, c. fit, in all such cases of variance instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and notwithstanding the finding on the issue joined, the said court or the court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action of defence, give judgment according to the very right and justice of the case.

Under the 9 Geo. 4, where there was a mistake in the statement of the Decisions date of the bill, as 26th March instead of 29th, the judge allowed an amend- on 9 Geo. ment without costs in an undefeeded cause(r). But the judge has a discre- 4, and 8 & tionary power, which imports a power to be exercised without caprice and partiality(s); and where the variance is attributable to the gross want of care in the attorney, amendments have been refused; as where in an action against the drawer of a bill, the declaration stated a special acceptance "at

⁽n) See Wilson v. Rastall, 4 T. R. 757; 4 Burr. 2539, as to how such a discretionary power ought to be exercised.

⁽o) See the act with notes, Ch. & H. Stat. 27.

⁽p) See cases, supra, note (n).
(q) The writ of trial under sect. 17.

⁽r) Bentzing v. Scott, 4 Car. & P. 24.

⁽s) See cases, ante, 567, note (n).

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Of Amendments in Case of Variance.

IV. Of the A. or at B.," but the bill produced appeared only to be accepted pavable "at A.," and the words "at B." were written on the bill merely as the address of the drawer, and which had been carelessly mistaken for part of the acceptance, an amendment was refused, because it would only encourage want of care in framing pleadings, which the judge was not bound to permit an amendment of, and that the act was only intended to aid clerical mistakes, and not such as any man who could read might avoid making(t)(1). So in another cause the same learned judge said, "It is not to be taken that a judge is bound to permit an amendment, for it is discretionary; and if a party has unnecessarily stated irrelevant matter, on which there is a variance, a judge is not bound to permit an amendment(u)." And it should seem this discretionary power of the judge at nisi prius cannot be controlled by the court in banc(x); at all events, where in a declaration on a bill of exchange it was stated that the bill was drawn by S. S. payable to his order, and the bill when produced in evidence was payable to the order of J. E., it was held, that the judge had rightly exercised his discretion in allowing the record to be amended under the 9 Geo. 4(y). Cases, how-[*569] ever, have occurred, where the court has interfered; as *where the declaration on a bill of exchange omitted the time at which the bill was payable, and the judge at nisi prius refused an amendment under the 3 & 4 Will. 4, and non-suited the plaintiff, the court set aside the nonsuit on terms (z). the case of a writ of trial, where the sheriff refused to amend the declaration on a bill of exchange, stating a special acceptance, by striking out the words, "and not elsewhere," which words were not in the acceptance, the court directed a new trial(a). It has been observed, that the act 3 & 4 Will. 4, was intended to apply to all cases where the defendant had not been misled by the misdescription of the instrument (b); and that in the present state of the rules of pleading, judges should be very liberal in allowing amendments under this statute(c). And, in an undefended cause, where the instrument declared upon was described as a bill of exchange instead of a promissory note, the judge who tried the cause ordered the declaration to be amended and also the judge's order which had been obtained for admitting the defendant's handwriting (d).

2. How became Party to ment.

Secondly, It is incumbent on the plaintiff, in every declaration founded Defendant on a breach of contract, to shew the contract for non-performance of which the action is brought, and consequently it is necessary to state in a declarathe Instru- tion on a bill how the defendant became party to it, whether by drawing, accepting, or transferring it, as that he "made," "accepted," "indorsed," or "delivered" it; which allegations will be sufficient, although the defendant did not in fact do either of these acts himself, provided he authorises the

> (t) Per Lord Tenterden, in Jelf r. Oriel Guildhall, 20th Oct. 1829. But note, plaintiff obtained a verdict on the account stated. Campbell and Brodrick for plaintiff, and Denman and Richards for defendant; 4 Car. & P. 22, (Chit. j. 1440).

> (u) Reeves v. Scott, 21st February, 1829, Guildhall, per Lord Tenterden.

> (x) Parks v. Edge, 1 C. & M. 429; S. C., 3 Tyrw. 364; 1 Dowl. P. C. 643; nom. Parker v. Ade. And see Doe v. Errington, 3 N. &

M. 646; 1 Ad. & El. 750, S. C. note (a). (y) Parks v. Edge, 1 C. & M. 429.

(z) Pullen v. Sevinour, 5 Dowl. 164. (a) Higgins v. Nichols, 7 Dowl. 551; 3 Jurist, 341.

(b) Per Parke, J. in Banbury v. Ella, 3 N. & M. 438. 440; 1 Ad. & El. 61, S. C. (c) Per Bosanquet, J. in Cholmondeley v.

Payne, 4 Scott, 418; 3 Bing. N. C. 708, S. C. (d) Moilliet v. Powell, 6 Car. & P. 233.

^{(1) {} A declaration on a bill of exchange was permitted to be amended after plea, by inserting the words "at London in Great Britain, to wit," without prejudice to the rules to plead. Wilkinson v. Rogers, 1 Smythe, 263. }

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doing of them; though, formerly, indeed, it was not unfrequent, when the IV. Of the fact was so, to state that those acts were done by the procuration of the Declaraagent who was employed'e)(1): and though the drawing and indorsing must tion. be in writing, and since the statute 1 & 2 Geo. 4, c. 78, the acceptance of 2. How Defendant an inland bill must be in writing, yet it is not necessary to state that either became of those was in writing (f); and if it be stated that the defendant indersed or Party to accepted a bill after it was drawn, proof of a previous indorsement or acceptance will be no variance(g). It is usual and proper to allege a promise, Promise. but it has been decided that this is unnecessary, as the law implies a promise where there is a legal liability (h)(2); and, it should seem, that this allegation is still less necessary since the new rules, which prevent a defendant from denying the promise alleged in the declaration on a bill or note(i). (See post, 823 (55). In an action against the acceptor of a bill and the maker of a note, at the suit of the payee or indorsee, the defendant's promise is to be stated to have been "according to the tenor and effect of the bill or note;" but in an action against the drawer or indorser of a bill, or the indorser of a note, after stating the default of the party primarily liable, the liability and the promise of the *defendant are stated to have been [*570] to pay on request, that being the legal result. And where a declaration on a promissory note stated that the defendant thereby promised to pay to the plaintiff 101. on account of W. H. D. fourteen days after the date thereof, which period had elapsed; and then averred that the defendant, in consideration of the premises, "then and there promised (without stating the promise to be to the plaintiff) to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof;" it was held, on special demurrer, that the promise was sufficiently alleged (k).

The words "his own proper hand being thereunto subscribed," should Signature. be omitted; although, if stated, the allegation, when untrue, may be rejected as surplusage (l); but since the rule T. T. 1 Will. 4(m), the introduction of

(e) Collis z. Emmett, 1 Hen Bla. 313, (Ch. j. 461); Brucker r. Fromount, 6 T. R. 659; 3 T. R. 182, 481; Heys v. Heseltine, 2 Campb. 604, (Chit. j. 825).

(f) Chalie v. Belshaw, 6 Bing. 529; 4

Moore & P 275, (Chit. j. 1498).

(g) Molloy r. Delves, 4 Car. & P. 492; 5
Moore & P. 275; 7 Bing. 428, (Chit. j. 1544); Selw. N. P. 9th edit. 867.

(h) Starkie v. Cheesman, Carth 510; Salk. 128, (Chit. j. 209); Hardr. 486; 1 Str. 214; and semble, Griffith v. Roxbrough, 2 M. & W. 734; 6 Dowl. P. C. 133, S. C.; at ull events the omission can only be taken advantage of on special demurrer, id ibid. Sed vide Buc Ab. tit. Assumpsit, F.; and Morris v. Norfolk, 1 Taunt. 217; Henry r. Burridge, 3 Bing. N.

C. 501; S. C., 4 Scott, 296; 5 Dowl. P. C. 484; 3 Hodges, 16. The latter case was decided on the ground of the action being against the drawer, and the objection taken on special demurrer.

(i) Sec observation of Alderson, B. in Griffith r. Roxbrough, 2 M. & W. 738.

(k) Banks v. Camp, 2 Moore & S. 784; 9 Bing. 604, S. C.; see I Chit. Pl. 302, 6th edit. Note, the declaration in this case followed the form given by rule T. T. 1 Will. 4, ante, 651,

(1) Booth r. Grove, Mood. & M. 182; 3 Car. & P. 885, (Chit. j. 1395); Bavl. 5th ed.

(m) Ante, 531.

It is not necessary in a declaration on a bill of exchange, to aver, that the maker delivered it: it is sufficient to state, that he made it, for these words imply a delivery. Ibid.

(2) A declaration upon a promissory note is good, without averments of liability, assumption, c. Richmond v. Patterson et al., Ohio Rep. Cond. 603.

⁽¹⁾ The averment in a declaration, that the defendant, by his note, under his hand of that date, for value received, promised to pay, &c. implies the delivery of the note. Binney et al. v. Plumley, 5 Vermont R. 500.

Where there were three special counts on different instruments and a promise averred only in the first count, and then the common counts and the general conclusion contained the words "last mentioned," held, on special demurrer, to the second and third counts for not averring a promise, that the general promise in the conclusion extended to those counts, not withstanding the words last mentioned. Mills r. Bamfield, 1 Irish Law Rep. 323.

2 How Defendant became Party to the Instru-

ment.

IV. Of the this or any other unnecessary averment, not sanctioned by the forms given by the judges, will subject the plaintiff to the costs occasioned thereby. In an action by the indorsee against the acceptor of a bill of exchange, the declaration stated that the payee indorsed it, his own proper hand being thereunto subscribed(1); and it appeared that the payee's name, upon the back of the bill, was written under his authority by his wife; it was held, that the defendant having, after notice of non-payment, promised to pay, was not at liberty to object that the indorsement was not in the handwriting of the payee himself(n); but had it not been for such promise, the variance would have And in an action against the drawers of a bill of exchange, been fatal(o). where the declaration stated that the defendants made the bill, "their own proper hands being thereto subscribed," and in fact their firm of A. & Co. was subscribed to the bill, Lord Ellenborough said, "Had it been their own proper hand,' I should have clearly held it sufficient: as it stands, I entertain some doubt; but I will not nonsuit(p)(2)."

Date of Acceptance, &c.

It is advisable to state the true date of the acceptance of the bill payable after sight, and in any other case where the acceptance is dated on a day different to the date of the bill, it should be described accordingly (q); but it seems that a variance is not material (r). And though it has been considered, that if the plaintiff allege in terms that the acceptance was made before the time limited by the bill for its payment, the plaintiff will be precluded from giving in evidence an acceptance afterwards(s); that doctrine has been questioned by high authority (t). The allegation of the day of the promise is immaterial as to the precise time (u). And where the plaintiff, as indorsee of a bill, against the defendant, as acceptor, stated in his declaration that the

(n) Helmsley v. Loader, 2 Campb. 450, (Chit. j. 799); Payl. Prin. & Agent, App. No.

(o) Levy v. Wilson, 5 Esp. R. 180, (Chit. j. 703); Payl. Prin. & Agent, 275, 276.
(p) Jones and another v. Mars and another, 2 Camph. 305, (Chit. j. 779).

(q) Bayl. 5th edit. 398.

(r) Forman v. Jacob, 1 Stark. Rep. 46; and see Young v. Wright, 1 Campb. 139, (Chit. j. 744); Jackson v. Pigott, Ld. Raym. 364; 12 Mod. 212 ,(Chit. j. 208).

(s) Jackson v. Pigott, Ld. Raym. 364; 12 Mod. 212, (Chit. j. 208)

(t) Bayl. 5th edit. 393; and see Molloy v. Delves, 4 Car. & P. 492, (Chit. j. 1544); where it was held, that under an allegation that defendant accepted bill after it was drawn, it might be proved that he accepted in blank before bill drawn; Selw. N. P. 9th edit. 367.

(u) Hawkey v. Borwick, 1 Younge & J. 276; 4 Bing. 135; 12 Moore, 478, (Chit.)

(1) The same point was ruled, where the note was signed by procuration, and it was alleged that the promissors "made their notes under their hands." Essex November Term, 1805. Gardner v. Stocker. Per Sedgwick, J. MSS.

An averment that the partners of a firm made the note, "the proper name and firm of the partners being thereunto subscribed," is proved by showing the note signed by one partner in the partnership name. It is not necessary to state that one of the partners signed in the name of the firm; but if so stated, it is good. Manhattan Company r. Ledyard, I Caines' Rep. 192. So an averment that "certain persons using the name, style and firm of W. & W. made the note, the proper handwriting of one of them in their said copartnership name, style, and firm, being thereto subscribel," is good. Kane r. Scofield, 2 Caines' Rep. 368. If in an action against two persons, the declaration does not allege them to be partners, or to act under a firm, and it is averred that they "made the note in their own proper hands and names thereto subscribed," proof that one of the defendants subscribed the note with the joint name of the firm,

is not sufficient to maintain the declaration. Pease v. Morgan, 7 John. Rep. 468.

If the plaintiff allege himself in the declaration to be the bearer of a note payable to the bearer, this is sufficient, without an express allegation that the maker promised the plaintiff to pay him.

Dole v. Weeks, 4 Mass. Rep. 451; and see Gilbert v. Nantucket Bank, 5 Mass. Rep. 97.

The words, that the defendant "by his note in writing under his hand," &c. imply that the defendant made the note. Binney v. Plumley, 5 Verm. 500.

In an action on a promissory note, brought by an assignee, the declaration should state the assignment to be made on the note under the hand of the assignor. Archer r. Spencer, 3 Blackf. 405, }
(2) See post, 822, (51).

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defendant became liable to pay, and promised to pay according to the tenor IV. Of the and effect of *the bill and his acceptance, it was held that he might, under Declarathe plea that the causes of action did not accrue within six years, give in tion. evidence a promise long after the bill was duc(v).

On the before-mentioned rule, that the plaintiff should not state more of Party to the bill than is essential to his title, it is not necessary or advisable in an the Instruaction against the drawer or indorser of a bill, to state that the drawee ac-ment. cepted it(x); though if it be stated, it need not be proved(y): more especial- [*571] ly if it be shewn that the drawer indorsed the bill after it was accepted, or that after it was due he promised to pay(z).

2. How Defendant became

If the engagement of either of the parties were conditional, it must be described accordingly, with an averment of the performance of the condition, and therefore a conditional acceptance must be so stated, and if declared upon as an actual engagement, the variance will be fatal, although the condition has been performed(a). We have already considered when it is necessary to describe the acceptance as payable at a particular place, and when

that statement would be improper (b).

Thirdly, A plaintiff, who sues upon a bill, check, or note, must shew in 3. How his declaration his right to sue thereon, in the same manner as every other Plaintiff plaintiff must shew a sufficient title to enable him to maintain the action which Party and he brings(c). Thus, in an action by the indorsec or bearer of a bill, it is entitled necessary to show that it authorised a transfer, and he must also state that thereto. the transfer was made. In general, whatever forms a constituent part of the plaintiff's title must be set out correctly (d). But this rule is liable to similar exceptions to that which makes it necessary to set out the instrument as made; and he may set it out, as in case of a bill payable to the order of a fictitious person, according to the effect given to it by law(e). It has been decided, that the payce of a bill or note payable to his own order, may state it to have been made payable to himself (f)(1); and a note payable to a married woman, and indorsed by her husband, may be stated to have been payable to the husband (g)(2). An indorsee may, it is said, declare against his immediate indorser, as on a bill of exchange made by the defendant, directed to the acceptor, and payable to the plaintiff, the act of indorsing be-

(v) Leaper v. Tatton, 16 East, 420, (Chit. j. 876); and see last note.

(x) Parks v. Edge, 1 C. & M. 429, post, 576, note (o).

(y) Tanner v. Bean, 4 Bar. & Cres. 312; 6 Dow. & Ry. 338, (Chit. j. 1261).

(z) Jones v. Morgau, 2 Campb. 474, (Chit. j. 807).

(a) Langeton v. Corney, 4 Campb. 176, (Chit. j. 930); Swan r. Cox, 1 Marsh. 176; Ralli v. Sarell, Dow. & Ry. N. P. C. 33; ante,

(b) Ante, 154, 362, note (1).

(c) Bishop v. Hayward, 4 T. R. 471, (Chit. j. 492).

(d) Per Lord Kenyon, in Gwinnet v. Phillips, 3 T. R. 645; Gibson v. Minet, 1 Hen. Bla. 605, 606, (Chit. j. 479).

(e) Ante, 157, 158.

(f) Frederick r. Cotton, 2 Show. P. C. 8, (Chit j. 165); Smith r. M'Clure, 5 East, 476;

 2 Smith's Rep. 43, (Chit. j. 699).
 (g) Barlow c. Bishop, 1 East, 432; 8 Esp. Rep. 266, (Chit. j. 637); Ankerstein v. Clarke, 4 T. R. 616; Arnold v. Revoult, 1 Brod. & Bing 443; 4 Moore, 66, S. C.

(2) And though a check be transferred to two persons, as collateral security for two several debts due to them respectively, yet one alone may sue upon it; and possession by him is, prima facie, evidence that the interest of the other is assigned to him. Murray v. Judah, 6 Coweu, 484.

⁽¹⁾ And so, a bill payable to the order of the drawer, and not indorsed, may be assigned for valuable consideration, by delivery only; and an action, for the benefit of the assignee will lie against the acceptor, in the name of the drawer, as on a bill payable to himself. Titcomb v. Thomas, 5 Greenl. 282.

In general, however, the plaintiff's title should be stated according to the

IV. Of the ing similar in its operation to that of making a bill, but this is not the prac-Declaratice(h). tion.

Indorsement.

facts, and if he claim as a remote indorsee, every indorsement is usually set forth; but where the first indorsement is in blank, and the plaintiff is apprehensive he shall not be able to prove all the subsequent indorsements, it is proper to state the plaintiff to be the immediate indorsee of some prior in-In such case, however, it is said, that in order to render the evi-[*572] dence correspondent to the declaration, *all the subsequent names must be struck out of the bill before or at the time of the trial(i); which may be done notwithstanding there has been a second or subsequent indorsement in full(k); though by so doing the plaintiff loses the benefit of the intermediate title(l). In this case, in order to avoid unnecessary expense, the indorsements may be described concisely thus: "And the said A. then indersed the said bill of exchange to the said B., and the said B. then indorsed the said bill of exchange to the said C. &c.(m)(1)." And in an action against a remote indorser, though there be several indorsements between that of the payee and the defendant, the plaintiff may declare as on an immediate indorsement by the payee to the defendant, and by him to the plaintiff, and need not notice the intermediate indersements (n)(2). But if a declaration state that A. drew his bill on the defendant, who accepted the same; that A. then indorsed the bill to B., who delivered it to the plaintiff, the declaration will be And if a declaration on a bill of exchange, at the suit of an indorsee against acceptor, state that it was indorsed to the plaintiffs, as the surviving assignees of A. B. after his bankruptcy, the plaintiffs must prove that the bill was indorsed to them after the bankruptcy, and in their capacity

> It has been decided, that in an action against the indorser of a bill of exchange, in which the declaration stated several prior indorsements, it is not necessary to prove any indorsements on the bill prior to the defendant's, though it is otherwise in an action against the acceptor; consequently, where a remote indorser is sued, there will be no risk in stating all the prior in-

> > 551, &c.

(h) Brown r. Harraden, 4 T. R. 149, (Chit.

j. 470); see ante, 241, 242. (i) Anon. 12 Mod. 345, (Chit. j. 212); Pen-

of surviving assignees (p).

cock v. Rhodes, Dougl. 633, (Chit j. 408); Anon. Holt, 296; Kyd, 206.

(k) Ante, 230, note (a), 231.
(l) And see Stein v. Yglesias, 1 C., M. & R. 565; 1 Gale, 98, S. C.

(m) And see rule T. T. 1 Will. 4, ante, P. 29, (Chit. j. 1351).

(n) Chaters v. Bell, 4 Esp. Rep. 211, (Chit. j. 636); Bayl. 5th edit. 396; and per Bayley, J. in Williamson v. Johnson, 2 D. & R. 283;

1 Bar. & Cres. 146, (Chit. j. 1163). (o) Cunliffe r. Whitehead, 3 Bing. N. C. 828; 6 Dowl. 63; 5 Scott, 31, S. C.

(p) Bernasconi v. Duke of Argyle, 3 Car. &

(1) { Where, in an action against the acceptor of a bill, indersed by the payee to the plaintiff, the allegation of the indorsement stated neither time nor place, the declaration was held bad on special demurrer. Potter v. Ryan, 1 Smythe's Rep. 22.

But the words "for value received," in setting forth a promissory note in a declaration are words of description, and not an averment, and therefore, if the words are not in the note, the variance is fatal. Baxton v. Johnson, 10 John. Rep. 418.

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⁽²⁾ It is not necessary to state the indorsement to be "for value received;" and if so stated, the averment is surplusage, and need not be proved. Wilson r. Codman's Ex., 3 Cranch, 193. But see Welch v. Lindo, 7 Cranch's Rep. 159. An indersement is prima facie evidence of being made for the full value. Riddle r. Mandeville, 5 Cranch, 322. But it is otherwise if being made for the full value. Riddle v. Mandeville, 5 Cranch, 322. But it is otherwise if made "without recourse." Welch v. Lindo. And if the indorsement be restrictive as to a right against the indorser, as if it be "without recourse" to the indorser, it is not necessary, in a declaration against the maker by the indersee, to state such restriction. Wilson v. Codman's Ex.

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dorsements in the declaration(q). And in another case it was held, that in IV. Of the an action by the indorsee against the acceptor, where several indorsements Declarahad taken place, and which were laid in the declaration, and are consequently necessary to be proved in general, yet if the defendant apply for time to 3. How Plaintiff the holder and offer terms, it is an admission of the holder's title, and a wai-became ver of proof of all the indorsements except the first(r). On an indorsement Party and for less than the full sum mentioned in the bill or note, the plaintiff must de-entitled to scribe the same accordingly, and shew that the residue was paid(s). In de-ment. scribing the indorsement, it is not advisable to allege that the indorser's hand-writing was thereunto subscribed; and, formerly, if that allegation was inserted, and the bill appeared to have been indorsed by an agent, the variance was considered fatal(t); though now it would probably be rejected as surplusage(u). We have already seen what will be a variance in the name of a party to the bill(x).

If a note payable to bearer be declared on as indorsed, the indorsement must be proved (y)(1); but if the declaration state that the indorsement was after the making of the bill, and it appear in evidence to have been before (z), or that it was before the bill was due, and it appear in evidence to have been made afterwards, this not a material *variance(a)(2). It is not necessary [*573] to allege, as part of the plaintiff's title, that the bill, &c. was delivered to him, as the allegation, that the bill was payable to the payee, or "that an indorsement was made" includes it(b); nor is it necessary to aver notice of an indorsement(c). A statement that the bill was delivered to the acceptor,

instead of the indorsee, though untechnical, is not demurrable (d).

In an action against the acceptor on a bill by a plaintiff who became a party supra protest for the honour of the second indorser, it was held not necessary to state in the declaration, that the party to whom the payment was made by plaintiff was the party having title to the bill; the declaration stating "that the plaintiff, according to the usage and custom of merchants, paid the bill, under protest(e)(3)."

If a party sue as indorsee of or by transfer from the crown, it suffices to

allege and prove a sign manual from the King(f).

Fourthly, It is also necessary to shew the defendant's breach of contract. 4. Defend-

- (q) Critchlow v. Parry, 2 Campb. 182, (Ch. j. 774).
- (r) Bosanquet v. Anderson, 6 Esp. Rep. 43,
- (Chit. j. 726).
 (s) Hawkins v. Gardner, 12 Mod. 213.
- (t) Lavy v. Wilson, 5 Esp. Rep. 180, (Chit. j. 703).
 - (u) Ante, 570, note (l). (x) Ante, 560 to 562.
- (y) Waynam v. Bend, 1 Campb. 175, (Chit. j. 746); and see Manning's Index, 75.
- (2) Snaith v. Mingay, 1 Maule & S. 92, (Chit. j. 880); Russell v. Langstaffe, Dougl.
- (a) Young v. Wright, 1 Campb. 139, (Chit. j. 774).
- (b) Churchill v. Gardner, 7 T. B. 596, Breach of (Chit. j. 605); Smith v. M'Clure, 5 East, 477; Contract.
 2 Smith, 43, (Chit. j. 699). But the forms given by rule T. T. 1 Will. 4, state a delivery to the payec. See ante, 553.
- (c) Reynolds v. Davies, 1 Bos. & Pul. 624, (Chit. j. 571). It will be seen, however, that this notice is alleged in the forms given by rule T. T. 1 Will. 4, ante, 533.
- (d) Smith v. M'Clure, 5 East, 477; 2 Smith, 43, (Chit. j. 699).
- (e) Cox v. Earle, 3 B. & Al. 430, (Chit. j.
- (f) Lambert v. Taylor, 4 Bar. & Cres. 138; 6 Dow. & Ry. 188, (Chit. j. 1248), where see form of declaration.

(2) A promissory note indersed long after it falls due, may be declared on as indersed when it was due. Parsons v. Parsons, 5 Cowen, 476.

(3) A mere agent, holding a check or note, may sue on it in his own name; and it does not lie with the defendant to object to the plaintiff's title. Mauran v. Lamb, 7 Cowen, 174.

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⁽¹⁾ The indersement of a note, payable to bearer, makes the inderser liable, as upon a new bill to bearer. Eccles v. Ballard, 2 M'Cord, 388. Where a note is made by A. payable to B., and indersed by C. at the time it is made, C. becomes a promissor on the note, and may be declared against as such. Baker v. Briggs, 8 Pick. 122.

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ant's Breach of Contract.

IV. Of the If a bill be accepted, payable when or if a certain event shall take place, it must be shewn that such event has occurred (g). And if the bill be payable at or after usances, their duration must be averred(h). If a note be paya-4. Defend- ble on or after demand, it is advisable, in an action against the maker, to allege a demand, though in strictness the bringing of the action is in itself a sufficient demand(i). In an action against an acceptor supra protest, it should be averred that the bill was presented at maturity to the original drawee(k). An averment of presentment of a bill on a Sunday under a videlicet is not bad; and it was in the same case considered that it would have been sufficient to have stated, that "when the bill became due and payable, according to the tenor and effect thereof," it was presented, without stating any day(l). And if the bill was not presented at its maturity, because it was impossible to present it, the cause of such impossibility need not be stated,

[*574] *and the usual averment of the bill having been duly presented will suffice(m).

As Acceptor or Maker.

Presentment for Payment.

In an action against the acceptor of a bill or maker of a note, payable generally, and who are respectively primarily liable, it is not necessary to aver or prove any presentment for payment, the action itself being a sufficient demand, and the common breach at the end of the money counts sufficing (n); and we have seen, that unless the bill be accepted payable at a particular place "only, and not elsewhere," pursuant to the 1 & 2 Geo. 4, c. 78, no averment of a presentment there is necessary, whether it be drawn payable at that place or not; though such averment would always suffice (o). But in all cases where a note is in the body of it made payable at a particular place, or where a bill has been accepted specially according to the statute, a presentment there and refusal, or some discharge dispensing with the pre-

(g) Ante, 300, 301. (h) Bayl 5th edit. 397.

(i) See post, Ch. IV. as to the statute of limitations; but see Capp v. Lancaster, Cro. Eliz. 548; Rumball v. Ball, 10 Mod. 38, (Chit.

j. 231).

In Teague v. Morse, 2 M. & W. 599, which was an action on a promissory note, dated 12th March, 1836, whereby the defendant promised to pay the plaintiff 301. 13s. 64. as follows: viz. 21. on the 12th April then next, the further sum of 21. on the 12th day of each and every succeeding month afterwards until the whole should be paid, and that in case of default in payment of any one of the instalments then the defendant promised to pay to the plaintiff, or order, on demand the sum of 301. 13s. 6d., or so much thereof as should remain unpaid. And the declaration averred that default was made in payment of the first two instalments, whereby, according to the tenor and effect of the note, the defendant became liable to pay to the plaintiff the said sum of 301. 13s. 6d., to which the defendant demurred generally on the ground that, by default in payment of the instalments, the note did not become payable without a de-mand of the amount of it. The question as to the necessity of a previous demand was not decided, the demurrer being held too large, as there was clearly a debt as to the two instalments.

(k) Williams v. Germaine, ante, 350,

note (a). (1) Bynner c. Russell, I Bing. Rep. 23; 7 Moore, 286, (Chit. j. 1151). And in Patience v. Townley, 2 Smith, 224, (Chit. j. 714), Lord Ellenborough, C. J. said, that the words "duly presented in" mean presented according to the custom of merchants, which necessarily implies an exception in favour of those unavoidable accidents which must prevent the parties from doing it within the regular time.

(m) Patience v. Townley, 2 Smith, 224, (Chit. j. 714).

(a) Frampton r. Coulson, 1 Wils. 33.

(v) Ante, 151 to 154, 359 to 365. Lyon v. Walls, 2 Moore & S. 736; 9 Bing. 660, S. C. Plaintiff declared on a bill of exchange averring a general acceptance. Defendant pleaded that the acceptance was a qualified acceptance, and that he did, according to the form of the statute in such case made and provided, in his said acceptance express that he accepted the same payable at a certain place only, to wit, at No. 32, Albany Street, Regent's Park, that is to say and not otherwise or elsewhere. The plaintiff replied that the said acceptance was a general acceptance, as in the fourth count set forth, "and that the defendant did not, in his said acceptance, express that he accepted the said bill payable at a certain place only, in manner and form as the defendant had in his plea alleged;" held, ou special demurrer, that the traverse sufficiently incorporated the particular mode of acceptance alleged in the plea, and was therefore good. And semble, that the defendant should have negatived in his plea a presentment of the bill at the place at which it was alleged to have been made specially payable.

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sentment, must be averred in an action against the acceptor of the one and IV. Of the the maker of the other (p)(1); and an allegation that the makers of the note, Declarapayable in the body of it at a particular house, became insolvent, and ceased and wholly declined and refused then and thenceforth to pay at the place 4. Defendspecified any of their notes, does not shew a sufficient discharge or excuse ant's Brench of for the want of a presentment of the particular note declared on (q)(2).

Contract.

It is sufficient, however, in these cases, if the declaration allege the presentment to have been made to the persons at whose house the bill was made payable, "according to the tenor and effect of the bill, and the acceptance thereof"(r). But if a bill be stated to have been accepted payable by certain persons, at a particular place, it has been holden, in an action against the drawer, that an averment of a presentment to those persons generally, without saying at what place, is sufficient(s). And so if the bill be payable at a banker's or other persons, it need not be alleged that it was presented to the bankers or other persons (t); and where a bill has been accepted payable at the house of A. B. it suffices to aver a presentment there, without alleging a presentment to A. B. or to the acceptor(u); or it will be sufficient to aver that the bill was in due manner presented to A. B., without saying at the house(x); and *although a declaration allege a presentment by a per- [*575] son specified, it is sufficient to prove a presentment by another (y). It suffices in an action against an acceptor, to aver a presentment at a particular place, without shewing that payment was refused there, it being sufficient to allege the non-payment at the conclusion of the declaration(z). Nor is it necessary to aver, that the acceptor of the bill, or maker of the note, had notice of the non-payment at the particular place (a).

(p) Id. ibid.

(q) Bowes r. Howe, 5 Taunt. 30, (Chit. j. 892); ante, 355, note (p)

(r) Huffan v. Ellis, 3 Taunt. 415, (Chit. j.

(s) Ambrose v. Hopwood, 2 Taunt. 61, (Chit. j. 772).

(t) Giles v. Brown, 2 Chit. Rep. 300; 6 M.

& S. 75, (Chit. j. 982).

(u) Hawkey v. Borwick, 1 Younge & J. 376; 4 Bing. 135; 12 Moore, 478, (Chit. j. 478). 1833); De Bergareche v. Pillin, 3 Bing. 476, (Chit. j 1292); Giles r. Brown, 2 Chit. Rep. 300; 6 M. & S. 75, (Chit. j. 982).

(x) Bush r. Kinnear, 6 Mau. & Sel. 210.

In assumpsit by indorsee against indorser of a bill of exchange, plaintiff declared that A. B. accepted, and by that acceptance appointed the money in the bill specified to be paid at the

house of G. and Co., and averred that the bill was in due manner presented to G. and Co. and to A. B. for payment, and that G. and Co. and A. B. were then and there required to pay the same to plaintiff, according to the tenor and effect of the bill, and acceptance, and indorsement: upon special deniurrer assigning for cause that it did not appear that the bill was presented at the house, it was held that the averment was sufficient.

(y) Boehm v. Campbell, 1 Gow, 55. (Chit. j. 1045).

(2) Butterworth v. Lord Despenser, 3 Maule & S. 150, (Chit. j. 913); and Benson v. White, 4 Dow, 334; 6 Maule & S. 73, (Chit. j.

(a) Id. ibid.; Peace r. Pembertley, 3 Campb. 261, (Chit. j. 870).

(2) In an action against the maker of a note, promising to pay at a particular place, it is not necessary that the declaration should allege a demand at the time and place appointed for payment. Carley v. Vance, 17 Mass. 389. Mulherrin v. Hannum, 2 Yerger's Rep. 81.

The same general principle is recognized in Caldwell v. Cassidy, 8 Cowen, 271; but where a

note is payable on demand at a particular place, it seems, that a demand at such place should be made before suit. Id.

As against the maker of a note or drawer of a bill payable at a particular place, it seems, that no averment in the declaration, or proof at the trial, of a demand of payment at the place designated, is necessary; but as against the indorser, it is, in general, otherwise. Bank of the United States v. Smith, 11 Wheat. 171.

If a promissory note be payable at a particular place, the declaration in an action against the maker, must aver a demand of payment at that place, and the averment must be proved at the trial. Palmer et ux. v. Hughes, 1 Black. Rep. 328.

^{(1) \} Where a note or hill is payable at a particular place, it is not necessary to aver a presentment at such place: it is sufficient to state a general presentment to the drawee. Ledlie v. Lockhart, Irish Law Rep. 89. But where there was no averment of presentment, the declaration was held bad on general demurrer. Potter v. Ryan 1 Smythe, 22. }

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IV. Of the Declaration.

As Drawer or Indorser.

Where the declaration is against the drawer or indorser of a bill, or the indorser of a note, as their contract is only conditional to pay if the acceptor of the one or maker of the other do not, it is necessary to aver a presentment for payment to the drawee of the bill or maker of the note, on the day it became due(b)(1), and that he refused to pay(c)(2) or could not be found

Presentment for Payment.

(b) Mercer v. Southwell, 2 Show. 180, j. 416); Lundie v. Robertson, 7 East, 231, (Chit. j. 724).

(c) Rushton v. Aspinall, Dougl. 679, (Chit.

In an action on a note payable at the Commercial Bank of Louisville, the breach laid was, that the defendant, although often requested, had not paid, &c.: Held, on general demurrer, that the breach was too general. Gilly v. Springer, id 257.

In debt on promissory note, by indorsee against maker, the declaration states the note as one made negotiable at the bank of V., and avers, that the note at maturity was duly presented at the bank, and protested for non-payment; the note offered in evidence, was made negotiable at bank; and there was no proof that it was presented at bank for payment: Held, a note made negotiable at bank, is not therefore payable there also, and so the averment of presentation at ank was wholly immaterial, and need not be proved. Burrett r. Wills, 4 Leigh's Rep. 114.

Quere, Whether in the case of a note made payable at a particular bank, it is necessary in an action against the maker, to aver and prove due presentation of the note for payment at the bank? 4 Johns Rep. 183. 17 ld. 248. 11 Wheat. 171. Ibid.

(1) A declaration in assumpsit on a bill of exchange, by holder against indorser, alleges that "when the bill became due, and payable according to the tenor and effect thereof, to wit, on the 27th Dec. 1816, at the bank of Marietta, in Ohio," (where it was payable,) it was presented for payment and dishonoured; the 27th Dec. was not the third but the fourth day after the time appointed for the payment of the bill. Held, that as it was averred that the bill was presented when it became due and payable according to its tenor and effect, and the date of the presentment was stated under a scilicet, the date so stated was not material, and the plaintiff might have proved presentment on the third day of grace. Jackson's Adm'x v. Henderson, &c., 3 Leigh's Rep. 197.

It seems that when a bill is made payable at a place or bank, at which there is a special established usage, that bills there payable shall be presented on the fourth and not on the third day of grace, such special usage must be alleged in the declaration upon such bill, otherwise proof of presentation on the fourth day of grace is not admissible. Ibid.

In assumpsit on a bill of exchange, drawn in Virginia payable at the bank of Marietta, Ohio, the declaration counting on the general law-merchant, and the general issue being joined: Held, that as the general law-merchant requires presentation on the third day of grace, proof of presentation on the fourth day of grace does not support the issue on the plaintiff's part. Ibid.

(2) But where in an action by an indorsee against his immediate indorser, there was in the declaration no averment of a demand on the maker on the day when the note became due, but only an averment, "although often requested," &c. it was held, that after verdict the declaration was sufficient. Leffingwell v. White, 1 John. Cas. 99. In an action against the drawer of an order by the payee, it must be alleged and proved that the order was presented and not accepted or that it was accepted and not paid; and that the defendant had notice: merely stating that the drawee, "although often requested to pay the plaintiff, had hitherto neglected and re-fused," is not a sufficient allegation. Treadway v. Nicks, 3 M'Cord, 195.

Where notice is averred to have been actually given of the dishonour of a bill, it must be proved as laid; and therefore if in fact it has not been given, the declaration should state that due diligence had been used to give notice, and assign the roason why it was not done. Blukely r. Grant, 6 Mass. Rep. 386. But see Stewart r. Eden, 2 Caines' Rep. 121. See Price r. Young, 1 M'Cord, 339. Williams r. Bank of the United States, 2 Peters, 96, 101. Where the declaration contains an averment of due notice of the dishonour of the bill, legal notice must be prov-Evidence that the holder had used due diligence to give notice, without effect, will not sustain the declaration. Hill v. Varrell, 3 Greenl. 233. And if no demand is made of the maker, and a sufficient excuse exist, that excuse, and not an averment of due presentment should be stated in the declaration. Semb. Bond v. Farnham, 5 Mass Rep. 170.

If notice of non-acceptance be duly averred in an action against the drawer, but no protest is averred, after verdict it is sufficient, for the law will presume it to be a regular notice by protest. Lawes on Assumpsit, 364, note. And it is not necessary or proper to set forth in the declaration a presentment or protest for non-payment of a bill, where there is an averment of a previous presentinent for acceptance and refusal, and due notice thereof given; and if averred, it will be rejected as surplusage. Mason v. Franklin, 3 John. Rep. 202, note. If the indorser of a note die before it becomes due, in an action against his executor by the holder, the declaration should allege the promise to pay, to be by the executor, and not by the testator, otherwise it will be a fatal variance. Stewart v. Eden, 2 Caines' Rep. 121.

Where a declaration by indorsee against indorser, avers demand and notice in the usual form. it is sufficient if the plaintiff proves a state of facts, which dispenses with actual demand, &c. and shows due diligence, &c. Williams r. Mathews, 3 Cowen, 252.

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upon diligent search; and such averment should correspond with the fact; IV. Of the and it has been decided, that if a presentment in fact be averred, evidence Declarathat the party could not be found will be inadmissible (d). But in a later case, in an action on a bill drawn upon "P. P. No. 6, Budge Row," and 4. Defendaccepted by him, an averment that the bill when due was presented and shewn Breach of to P. P. for payment, was held to be supported by proof that the holder Contract. went to No. 6, Budge Row, to present it, but found the house shut up, and As Drawer no one there(e). And where the drawee or maker cannot be found, it is or Indorssufficient to aver generally, that he was not found, without stating that any er. inquiry was made after him, though it is now more usual to aver that diligent search was made, and which must, as we have seen, be proved(f). seems unnecessary to state the reason why the bill was not presented exactly at maturity, if by the law it need not have been so, provided the declaration contain the usual or similar averment that the bill "was duly presented. according to the custom of merchants," and under this averment, evidence of the impossibility of presenting at the time of the maturity of the bill may be given(g). When the drawee or maker has merely removed, and not absconded(h), a presentment must be alleged(i). But it need not be stated, that the bankers did not pay(k), nor, if the bill be payable at a banker's, need it be stated that it was presented to the bankers (l). In an action on a foreign bill drawn in sets, it is not necessary, though usual, to aver the nonpayment of the other parts of the bill(m).

With respect to the place of presentment, if a bill be drawn payable at a particular place, and accepted so payable, or, it seems, if merely *accepted [*576] payable at a particular place, and such acceptance appear on the face of the declaration, it will be necessary to aver as well as prove, a presentment at that particular place, in order to charge the drawer or indorser; although,

(d) Leeson v. Piggott, Sittings after Trin. Term, 1788, (Chit. j 446); Bayl. 5th ed. 401, note 145; and Smith r. Bellamy, 2 Stark. Rep. 228, (Chit. j. 1005), acc.; but see Boulager v. Talleyrand, 2 Esp. Rep. 550, (Chit. j. 585); Hine v. Allely, 4 B. & Ad. 604, next note.

(e) Hine v. Allely, 4 Bar. & Adol. 624; 1

Nev. & Man. 433, S. C. (f) Firth v. Thrush, S Bar. & Cres. 387; 2 Man. & Ry. 359; Dans. & Ll. 151, (Chit. j. 1898). But this is not absolutely necessary, id. ibid.

(g) Patience r. Townley, 2 Smith, 228, 224, (Chit. j. 714); and see Firth v. Thrush, 8 Bar. & Cres. 387.

(h) Starkie r. Cheeseman, Carth. 509, (Chit. j. 209).

(i) Parker r. Gordon, 7 East, 385; 3 Smith, 858; 6 Esp. 41, (Chit. j. 727).

(k) Giles r. Brown, 6 Maule & S. 73; 2 Chit. Rep. 800, (Chit. j. 982).

(l) Id. ibid. (m) Carth. 509; Ld. Raym. 810; Salk.

Where the indorsee of a bill, in an action against the indorser, relies on the want of funds of the drawer in the hands of the drawee, instead of due notice, it is necessary for him to aver that fact in the declaration. Frazier v. Harris, 2 Litt. 185.

130; Stra. 214.

Assumpsit by the payee against the drawer of a bank-check payable 15 days after date, the bank having refused payment; the declaration averred a presentment of the check for payment after it had become due, according to the custom of merchants; but did not state the day of presentment: held, that the averment was insufficient on general demurrer. Glen et al. r. Noble et al., 1 Blackf. 104.

Indersee against inderser of a promissory note dated 15th October, 1818, payable at the N. Bank, 12 Months after date. Averment of presentment at the bank to the cashier and demand of payment on the 18th of October, 1819, and that neither makers nor any one else on their be-balf then and there paid, is, especially after verdict, sufficient allegation that makers did not pay before action brought. Crenshaw v. M'Kiernan, 1 Miner's Alabama Rep. 295.

In an action brought by the payoe of an order or bill of exchange against the drawer, the statement of demand must substantially aver, that notice in due season was given to the drawer, of the non-acceptance or non-payment of the bill or order. Ribble et al. v. Jefferson, 5 Halsted's

Rep. 189.

Declaration by assignee against assignor of a bond payable by instulments, avers demand and 1892 and after the 11th day of February, 1822, when the day of February, 1822, and after the 11th day of February, 1822, when the last instalment was due, good after verdict. Dupuy v. Gray, 1 Minor's Alabama Rep. 357.

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ant's Breach of Contract. As Draw-

IV. Of the as against the acceptor, such acceptance amount only to a general acceptance, since the 1 & 2 Geo. 4, c. 78 (n). But inasmuch as in declaring against a drawer or indorser it is unnecessary to aver an acceptance by the 4. Defend- drawee, if such averment be omitted, in a case where the bill has been accepted payable at a particular place, it will suffice to allege a general presentment, and to prove a presentment according to the terms of the acceptance although a statement of the acceptance would render a corresponding averment of presentment necessary (o). And, it should seem, that in either case, a general allegation of presentment would after verdict be taken to mean a presentment according to the tenor and effect of the bill(p). We have seen(q), that promissory notes are not affected by the 1 & 2 Geo. 4, c. 78, and, therefore, when made payable in the body thereof at a particular place, an averment and proof of presentment at such place will still be necessary, as well against the maker as the indorser.

Notice of

In an action against the drawer or indorser of a bill, or the indorser of a Dishonour. note, it is also a most material averment, that the defendant had notice of the dishonour of the bill, or some excuse must be alleged for the neglect to give such notice, and an error in this respect will be fatal even after verdict(r). But it is not necessary to state the facts justifying or excusing a delay in giving notice, it suffices to state that the defendant had due notice, and all the facts may be given in evidence in proof of that allegation(s); though if no notice whatever has been given to the defendant before action brought, then it seems still necessary to aver in the declaration and prove that diligent inquiry was made after the defendant, and that he had gone away or could not In the case of a foreign bill, a protest also should be stated(u); and the allegation that the plaintiff protested, or caused to be protested, *would be improper(x); and it was formerly considered, that where the plaintiff proceeds for interest, &c. against the drawer or indorser of a bill, a protest must also be stated even in the case of an inland bill (y), but that doc-

Protest.

(n) Gibb v. Mather, 8 Bing. 214, 220, 221; 1 Moore & S. 387; 2 C. & J. 254; 10 Law J. 87. On error in the Exchequer Chamber,

see Parks v. Edge, 1 C. & M. 429, next note.
(o) Parks v. Edge, 1 C. & M. 429; 3 Tyrw.
364; 1 Dowl. P. C. 643; nom. Parker v. Ade.

(p) Lyon v. Holt, 5 M. & W. 250.

(q) Ante, 153, 154, 360, et seq. (r) Rushton v. Aspinall, Dougl. 679, (Chit. j. 416; Lundie r. Robertson, 7 East, 231, (Chit. j. 724.)

(s) Firth v. Thrush, 8 Bar. & Cres. 387; 2 Man. & Ry. 359; Dans. & Ll. 151, (Chit. j. 1898); but see Harris v. Richardson, 4 Car. & P. 522.

(t) Harris v. Richardson, 4 Car. & P. 522, (Chit. j. 1533). And see Bayl. 5th edit. 466, 467; and Corey v. Smith, 3 B. & Ald. 619.

Harris v. Richardson. Assumpsit on a bill of exchange. The declaration alleged notice to defendant of the non-payment. The witness stated that he went for the purpose of giving such notice, to No. 5, in the Oval, at Kenning ton, where he saw a female servant, and told her that he wanted Mr. Richardson, and was come to give him notice of the dishonour of a bill. The servant replied, that Mr. Richardson had left, and she believed he had failed in business; but if he, the witness, wanted to know any thing more, he must inquire of a Mr. Pledge, who lived in the neighbourhood. The counsel for the defendant having objected to thise vidence, as insufficient to prove the declaration, the counsel for the plaintiff cited Crosse r. Smith, 1 Maule & S. 545, and contended, that anything which amounted to an excuse, by shewing that the party had used due diligence, was sufficient to sustain the allegation.

Lord Tenterden, C. J. "I have always had considerable doubt about that; when notice in such a case is proved to have been given before action brought, I have thought it sufficient, although it was not given at the proper time; but here you do not prove that any notice has been given at all. In Crosse v. Smith, the parties went to the counting-house. The only question is, whether this evidence will sustain the allegation; I am of opinion that it will not; and therefore I must nonsuit the plaintiff; but I will give you leave to move to enter a verdict for the plaintiff."

Nonsuit, with leave to move.-But no motion was made.

(u) Gale v. Walsh, 5 T. R. 239, (Chit. j. 506).

(x) Witherley v. Sarsfield, 1 Show. 127, (Chit. j. 173).

(y) Boulager v. Talleyrand, 2 Esp. Rep. 550.

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trine has been over-ruled (z). And the neglect to state the protest of a for- IV. Of the eign bill can only be taken advantage of on special demurrer(a).

If there are any circumstances in the case dispensing with presentment or Dispensaprotest, or notice of the dishonour, as if the drawer countermanded the pay- tion with Notice, &c. ment, or had no effects in the hands of the drawee, &c. The declaration must state those circumstances (b). In an action against a drawer or indorser of a bill, and the indorser of a note, their liabilities and promises are stated to have been to pay on request, and not according to the tenor and effect of

The other points relative to the declarations on bills, notes, and checks, will be found subjoined to the Precedents in the TREATISE on PLEAD-ING(c).

*With respect to the common counts, although it is not usual, when there Secondly, is a bill or note, to rely on them alone in pleading, yet they will in many on the cases supply the omission or defect of the count on the instrument itself; and Counts. the plaintiff will be at liberty to go into evidence of the consideration for [*578] which he received it, and may recover on the common counts, if adapted to

- (z) Windle v. Andrew, 2 B. & Al. 696, (Chit. j. 1062).
- (a) Solomons v. Staveley, 3 Dougl. 298, and cited 2 Dougl. 684, note; 1 Salk. 131; 1
- (b) See form, in Legge v. Thorpe, 12 East, 171; 2 Campb. 310, (Chit. j. 783). And see generally as to what amounts to a dispensation with notice, ante, 451, 481.

Burgh v. Legge, 5 Mee. & Wels. 418. Assumpsit on two bills of exchange by indorsee against his immediate indorser, averring notice of dishonour, to which was added a count upon an account stated. The defendant by his plea traversed the notice of dishonour of the bills as alleged. The plaintiff, in order to support that issue, proved that on the day when the first bill became due the defendant called upon him and told him that he knew neither of the bills would be paid; that it was no use sending him a twopenny post letter the next day to give him notice, as it was not worth the money, and that he would send the plaintiff money in part payment of the bills on a future day: held, that this was not evidence of notice of dishonour, but of a dispensation with it, and that it ought to have been so alleged in the declaration: held also, that it was not sufficient evidence to support the count upon the account stated.

Per Parke, B. " As to the variance between the allegation in the special counts and the evidence, it seems to me to be perfectly clear, although the point has not been hitherto expressly decided, that, under the allegation that a party has received notice of the dishonour of a bill, after the dishonour has taken place, an actual notice to that effect must be proved; and, that shewing the party's knowledge of the fact that it will not be paid at maturity is not sufficient. There must be proof of a notice given from some party entitled to call for payment of the bill and conveying in its terms intelligence of the presentment, dishonour, and parties to be held liable in consequence. That is the true meaning of the word 'notice' when used in de-

clarations of this kind, and the mere knowledge of a party is not enough. Now, in the present case, there is no proof of any such notice, but rather the contrary; for the defendant applies to the plaintiff for more discount, and says the other bills would not be paid; and as to notice, that it would not be worth while to give it, for the drawer had since become bankrupt. The meaning of this rather is, that the plaintiff did not send notice of the dishonour, than the contrary. In the case of Cory v. Scott, 3 Bar. & Ald. 621, which has been referred to, there seems to have been a little discrepancy of opinion between the judges whose names have been mentioned,-one of them considering the allegation not sufficient, and the other inclining to a contrary opinion: although it is somewhat re-markable that Bayley, J. himself, in his Treatise on Bills of Exchange, p. 407, states that he and Holroyd, J. agreed in that case that the evidence would not be sufficient, and intimates a rather strong opinion that the allegation of notice must be proved; and that if, either from want of assets on the part of the drawer, or any other cause, it should become unnecessary, the fact should be so stated. For my part I am not at all taken by surprise by this question. I always thought, that if presentment or notice was to be excused on the ground of want of effects, &c. that fact ought to be stated in the declaration. Reason points out, that where the fact of notice is averred it must be proved; and so I have always understood it. I was of opinion at the trial, and think so still, that, although the evidence adduced did not amount to proof of notice having been actually given, it was good evidence of a dispensation with notice: and on that point the plaintiff may, if he chooses, have a rule nisi for a new trial on payment of the costs of the day, and be allowed to amend his declaration by alleging a dispensation with notice, instead of the averment of notice having been actually given."

(c) Chitty on Pleading, 6th edit. vol. ii. 75

Declara-Secondly, on the Common

Counts.

IV. Of the such consideration, in case he cannot substantiate in evidence the facts necessary to support the count on the instrument, or such count should be defective(d)(1): taking care that the particulars of his demand state the consideration of the bill, &c.(e); and perhaps to notice such demand in the Thus where the plaintiff decounsel's opening of the case on the trial (f). clared on a promissory note, and on a quantum meruit(g) for work and labour, which was the consideration for which it was given, but the note not being duly stamped, and a verdict having been taken generally for the plaintiff, the defendant moved to enter a noneuit, the court said, "that although the note, not being stamped, could not be given in evidence, yet the plaintiff ought to have an opportunity of recovering on the other count," and accordingly a new trial was granted(h); and in Wilson v. Kennedy, i), where the same point was determined, Lord Kenyon said, that a promissory note is not like a bond, which merges the demand(k). It has also been decided, that it is not necessary to declare on a promissory note, but that in an action for money lent, the same may be given in evidence(1); for the statute of 3 & 4 Anne, c. 9, which enables the plaintiff to declare upon the note, is only a concurrent remedy: and where a bill was drawn on an agent, and made payable out of a particular fund, and consequently invalid, and the agent said he would pay it when he got money of the principal, it was held, that this was binding on him, and that if he got the money at any subsequent time, he was bound to pay the amount, and that it was recoverable as money had and received(m). Where, however, the party has been discharged by

> (d) See the older cases, in Selw. 9th edit. (d) See the older casea, in Selw. 9th edit. 368, 369; Manning's Ind. 75, 76; Thompson v. Morgan, 3 Campb. 101, 102, (Chit. j. 847); Tyte v. Jones, 1 East, 58, note (a); Alves v. Hodgson, 7 T. R. 241, (Chit. j. 458); Tatlock v. Harris, 3 T. R. 174, (Chit. j. 458); Claxton v. Swift, 2 Show. 501, (Chit. j. 167, 168); Kyd, 58, 197; Peake's Law of Evid. 219; Bul. N. P. 189; Payne v. Bacomb, Dougl. 651; Brown v. Watts, 1 Taunt. 353, (Chit. j. 753).

(e) Wade v. Beasley, 4 Esp. R. 7, (Chit. j. 685); Selw. 9th edit. 369.

(f) Paterson v. Zechariah, 1 Stark. R. 72. See the cases in Wells v. Girling, Gow Rep. 22, 28; 3 Moore, 79, (Chit. j. 1051).
(g) Since the rule T. T. 1 Will. 4, the

quantum meruit and quantum valebant counts are not used. See ante, 552, note (o); 556, note (h).

(h) Alves v. Hodgson, 7 T. R. 241, (Chit.

(a) Aives v. Hodgson, 7 T. K. 241, (Chit. 584); Tyte v. Jones, 1 East, 58, note (a); Wade v. Beasley, 4 Esp. Rep. 7, (Chit. j. 635).
(i) Wilson v. Kennedy, 1 Esp. Rep. 245, (Chit. j. 535); Tyte v. Jones, 1 East, 58; note (a); Selw. 9th edit. 368; Carter v. Palmer 128 mer, 12 Mod. 880, (Chit. j. 218).

(k) See also ante, 125. (l) Bul. N. P. 137, 138; Storey v. Atkins, 2 Stra. 719, (Chit. j. 960); Ex parte Mills, 2 Ves. jun. 308, (Chit. j. 498). (m) Stevens v. Hill, 5 Esp. Rep. 247, (Ch.

j. 716).

In an action on a promissory note, where, besides the special count, there are the usual money counts and for goods sold, &c. the plaintiff may elect on which count to give the note in evi-

dence. Burdick v. Green, 18 Johns. 14.

Bills of exchange by the law merchant and promissory notes by statute, may be declared on as specialties; but this privilege may be waived, and where there is a privity of contract, the holder may declare in the original consideration, and give the bill or note in evidence. Hanna r.

Pegg, 1 Blackf. 181.
Indorser v. Indorsec, with common counts and general issue to all. Though the counts on the indorsement be insufficient, the judgment shall be sustained by the verdict on the common counts. Brown & Parsons v. Tower, 1 Minor's Alabama Rep. 370.

A promissory note, void on the ground of being discounted by an incorporated company not authorized to carry on banking business, is nevertheless competent evidence, it seems, in support of the money counts. Utica Ins. Co. v. Bloodgood, 4 Wend. Rep. 657.

In New York, where the plaintiff includes the maker and indorser in one action, and declares pursuant to the statute on the money counts, he cannot give the note in evidence under such counts, unless he proves upon the trial, that a copy of the note was saved with the declaration. Steuben County Bank v. Stephens, 14 Wend. 243.

⁽¹⁾ A note made by the defendant, and payable to a third person or order, and by such their person indorsed to the plaintiff, may be given in evidence to support a count for money had and received. Tenney v. Sanborn, 5 New Hamp. Rep. 557.

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2.3 الله . ایک^{ون} the alteration(n) of the bill, &c. or by the laches of the holder, the plaintiff IV. Of the will not be allowed to go into evidence on the common counts(o)(1); and Declarawhere a promissory note has been given for money due from the defendant to the plaintiff, who declares thereon, together with the money counts, he Secondly, must produce the note on the trial, or prove that it has been destroyed before Common he can have recourse to the money counts, if it appear that the money so Counts. claimed was that for which the note was given (p)(2).

*On the other hand, when there are counts for work or goods, as well as on [*579] a bill or note, and the latter be dated after the work was done, or goods delivered, it will be presumed, till the contrary be proved, that the bill or note was given in payment for the prior debt, and the plaintiff will not be allowed to recover for both(q); and therefore where the plaintiff has two demands, viz. one on a bill or note, and another for any other debt, in order to recover both, he must be prepared with evidence to establish that they are distinct claims (r).

The forms of declaration on bills and notes given by the rule of T. T. 1 Will. 4(s), apply to both assumpsit and debt, and, therefore, a count by the payee against the acceptor of a bill, in the form there given, may well be

charged by alteration, ib.

(0) Long v. More, 8 Esp. Rep. 155, note; and see Bridges v. Berry, 8 Taunt. 180, (Chit.

j. 804); ante, 488, note (c).
(p) Dangerfield v. Wilby, 4 Esp. Rep. 159, (Chit. j. 648); ante, 267, note (c); Hadwen

(n) Ante, 191. When prior debt not disserged by alteration, ib.

(a) Long v. More, 8 Esp. Rep. 155, note;

(b) Long v. More, 8 Esp. Rep. 155, note;

(c) Long v. More, 8 Esp. Rep. 155, note;

(d) Long v. More, 176, 265 to 271.

(q) King v. Masters, 8 Car. & P. 847, (Ch. 1408).

(r) Id. ibid.

(s) Ante, 551 to 557.

(2) See Pintard v. Packington, 10 Johns. Rep. 104, and other cases collected in the note to p. 185. But a recovery cannot be had upon a note lost, and not destroyed, if it had been indorsed before it was lost. Pintard v. Packington. See Freeman v. Boynton, 7 Mass. Rep. 583. Anderson v. Robson, 2 Bay's Rep. 495. Usher's Ex. v. Guither, 2 Harr. & M'Hen. Rep. 475. Morgan v. Reintzel, 7 Cranch. 273.

A note not negotiable within the statute, expressed to be for value received, may be given in evidence between the original parties under the money counts, if there be proof of a sufficient consideration. Smith v. Smith, 2 John. Rep. 285. See Hughes v. Wheeler, 8 Cowen, 77. But if no consideration appear on the face of the note, it is otherwise. Saxton v. Johnson, 10 John. Rep. 418. And if such a note be transferred and an express promise be made to pay the assignee, he may maintain an action on the money counts. Surtees v. Hubbard, 4 Esp. Rep. 204. Mowry v. Todd, 12 Mass. Rep. 281. So between the assignor and his immediate assignee, an action on such counts may be maintained; but not by a remote assignee against the assignor, for there is no privity between them. Mandeville v. Biddle, 1 Cranch, 290, 298.

A bill of exchange may be given in evidence in an action by the payee against the maker under the money counts. Cruger v. Armstrong, 3 John. Cas. 5. Arnold v. Crane, 8 John. Rep. 79. So, in an action by the indorsee against the maker of a promissory note, the note itself may be given in evidence under the common counts. Wilde v. Fisher, 4 Pick. 421. A note payable to A. or bearer may be given in evidence in an action by the holder against the maker under the money counts. Pierce v. Crafts, 12 John. Rep. 90. So in an action by the indorsee against the maker. Ibid. And in this last case the court over-ruled the decision in Waynam v. Bend, 1 Campb. Rep. 175.

An indorsement "without recourse to the indorser" is not evidence in an action by the indorsec against the indorser under a count for money had and received. Welch v. Lindo, 7 Cranch, 159. But a general indorsement is.—State Bank v. Hurd, 12 Mass. Rep. 172.

A promissory note is legal evidence, in an action for money paid, if nothing appear on its face to render it void: though it may be void from circumstances dehors the note. Myers v. Irwin, 2 Serg. & Rawle, 368.

A promissory note against the defendant and another, is evidence, under the common counts, against the defendant alone. Williams v. Allen, 7 Cowen, 316.

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⁽¹⁾ If the drawer has been discharged from liability upon the bill by the laches of the holder, the latter cannot recover on a count for money had and received. Austin v. Rodman, 1 Hawks,

When a party is once exonerated, his liability cannot be revived without his assent. Even eyment by his friend, for his bonor, subjects him to no legal liability. Higgins r. Morrison's Ex'r, 4 Dana, 102. }

IV. Of the joined with indebitatus counts in debt, the declaration concluding in the usual form in debt $(t_1(1)$. tion.

When no Privily between Plaintiff and Defendant. the Bill or Note will not be Evidence in support of common Counts.

When the will prove a common Count.

The above rule does not in general apply when there is no privity between the plaintiff and defendant, as between the indorsee and the acceptor of a bill, and the indorsee and the maker of a note (u), between whom, if the plaintiff cannot succeed on the count upon the bill, and there be no express promise to pay the amount, the common counts are in general of no avail(v); and a promissory note is not admissible in evidence under the common counts in an action by an indorsee against the maker (x)(2). And a person who is merely a surety for the payment of a bill or note, is not liable on the common counts(y).

The instrument itself will, when duly stamped, in certain cases, be evi-Bill or note dence in support of the counts for money lent, paid, had and received, and that founded on an actual or supposed account stated; and those counts, when applicable, should therefore always be inserted in the declaration(z); but Lord Ellenborough expressed an opinion, that a promissory note is only evidence under the money counts as between the *original* parties to it(a)(3), unless it could be proved that the defendant had received value to the use of the plaintiff; a decision which appears to accord with the rule of law as to the assignment of choses in action, and may probably affect the authority of some of the decisions presently noticed (b). It should be observed, however, that the theory of a bill of exchange is, that it is an assignment to the payee of a debt due from the acceptor to the drawer, and the acceptance imports that the acceptor is a debtor to the drawer to the amount of the bill; hence it has been said, that the effect of the transactions is to appropriate, by an agreement between the parties, so much property to the account of . the holder (c).

Money lent. [*580]

The count for money lent, it is said, is proper in an action at the suit of the payee of a bill against the drawer, and in an action at the suit *of the payce of a note against the maker; they being evidence of money lent by the

(t) Compton v. Taylor, 4 M. & W. 138; Cloves v. Williams, 3 Bing. N. C. 868; 5 Scott, 68, S. C.

(u) Johnson v. Collings, 1 East, 98, (Chit. j. 633); Barlow v. Bishop, 1 Fast, 434, 435, (Chit. j. 687); Whitwell v. Bennett, 3 Bos. & Pul. 559, (Chit. j. 685); Houle v. Baxter, 3 East, 177, (Chit. j. 664).

(v) Waynam v. Bend, 1 Campb. 175, (Chit.

j. 746). (x) Bentley and another v. Northouse, Mood. & M. 66, (Chit. j. 1335).

(y) Wells v. Girling, 3 Moore, 79.

(2) See Wells v. Girling, Gow's Rep. 22, (Chit. j 1051), and cases there cited; 3 Moore, 79, S. C.

(a) Waynam v. Bend, 1 Campb. 175, (Chit. j. 746).

(b) See Lord Kenyon's observations in Johnson v. Collings, 1 East, 103, 104, (Chit. j. 633); and in Barlow v. Bishop, 1 East, 434, 435, (Ch.

j. 637). (c) Stark. on Evid. part iv. 302.

(2) The holder of a negotiable note transferred by delivery or indorsement may recover on it under the money counts. Olcott v. Rathbone, 5 Wend. Rep. 490.

In an action by indorsee against maker, a promissory note cannot be given in evidence under a count for money lent, but it may under a count for money had and received. Rockefeller v. Robison, 17 Wend. 206.

(3) { In an action against the maker, a promissory note may be given in evidence under the money counts, although the consideration of the note be work done. Smith v. Van Loan, 16 Wend. 659. }

^{(1) {} Where the common counts did not allege any indebtedness, in respect to the money lent, paid, advanced, &c. or any time and place, they were held bad. Potter v. Ryan, I Smythe,

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payee to the drawer of the one, and the maker of the other (d). It is also IV. Of the proper, in an action at the suit of an indorsee against his immediate indors- Declaraer(e). So a note in this form:—"3d December, 1751, then received of Mr. Harris, the sum of nineteen pounds, on behalf of my grandson, which I On the promise to be accountable for on demand; witness my hand, S. Huntbach." Common -the grandson being an infant, was holden to be evidence in support of the Counts. count for money lent (f); and that decision was recently recognised (g). an instrument engaging to pay " for value received," if void, because payable on a contingency, affords no evidence of money lent(h).

It has been said, that a bill or note is prima facie evidence of money paid Money by the holder to the use of the drawer of the one, and maker of the other(i); and that a bill, when accepted, is evidence of money paid by the holder to the use of the acceptor (k); and if an indorser has taken up a bill, he may, having failed in his first count against the acceptor, on account of a variance, recover under the count for money paid (l)(1). And an indorser who has been obliged to pay a part of a bill, may sue the acceptor for money paid, although the holder whom he paid still retains the bill(m). case, Eyre, C. J. said, "That the presumption of evidence which a bill of exchange affords, has no application to the assumpsit for money paid by the payee or holder of it, to the use of the acceptor; and that it must be a very special case which will support such an assumpsit(n)." And in the case of Cowley v. Dunlop(o), Lawrence, J. expressed an opinion that the drawer of a bill, who is obliged to take it up, after having negotiated it, is confined to his action on the bill to recover against the acceptor. If, however, the drawee, without having effects of the drawer in his hands, accept and pay the bill, without having it protested, he may recover the amount in an action for money paid to the use of the drawer(p), though it is usual to declare on the express or implied promise to provide for the bill at maturity,

- (d) Per Bayley, B. in Morgan v. Jones, 1 Tyrw. Rep. 29; i Cro. & Jer. 162, (Chit. j. 1515); per Lord Ellenborough, in Marshall v. Poole, 13 East, 100, (Chit. j. 809); Ex parte Mills, 2 Ves. jun. 295, (Chit. j. 498); Storey v. Atkins, 2 Stra. 725, (Chit. j. 960); Clerke v. Martin, Ld. Raym. 758, (Chit. j. 219); Carter v. Palmer, 12 Mod. 380, (Chit. j. 213); Grant v. Vaughan, 3 Burr. 1516, 1525, (Chit. j. 365); Smith r. Kendall, 6 T. R. 124, (Chit. j. 533); Carr v. Shaw, ante, 519, note (p). Scd ride Cary v. Gerrish, 4 Esp. Rep. 9, (Chit.
- (e) Kessebower r. Tims, K. B. 22 Geo. 3, Bayl. 5th edit. 359, note 60.
- (f) Harris r. Huntbach, 1 Burr. 873, (Chit. j. 344), cited in Morgan r. Jones, I Tyrw. Rep. 26; 1 Cro. & Jer. 162, (Chit. j. 1515).
- (g) Morgan v. Jones, 1 Tyrw. Rep. 29; 1 Cro. & Jer. 162, (Chit. j. 1515).

- (h) Id. ibid.
- (i) Bayl. 5th edit. 358.
 - (k) Id. ibid.
- (1) Le Sage v. Johnson, Forr. Rep. 23; Bayl. 5th edit. 358, S. C.
- (m) Pownall v. Ferrard, 6 Bar. & Cres. 439;
- 9 Dow. & Ry. 603, (Chit. j. 1327). (n) Gibson v. Minet, 1 H. Bla. 602, (Chit. j. 479); and see Howle r. Baxter, 3 East, 177, (Chit. j. 664).
- (o) Cowley v. Dunlop, 7 T. R. 572, (Chit. j. 598); Buckler v. Buttevant, 3 East, 72, (Ch. j. 659); Simmonds v. Parminter, 1 Wils. 186, (Chit. j. 321).
- (p) Smith v. Nissen, 1 T. R. 269, (Chit. j. 435); Cowley v. Dunlop, 7 T. R. 576, (Chit. j. 598); Simmonds v. Parminter, 1 Wils. 188, (Chit. j. 821). See Bleaden v. Charles, 5 M. & P. 14; ante, 81, note (i).

A former recovery for a previous payment is no bar to a second action for a subsequent payment, although the evidence in both actions is, in fact, the same, i. e. the proof of the liability of the defendant as indorser, the former recovery not having been upon the note, but for money

⁽¹⁾ An action for money paid, laid out and expended, will lie at the suit of an indorsee of a promissory note against an indorser, for money paid on a judgment obtained against the former by the holder of the note, although such payment is but in part satisfaction of the debt; and such suit will lie for every payment made in good faith, and with the bona fide intent of reducing or extinguishing the debt. Butler v. Wright, 2 Wend. Rep. 369.

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IV. Of the or to indemnify (q)(1). And if he has not actually paid the bill in money, but has only given security for it, or he has sustained any costs or damage, the declaration must be special (r).

Secondly, On the Common Count.

Money received. [*581]

*It has been holden, that a bill as well as a note(s), is prima facie evidence of money received by the drawer or maker to the use of the holder(t); and an acceptance is evidence of money received by the acceptor to the use of the drawer(u); but it was afterwards doubted whether the indorsee or holder can use the bill against the acceptor as evidence under this count(x); and afterwards it was decided, that in an action by the indorsee against the acceptor, the bill is not admissible in evidence of money received (y). And it seems now to be settled, that the plaintiff can in no case recover under this count, unless money has actually been received by the party sued, and for the use of the plaintiff (z)(2). If the indorsee of a bill of exchange, who has received a navy bill as a security to him till the bill of exchange is accepted, deposit such navy bill with the drawee, and the drawee receive the money upon it, he is answerable for the amount in an action for money had and received to the use of the indorsee, though he may have done nothing that amounts to an acceptance of the bill of exchange (a). In a late case, where the plaintiffs were creditors, and the defendants debtors to T. and Co., and by consent of all parties, an arrangement was made, that the defendants should pay to the plaintiffs the debt due from them to T. and Co., it was

(q) Simmonds v. Parminter, 1 Wils. 188,

(Chit. j. 321). (r) See Taylor v. Higgins, 3 East, 169, 172; Maxwell v. Jameson, 2 Bar. & Ald. 51.

(s) Vin. Ab. tit. Evidence, A. b. 36; Ford v. Hopkins, 1 Salk. 283, (Chit. j. 215).

(t) Bayl. 5th edit. 857, cites Grant v. Vaughnn, 8 Burr. 1516, (Chit. j. 365). Sed vide Waynam v. Bend, 1 Campb. 175, (Chit. j. 746). A bill drawn by the defendant, the captain of the plaintiff's ship, at Rio de Janeiro, on the plaintiff's agent for disbursements, and paid in London by the plaintiff's agent, is not evidence of money received by the defendant to the use of the plaintiff; Scott v. Miller,

8 Bing. N. C. 811; 5 Scott, 11, S. C.
(u) Thompson v. Morgan, 3 Campb. 101, (Chit. j. 947).

(x) Johnson v. Collings, 1 East, 104, (Chit. j. 688); Dimsdale v. Lanchester, 4 Esp. Rep. 201, (Chit. j. 684); Brown v. London, Freem. 14; 1 Ventr. 153, (Chit. j. 162); Israel v. Douglas, 1 H. Bla. 239; Eaglechild's case, Holt, C. N. P. 67, (Chit. j. 769). Vide Waynam v. Bend, 1 Campb. 175, (Chit. j. 746); but in Bayley on Bills, 5th edit. 358, it is laid down that the acceptance is evidence of money received by the acceptor to the use of the holder, and of money paid by the holder to the use of the acceptor, and an indorsement of money lent by the indorsee to the indorser.

(y) Eales v. Dicks. Mood. & M. 324, (Chit. j. 1428); Bayl. 5th edit. 592; and see note in Wharton v. Wulker, 4 Bar. & Cres. 163; 6 Dow. & Ry. 288, S. C.

(z) Barlow v. Bishop, 1 East, 434, 435; 3 Esp. Rep. 266, (Chit. j. 637); Waynam v. Bend, 1 Campb. 175, (Chit. j. 746).

(a) Pierson v. Dunlop, Cowp. 571, (Chit. j. 598); and see 5 Esp. Rep. 247; 14 East, 590.

(2) A bill or note is prima facie evidence under a count for money had and received against the drawer or indorser: but the presumption that the contents of the bill or note have been received by the party sued may be rebutted by circumstances, and a recovery cannot be had if it be proved that the mency was actually received by another. Page's Adm. v. Bank of Alexandria, 7 Wheat. 85.

Payment of a debt by the surety or indorser, by a conveyance of land, which is received at the time by the creditor, as payment, will support a count for money paid, laid out and expended, Ainslie v. Wilson, 7 Cowen, 662.

The indersee of the payee of a negotiable note, can maintain an action for money had and received, against the maker of the note, upon proof of the note and indersement. Penn r. Flack & Cooley, 3 Gill & Johns. Rep. 369.

⁽¹⁾ A, the payee of a note for 1500 dollars indorsed it to B., who indorsed it to a bank by whom it was protested for non-payment. Due notice was given to A. who afterwards paid the bank 300 dollars in part and promised to pay the residue. The bank sued B. as indorser and recovered judgment against him for the balance due on the note after deducting the 800 dollars. B. afterwards paid 880 dollars to the bank who continued in possession of the note which had not been fully paid. Held, that though B could not maintain an action on the note, as it had not been fully paid and was the property of the bank, yet that he might recover the 380 dollars of A., on a count for money paid, laid out and expended, &c. Butler v. Wright, 20 Johns. 367.

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held, that as the demand of T. and Co. on defendants was for money receiv- IV. Of the ed, the plaintiffs were entitled to recover on a count for money received Declaraagainst defendant(b). In an action for money received by the holder of a bill against a person who has received a sum of money from the acceptor to sat- Secondly, isfy it, any defence may be set up which could have been available, if the Common action had been brought against the acceptor himself(c).

Counts.

As to when the assignee of a debt or a third person can support an action for money received against the original debtor, a late case (d) establishes that the general rule of law is, that a debt cannot be assigned, and that the exception to that rule is, that where there is a defined and ascertained debt due from A. to B., and a debt to the same or a larger amount due from C. to A., and the three agree that C. shall be B.'s debtor instead of A., and C. promises to pay B., the latter may maintain an action against C.; but in such action it is incumbent on the plaintiff B. to shew that at the time when C. promised to pay B. there was an ascertained debt due from A. to B. and C.

Where a party has been induced to take up a bill under a misrepresentation of facts, it is not necessary, in an action for money received, to *recover back [*582] the money so paid, to shew that the bill was tendered back to the defendant(e).

According to the case of Israel v. Douglas, an acceptance is evidence of Account an account stated by the acceptor with the holder of the bill (f); and if there stated. be a variance in describing the bill in an action by drawer against acceptor, the former may recover on this count, although there be only one bill, and one item of account(g). But in a recent case, the court appears to have been of opinion, that a bill is not evidence of an account stated between the payee and the acceptor(h). And in an action by the indorsee against the acceptor of a bill, where it appeared that the defendant, on application to him for payment, answered, that the bill had been altered as to the acceptance, by being made payable at a particular place, that he never made it payable there, nor elsewhere than at his own house, and that he should take such steps as the law would authorise on the subject, that he had been prepared for payment, and the party might have the money by calling at his house; it was held, that this letter was no acknowledgment of a subsisting debt, so as to support a count on an account stated (i). A promissory note is evidence of money due from the maker to the payee on an account stated (k), espe-

(b) Wilson r. Coupland, 5 B. & Ald. 228. (Chit. j. 751).

(d) Fairlie r Denton, S Bar. & Cres 395;

3 Car. & P. 103. (e) Pope v. Wray, 4 Mec. & W. 451. The defendant supplied the plaintiff with goods to the amount of 711., the plaintiff authorized M. to pay the defendant that sum. M. paid the defendant 501., and applied the remaining 211. to his own use. M. also owed the defendant 241. and the defendant drew on him a bill for 451., the amount of these two sums, which he accepted, but which was dishonoured when due, and M. subsequently became bankrupt. The defendant applied to the plaintiff for payment of the amount of the bill, representing that it had all been left unpaid on the plaintiff's account by M.; and the plaintiff, on such representation, paid the 451., and took possession of the bill. In an action to recover back the

balance, 24/., as having been paid under a mis-(c) Redshaw v. Jackson, 1 Campb 372, representation of the facts, it was held, that the plaintiff was not bound to prove that before action brought he tendered back the bill to the defendant. See ante, 425, et seq., when money paid by mistake may be recovered back in this form of action.

(f) Israel r. Douglas, 1 Hen. Bla. 239. Sed vide Taylor v. Higgins, 3 East, 169; Whitwell v. Bennett, 3 Bos. & Pul. 559, (Chit. j 685); Johnson v. Collins, 1 East, 98, (Chit. j. 633); Fairlie v. Denton, S Bar. & Cres. 395; 3 Car. & P. 103, S. C.

(g) Highmore v. Primrose, 5 Maule & S. 65; 2 Chit. Rep. 333, (Chit. j. 956).

(h) Earle r. Bowman, 1 Bar. & Adol. 889.

(i) Calvert v. Baker, 4 Mee. & W. 417. (k) Storey v. Atkins, 2 Stra. 719, (Chit. j. 960); Bul. N. P. 136, 137; Harris v. Huntbach, 1 Burr. 373, (Chit. j. 344); Pawley v. Brown, cor. Abbott, J. Devon Lent Assizes, 1818.

Secondly, On the Common Counts.

IV. Of the cially if it be expressed to be "for value received (1)." And in an action by an indorsee against an indorser of a bill, evidence of an acknowledgment of an existing debt, and of a promise to pay, is admissible under this count(m); and proof of an I. O. U. stating a sum certain, is also evidence to the like effect(n). So an agreement between the plaintiff and the defendant for the payment of a certain sum by instalments, though without any consideration apparent on the face of the instrument, will be sufficient evidence of an accounting, where there is proof of money lent(o). If, therefore, the plaintiff declare on a bill of exchange with a count on an account stated, and in his particulars omitted to state that he intends to rely on both counts, he cannot, on failure of proof of the first count, resort to the second(p).

It is here proper to observe, that whenever the bill or note is not declared upon, it is not adduced in evidence as an instrument carrying with it the [*583 | privileges it would otherwise be entitled to, in respect of its *bearing internal evidence of a consideration; but it is merely used as a piece of paper or writing, to found an inference only, in support of the money counts, which inference may be rebutted and destroyed by contradictory evidence on the part of the defendant; in which case the jury must draw, from the whole of the evidence, the conclusion of fact, whether or not so much money was lent, paid, or had and received, or that an account was stated(q). If the jury find general damages on a declaration containing a count on the bill or note, and a count upon an account stated, and the bill or note be void, the court will not arrest the judgment altogether, but award a venire de novo(r).

> (1) Clayton v. Gosling, 5 Bar. & Cres. 360; 8 Dow. & Ry. 110, (Chit. j. 1287); High-more v. Primrose, 5 Maule & S. 65; 2 Chit. Rep. 333, (Chit. j. 956).

(m) Wagstaffe v. Beardman, 9 Dow. & Ry. 248; Ashby v. Ashby, 3 Moore & P. 186,

(Chit. j. 1438).
(n) Payne v. Jenkins, 4 Car. & P. 324,

ante, 130, note (1). See post, 822, (48).
(0) Davies v. Wilkinson, 2 Perry & Dav. 256; ante, 136, note (o).

(p) Siggers v. Nicholls, Bail Court, H. T.

1839, cor. Patteson, J. 3 Jurist, 341.
(q) Storey v. Atkins, 2 Stra. 725, (Chit. j. 960); Gibson v. Minet, 1 Hen. Bla. 602, (Ch.

Where there is a promise "to pay a bill of exchange within a fixed time, if during that time no proof be brought of its being already paid," though the promise be broken (no proof

being brought within the time), and the plaintiff in an action on the bill with an insimul computasset gives evidence under the insimul computasset of the special promise, yet the defendant may also prove under that count, that the debt for which the bill was originally given was paid, and thereby avoid the promise by shewing it was without consideration; Elmes v. Wills, I Hen. Bla. 64.

(r) Ayrey v. Fearnsides, 1 Mee. & W. 168,

ante, 133, note (n).

Where to a declaration on a bill or note, with an account stated, the defendant pleads as in bar of the whole action, but omits to notice the account stated, the proper course is for the plaintiff to demur, and not to sign judgment; Vere v. Goldsborough, 1 Bing. N. C. 353; 1 Scott, 265, S. C.; Putney v. Swann, 2 Mes. & W. 72; 5 Dowl. 296, S. C. See post, Chap. IV. Defences and Pleas.

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*CHAPTER III.

OF BILLS OF INTERPLEADER, AND MOTIONS TO STAY PROCEEDINGS IN NATURE THEREOF—PAYMENT OF DEBT AND COSTS-JUDGMENT BY DE-FAULT-AND OF EXECUTION UN-DER A FIERI FACIAS.

I. OF BILLS OF INTERPLEADER, AND MOTIONS TO STAY PROCEEDINGS IN NATURE THEREOF Decisions under 1 & 2 Will. 4, c. 58	584	In case of Loss or Destruction of Bill, &c. When not allowed At what Time may be moved for	535 ib. 589
II. OF STAYING PROCEEDINGS ON PAYMENT OF DEBT AND COSTS	595	Service of Rule Effect of Irregularity before Judg-	ib.
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Costs of what Actions must be paid III. OF JUDGMENT BY DEFAULT Rule to compute Principal and In-	ib. 597	IV. OF EXECUTION UNDER A FIERI FACIAS Provisions of 1 & 2 Vict. c. 110, s. 12	ib. ib.
lerest After Death of Plaintiff	588 ib.	Bills, &c. may be taken under	ib.

I. OF BILLS OF INTERPLEADER, AND MOTIONS TO STAY PROCEED-INGS IN NATURE THEREOF.

AFTER the plaintiff has declared, and before the defendant has pleaded, I. Of Bills and as soon as the defendant has ascertained the nature of the plaintiff's of Interclaim, he may, if another person has also claimed the amount of the same &c. bill or note, or its proceeds, file a bill of interpleader to compel the contending parties to litigate their respective rights between each other without subjecting him to costs; or he may now, as a less expensive and more immediate remedy, apply, by a summary motion, to the common law courts in which the action is pending, to stay the proceedings under the Interpleader Act, 1 & 2 Will. 4, c. 58(a).

In order, however, to obtain relief under the 1 and 2 Will. 4, c. 58, s. 1, Decisions it is necessary that the defendant claim no interest in the subject matter of 2 Will. 4, the suit; and, therefore, where a party has given a promissory note for mon- c. 58, s. 1. ey due by him, and which is deposited with a third person for the benefit of the creditor, and an action is brought upon it by the trustee, it is no ground for obtaining relief under this act, that an action is anticipated at the instance of the creditor(b). So the cross claims must be in respect of one and the same subject-matter(c).

(a) See this act with notes, Chit. & H. Stat. 564.

(b) Newton v. Moody, 7 Dowl. 582; 8 Jurist, 42.

(c) Farr v. Ward, 2 Mee. & W. 844. The defendant having purchased cattle from the plaintiff accepted a bill in payment with a blank for the name of the drawer, and remitted it by post to the plaintiff. This bill subsequently came into the hands of B. and S. for a valua-

ble consideration. The plaintiff denying that he had ever authorized payment by an acceptance, or that he had ever received the bill or indorsed it, brought an action against the defendant for the price of the cattle. B. and S. also threatened to commence an action against him upon the bill: Held, that the defendant was not entitled to relief under the first section of the Interpleader Act.

*II OF STAYING PROCEEDINGS ON PAYMENT OF DEBT AND COSTS.

II Of Staying Proceedings on Debt and Costs.

Ir the defendant find that he has no defence, he should either settle the action by paying the debt and costs, or should let judgment go by default, or obtain time by pleading; but neither the court or a judge at chambers has Payment of any power, without consent, to make an order before declaration, that on payment within a given time of the amount of the bill or note, with interest and costs, all proceedings shall be stayed, the plaintiff, in default of such payment, to be at liberty to sign final judgment (d).

Inspection of Bill,

Where the defendant wishes to see a copy of the bill or note, the practice is stated to be, for a judge on summons without an affidavit, or the court on motion founded on affidavit, to make an order for the delivery of a copy to the defendant or his attorney, and that all proceedings be in the mean time And a defendant charged as the indorser of a note has been allowed to inspect it, on an affidavit that he never indorsed, or had in possession, any such note (f). But the court of C. P., in an action against the defendant as acceptor of a bill of exchange, refused to compel a plaintiff to deposit the bill in the hands of the prothonotary, to enable the defendant to inspect it, in order to see whether or no the acceptance was a forgery (g)(1). And that court also refused to compel a defendant to produce bills of exchange on which an action was brought, and permit the plaintiff to take copies of them, upon an affidavit, contradicted by defendant, that the bills had come into his hands by fraud, and had not been satisfied (h).

Staying Proceeding.

If the defendant be advised to settle the action in the first instance without incurring further expence, he may move the court, in which the action is brought, for a rule, calling on the plaintiff to shew cause why, on payment of the debt and costs, all further proceedings should not be stayed; or he may apply to a judge for a summons to the same effect; and it may be added, "and why the plaintiff should not deliver up the bill or note to the defendant(i);" and which rule would be considered to have been complied with, although the bill has been rendered a nullity by the plaintiff making considerable erasures, and if any injury has thereby occurred to the defendant, he must resort to a cross action(k). Where an indorsement was made upon a note by the payee, that if the interest was paid on stipulated days during his life, the note should be given up; default having been made in payment of the interest, the Court of Common Pleas refused to stay the proceedings on payment of it, with costs(l).

(d) Reynolds v. Sherwood, H. T. 1840, Exch. 4 Jurist, 27.

(e) Tidd, 9th edit. 591; and see Odams v. Duke of Grafton, Bunb. 243, (Chit. j. 266.)

(f) Cæsar v. —, 4 Dougl. 11, (Chit. j. 428). And in M'Dowall v. Lyster, 2 M. & W. 26, an inspection was granted by a judge at chambers, on an affidavit that the instrument was a forgery

(g) Hildyard v. Smith, 1 Bing. 451; 8 Moore, 586, (Chit. j. 1202); Tidd, 9th edit. 591, 592.

In Ireland, however, the practice is otherwise;

Richey v. Ellis, 1 Alcock & Napier, 111.

(h) Threlfall v. Webster, 1 Bing. 161; 7
Moore, 559, (Chit. j. 1174); Tidd, 9th edit.

(i) Tomlins v. Lawrence, 6 Bing. 376; 4 Moore & P. 54, S. C.

(k) Id. ibid. (1) Steel v. Bradfield, 4 Taunt. 227, (Chit. j. 855); 2 Bla. Rep. 958.

The rule is otherwise in Ireland. Thus, where the defendant alleges that certain bills on which he is sued are forgeries, the court will order the plaintiff's attorney to exhibit them to the defendant for inspection. Smith v. McGoregal, 2 Irish Law Rep. 272.

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If the holder of a bill bring separate actions against the acceptor, the II. Of drawer, and indorsers, at the same time, the court will stay the proceedings Staying Proceedin the action against the drawer, or any one of the *indorsers, upon payment ings on of the amount of the bill and the costs of that particular action(m); for a Payment of drawer or indorser is not in any case, whether before or after verdict or Costs. judgment, liable to pay the costs of proceedings against other parties(n). Costs of But, before the late rule of court T. T. 1 Vict. 1838, in an action against what Acthe acceptor, who is primarily liable, and the original defaulter, if he, before tions must judgment against him, applied to the court or a judge for a favour, i. e. to be paid. stay the proceedings on payment of debt and costs, thereby admitting his li- Rule T. T. ability, it was considered but just that he should also pay the costs of any the costs of a therefore in general the court would not stay the proceedings in such action unless upon the terms of paying the costs of all the actions(0). Now, however, by that rule, applicable to all the courts, it is ordered, that in future in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of debt and costs in that action only. And formerly, after judgment against an acceptor, either by default or after verdict, he was liable only to pay the costs of the particular action against himself, and was not liable in any way to pay the costs of any other party, unless upon an express agreement to pay them (p). And after such judgment against the acceptor, he might obtain a stay of further proceedings, on payment of the bill, interest, and costs of the action against himself(q); and if he neglected to do so, each party who had been sued was liable only to pay the costs of the particular action against himself, and the plaintiff could not tax or obtain or issue execution against one defendant for the costs of another (r); and an indorser, who had been obliged to pay costs, could not recover the same from the acceptor. unless he had expressly, engaged on adequate consideration to pay them(s). In general, therefore, before the new rule, when several actions were depending on the same bill, and there was no defence, the most economical course for an acceptor was to suffer judgment by default; in which case it was clear that he could only be charged with the costs of the particular action against himself(t).

There were some cases, however, where the court would, before judgment, stay proceedings even against the acceptor, on payment of the debt and costs of one action. Thus, where in an action against the acceptor of a bill, an attachment had been obtained against the sheriff for not bringing in the body, the sheriff might be relieved on payment of the costs of that action only(u); and, under circumstances, the acceptor would not be liable for more than the costs of the action against him—as where after the acceptor had offered to pay the debt and costs of the action against himself, the plaintiff, who was an attorney and the indorsee of the bill, brought another action

(m) Smith v. Woodcock, 4 T. R. 691, (Ch. j. 494); Windham v. Wither, 1 Str. 515; Golding v. Grace, 2 Bla. Rep. 749; Tidd, 9th edit. 541; Supplement, 1830, 107.

(n) Id. ibid.; Dawson v. Morgan, 9 Bar. & Cres. 618, (Chit. j. 1440); Roach v. Thompson, 4 Car. & P. 194; M. & M. 487, (Chit. j. 1486).

(o) See cases in note (m), but see post, 587, note (x).

(p) Dawson v. Morgan, 9 Bar. & Cres. 618, (Chit. j. 1440); Ronch v. Thompson, 4 Car. & P. 194; M. & M. 487, (Chit. j. 1486). Sed quære, if not liable at suit of drawer for costs of action against the latter; Stovia v. Taylor, 1 N. & M. 250, 251; post, Ch. VI. Sum recoverable.

(q) 1 Str. 515.

(r) Id. ibid.; Tidd, 9th edit. 541.

(s) Dawson v Morgan, 9 Bar. & Cres. 618, (Chit. j. 1440); supra, note (p). Quare, whether drawer could recover such costs; Stovin v. Taylor, 1 N. & M. 250, 251.

(t) The King v. Sheriffs of London, 2 B. & Ald. 192, (Chit. j. 1040).

(u) Id. ibid.

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II. Of Stuying Proceedings on Debt and Costs. [*587]

against the drawer, who was his own client, the court stayed the proceedings upon *payment of the debt and costs of one action only(x). So where separate actions were brought against several persons for the same debt, who Payment of (if at all) were jointly liable, the defendant in one action having paid the debt and costs in that action, the court stayed the proceedings in the others with-And in an action against the acceptor of a bill of exchange, out costs(y). the sheriff was entitled to stay proceedings commenced against himself, upon payment of the debt and costs in that action only (z).

Cost of what Actions must be paid.

Where proceedings were commenced on a bill of exchange against the drawer, and also against the defendant as acceptor, and the former paid the bill and costs, and it was delivered up to him, and notice was given to the defendant that proceedings against him were abandoned, but his costs were not paid, and he, disputing his liability as acceptor, on the ground of forgery, ruled the plaintiff to declare, who then applied to a judge to stay proceedings, and obtained an order for that purpose; it was held, on motion to set aside the order, that the plaintiff was bound either to pay the defendant his costs or to proceed, the defendant having no other means of being indemnified for his costs(a).

It is said to have been decided, that if the bill or note were obtained by plaintiff from defendant without consideration, the court will, on an affidavit of that fact, which the plaintiff does not contradict, stay the proceedings; though not so if the plaintiff make a contradictory affidavit(b). But the court will not stay proceedings on the ground that the money when recovered will be held by the plaintiff in trust for the defendant(c). And it has been held no ground for staying the trial of an action on a promissory note given for the amount of a penalty levied under the revenue laws, that the party on whose evidence the conviction proceeded has been indicted for perjury, and a true bill found(d).

III. OF JUDGMENT BY DEFAULT, &c.

III. Of ₽c.

WHEN the defendant has no defence, either on the merits or on the Judgment pleadings, and is not able to pay the debt and costs in the first instance, he by Default, usually obtains time by pleading, or suffers judgment to go by default, whereupon the plaintiff must, in an action of assumpsit, before he will be entitled to final judgment and execution, ascertain the amount of the debt, which is done either by referring it to the master to compute the principal, interest, and costs (1), or by suing out a writ of inquiry(e). By suffering judgment by default, the

> (x) Hodson v. Gunn, 2 Dow. & Ry. 57, (Chit. j. 1156).

(y) Carne and others v. Legh, 6 Bar. & Cres. 124; 9 Dow. & Ry. 126, S. C.

(z) Ball v. Blackwood, 6 Dowl. 589; Rex v. Sheriffs of London, in the cause of Hollier v. Clark, 2 Bar. & Ald. 192.

(a) Lewis v. Dalrymple, 3 Dowl. P. C.

(b) Turner v. Taylor, Tidd, 9th edit. 530,

(c) Barlow v. Leeds, 4 Adol. & El. 66; 5 Nev. & Man. 426; 1 Har. & W. 479, S. C. There, A. gave a promissory note to B. & C.

jointly, for money lent to him, one half by each. B. died, and A. took out administration with the will annexed to her effects. C. sued him on the note. C. was a legatee, and was charged by A. with having goods of the testatrix's in her hands. On motion to stay proceedings in the action, upon A. paying half the the principal and interest of the note into court, and giving C. a discharge for the residue: held, that the case was not one in which the court, by virtue of its equitable jurisdiction, could interfere.

(d) Aysheford v. Charlott, 4 Dougl. 210. (e) Quære, whether after the lapse of a



⁽¹⁾ This is the settled practice in the courts of the United States in all cases where the sum is certain, or may be made certain by computation. Renner v. Marshall, 1 Wheat, 215.

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defendant *is precluded from making any objection to the validity of the in- III. Of strument(f), and from availing himself of its loss as a ground of defence(g). Judgment by Default

Formerly, a writ of inquiry was the only legal mode of ascertaining what Rule to was due in the case of a judgment by default in an action an a bill or note; compute. but it has long been the practice of the courts of King's Bench and Common Pleas, for the plaintiff, instead of executing a writ of inquiry, to apply to the court in term time, or to a judge in vacation, on an affidavit of the nature of the action, for a rule or summons to shew cause why it should not be referred to the master or prothonotary to see what is due for principal and interest, and why final judgment should not be signed for that sum, without executing a writ of inquiry, upon which the court or judge will make the rule absolute, or grant an order, on an affidavit of service, unless good cause be shewn to the contrary(h). And although formerly the Court of Exchequer did not adopt this practice(i), yet now it is otherwise(k). It seems also to be the practice, since the 3 & 4 Will. 4, c. 42, s. 28, empowering juries to allow interest, to refer it to the master to compute principal and interest on a banker's check(l).

In the King's Bench, where interlocutory judgment was signed, and the After plaintiff died on a subsequent day in the term, the court granted a rule to Death of Plaintiff. compute principal and interest on the bill on which the action was brought (m).

If the bill or note upon which the action is brought be lost or destroyed, In case of the court will, nevertheless, refer it to the master, to see what is due for Destrucprincipal and interest upon the bill or note, upon producing a copy of the in-tion of strument verified by affidavit(n); though in one case the court also required Bill, &c. the plaintiff to give an indemnity to the satisfaction of the master against any possible claim on the lost bill(o). Where the production of the bill before the master has been rendered impossible by a fraud on the part of the defendant, the court will not entertain a preliminary motion to dispense with its production, but the plaintiff should first submit to the master such evidence as he may be prepared with, and then, if dissatisfied with the muster's decision, apply to this court p).

This practice, however, is confined to cases where the declaration states When not allowed.

year from the time of signing interlocutory judgment, the debt having been paid, the plaintiff can issue a scire facias for the purpose of getting his costs; Benn v. Greatwood, 6 Scott, 891.

(f) Shepherd v. Charter, 4 T. R. 275, (Chit. j. 480).

(g) Brown v. Messiter, 3 Maule & S. 281,

(Chit. j. 915).
(A) Shepherd v Charter, 4 T. R. 275, (Chit. j. 480); Rashleigh v. Salmon, 1 Hen. Bla. 252, (Chit. j. 457); Andrews v. Blake, 1 Hen. 529; Longman v. Fenn, 1 Hen. Bla. 541, (Chit j. 476). In Chilton v. Harborn, 1 Anstr. 249, it is said, that the first case where the court granted this rule was that of Rashleigh v. Salmon, 29 Geo. 8, 1 Hen. Bla. 252; Theliasson v. Fletcher, Dougl. 815, 816.

(i) Chilton v. Harborn, I Anstr. 249; and see Eyre v. The Bank of England, I Bligh's

Rep. 582.

(k) Biggs v. Stewart, 4 Price, 184; see Tidd, 9th edit. 571.

(1) Bentham v. Lord Chesterfield, 5 Scott.

(m) Berger v. Green, 1 Maule & S. 229. (n) Brown v. Messiter, 3 Maule & S. 281, (Chit. j. 915); and see 2 Chit. Rep. 233 a; Allen v. Miller, 1 Dowl. P. C. 420; Clarke r. Quince, 3 Dowl. P. C. 26. (o) Peto v. Champion, K. B. 30th June.

1830.

(p) Landers v. Lee, 6 Scott, 732; 7 Dowl. P. C. 97, S. C.; nom. Sanderson v. Lee. In the case of a writ of inquiry the bill must be produced, though it need not be proved, the defendant's liability being admitted by suffering judgment by default; and its production is only necessary to see whether any part has been paid; Greene v. Hearne, 3 T. R. 361; and see Bevis r. Lindsell, 2 Str. 1149; post, 501, note (b).

III. Of Judgment by Default.

Rule to compute.

When not allowed. [*590]

the bill or note, and does not apply to cases where the instrument is not specially declared upon (q). And it is still necessary to *sue out a writ of inquiry when the bill is payable in foreign money, the value of which, it is said, can only be properly ascertained by a jury (r)(1). So if the court be satisfied by the defendant, upon affidavit, that there is a fair question for a jury as to the amount really due, they will leave the plaintiff to his writ of inquiry, and will not send the matter to the master by the usual rule to compute(s). Nor will the court direct the master to allow re-exchange in an action upon a bill drawn in Scotland upon and accepted by the defendant in The court also refused a reference to the master in an action England(t). of debt on a judgment recovered on a bill of exchange(u). ever, there was a demurrer to one count on a bill of exchange and judgment for the plaintiff, and a plea to other counts on which issue was joined, the Court of King's Bench referred it to the master to see what was due to the plaintiff But in such case a nolle prosequi must be entered as to on the former (x). the other counts, which may be done any time before final judgment(y). And if after the delivery of a declaration for goods sold, and on a promissory note, the defendant pay the plaintiff 1501. "on account of the cause," leaving a balance due less than the amount of the note, the plaintiff cannot have a rule to compute principal and interest on the note, without the count for goods sold being first struck out of the declaration; and having received the damages on that count, he is not at liberty to enter a nolle prosequi thereto without the defendant's consent(z).

At what time may be moved for.

The plaintiff may, in the King's Bench, obtain a rule for referring a bill of exchange to the master on a proper affidavit(a), on the day on which interlocutory judgement was signed for want of a plea(b), or for not producing the record (c). But where it is signed upon demurrer, as a day is given to the parties upon the record, it might be thought incongruous to deprive either of them of the whole of the day, after he is once possessed of it; and it has therefore been the practice not to move for such rule until the following day(d). It is also necessary, in that court, that interlocutory judgment be signed, before there can be a reference to the master; whether it be a

(q) Osborn v Noad, S T. .R 64S. (r) Messing v. Lord Massarene, 4 T. R. 493; Maunsel v. Lord Massarene, 5 T. R. 87, (Chit. j. 498); Nelson v. Sheridan, 8 T. R. 395; Cro.

Eliz. 536; Cro. Jac. 617.

(s) Jardine v. Williams, 7 Law J. 31, K. B. M. T. 1828. (t) Napier v. Schneider, 12 East, 420, (Chit.

j. 790); Goldsmith v. Taite, 2 Bos. & Pul. 55, (Chit. j. 616).

(u) Nelson v. Sheridan, 8 T. R. 395. (x) Duperoy v. Johnson, 7 T. R. 473, (Chit.

j. 595). (y) Heald v. Johnson, 2 Smith's Rep. 46,

47, (Chit. j. 704); 1 Str. 532; Tidd, 9th edit.

(z) Jones v. Shiel, 3 Mee. & W. 433; 6 Dowl. 579, S. C

(a) See M'Clel. 366, as to the requisites of the affidavit.

(b) Pocock v. Carpenter, 3 Maule & S. 109, (Chit. j. 912).

(c) Russen v. Hayward, 5 B. & Al. 752; 1 D. & R. 444, (Chit. j. 1138).

(d) Pocock v. Carpenter, 3 Maule & S. 109; Gordon v. Corbett, 3 Smith's Rep. 179; Tidd, 9th edit. 572.

(1) If there be no averment of the value of the foreign money in a bill, the defect is cured by verdict. Brown v. Barry, 3 Dall. Rep. 365.

Where there were several counts, one on a promissory note, and others for money lent, money had and received, and insimul computassent, and judgment was taken generally, with a rule that the clerk assess the damages, without entering a nolle prosequi on the money counts, judgment was reversed. Burr v. Waterman, Court of Errors, 2 Cowen, 36 in note.

And where the general money counts are joined with one on a promissory note, the defendant cannot compel the plaintiff to enter a nolle prosequi on the money counts, and assess the damages through the clerk, on the promissory note. Beard v. Van Wickle, 3 Cowen, 835.

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judgment for want of a plea, or on demurrer(e), or for not producing the re- III. Of

fault, & c.

In the King's Bench the rule nisi and rule absolute must both be served Service of on the defendant before final judgment is signed(g); but in that court there Rule. need not be any notice of taxing; if the defendant wish it, he must at his peril take care to get a rule to be present(h); but in the Common Pleas notice must be given to the defendant of the prothonotary's appointment to compute principal and interest on the bill, in *order that the defendant may have [*590] an opportunity of bringing forward any facts which may have occurred to reduce the sum which the plaintiff seeks to recover(i). It has also been decided in K. B. that the rule nisi must be served on all the defendants(k); but in the Exchequer it has been held otherwise, and that after judgment by default in an action against several joint makers of a promissory note, service of the rule nisi on one or more of the defendants will be good service on all(1). Service of a copy of the rule will in any of the courts be sufficient without shewing the original(m). And where in the case of two defendants a copy of the rule was served on one of the defendants, and the rule itself on the other, and the latter afterwards returned the rule to the plaintiffs attorney, saying that he should take no steps in the matter, the court made the rule absolute(n). Service of the rule on the mother of the defendant at his residence(o), or leaving it at a house where the defendant's family is still living, though he himself is gone away (p), or leaving it at the defendant's chambers, if a person there send it to him(q), is sufficient. And where an attorney has been served with process at chambers, from which he afterwards removes to an unknown residence, a rule to compute may be served by leaving a copy at those chambers, (they being his last known place of abode), and sticking up another in the King's Bench office (r). But service of the rule on the defendant's landlady(s), or leaving it at the defendant's apartments, no person being there at the time, though the defendant then resided there (t), has been held insufficient. Nor will service on the day on which cause is to be shewn be sufficient, although ten days elapse since the service(u). And it is necessary that the affidavit of service be entitled with the christian name of the plaintiff as well as of the defendant (x). ing for the rule nisi, or after the same has been made absolute, the court will make no order that a particular service of the rule shall be deemed good service(y)(1).

(e) Burton v. Stanley, M. T. 57 Geo. 3, cited 6 Maule & S. 382.

(f) Moses v. Compton, 6 Maule & S. 381. (g) The Bank of England v. Atkins, 1 Chit.

Rep. 466, 468, (Chit. j. 1064).

(h) Sellers v. Tufton, Hil. 1913; Farmer v. Wood, Easter Term, 1816, MS. of Mr. Le Blanc; Tidd, 9th edit. 572; 1 Chit. Rep. 467,

(i) Branning v. Patterson, 4 Taunt. 487; Tidd, 9th edit. 572.

(k) Flindt v. Bignell I Chit. Rep 466, note; Tidd, 9th edit. 572.

(1) Figgins v. Ward, 2 Dowl. P. C. 364; Carter v. Southall, 3 M. & W. 128. (m) Flindt v. Bignell and another, M. T. 1815, Nov. 21, K. B. 1 Chit. Rep. 466, note; Belairs v. Poultney, E. T. 1817, May 12, id. ibid.; 6 Maule & S. 230, S. C.; and see new

rule in all the courts, H. T. 2 Will. 4, s. 51; Holmes v. Senior, 4 M. & P. 828; 7 Bing, 162.

S. C.

(n) Grant v. Stoneham, 2 Dopl. 126, C. P. (o) Warren v. Smith, 2 Dowl. P. C. 216, Exch.

(p) Payett. r. Hill, 2 Dowl. P. C. 688.
(q) Carew r. Winslow, 5 Dowl. P. C. 543.
(r) Scaley r. Robertson, 2 Dowl. P. C. 568.

(s) Gardner v. Green, 8 Dowl. P. C. 343.

(t) Chaffers r. Glover, 5 Dowl 81, Exch.
(u) Farrell r. Dale, 2 Dowl. P. C. 15, Exch.

The service was at York, and the court enlarged the rule for a week to enable the plaintiff to make a fresh service.

(x) Anderson v. Baker, 3 Dowl. 107, C. P. (y) Palmer v. Jervis, M. T. 1839, Bail Court, cor. Littledate, J. 3 Jurist, 1077.

III. Of Judgment by Default, δic.

Effect of before Judgment.

Though the rule nisi calls upon the defendant to show cause why the matter should not be referred to the master, yet it has been held in the Common Pleas that no irregularity previous to the judgment can be shewn as cause against the reference(z). And the same practice prevails in the King's irregularity Bench; and where the defendant's counsel opposed a rule nisi for referring to the master, on an affidavit shewing that the judgment was irregular, it having been signed without a plea having been demanded, the court determined that this was no ground for opposing the motion, and that a cross motion to set aside the judgment must be made, which was accordingly done, and the rule for referring to the master was enlarged, till the motion of the defendant had been discussed and determined(a).

Writ of Ineniry. *591]

*When the plaintiff proceeds to ascertain the damages by executing a writ of inquiry, he need not adduce any evidence, but should produce the bill, which it will not be necessary to prove(b); for where the action is founded on the instrument itself, letting judgment go by default is an admission of the cause of action, and of the defendant's liability to the amount of the bill(c); and all the plaintiff has to prove, or the defendant is permitted to controvert, is the amount of the damages; and the only reason why the production of the bill is required, is, that it may be seen whether or not any part of it has been paid(d); for the same reason the defendant will not be suffered to give in evidence any matter in defeasance of the action(e)(1). It seems the plaintiff is entitled to nominal damages though he do not produce the bill (f).

IV. OF EXECUTION UNDER A FIERI FACIAS.

IV. Of Execution under a Fieri Facias.

Before the late important act of 1 & 2 Vict. c. 110, bills of exchange,

Chit. Rep. 119; Tidd, 572, 573.

(a) Marshall v. Van Omeran, K. B. Trin. T. 1818, MS.; Kelly v. Villebois, Bail Court, M. T. 1839, cor. Littledale, J. 3 Jurist, 1172.

(b) Greene v. Hearne, 3 T. R. 301, (Chit. j. 456); Bull. N. P. 278; Thellusson v. Fletcher, Doug. 316, n. 2; Golding v. Grace, 2 Bla. Rep. 749.

Bevis v. Lindsell, 2 Stra. 1149, (Chit. j. 291). On executing a writ of inquiry in an action on a note, the plaintiff did not produce the subscribing witness, but offered other evidence that it was the defendant's hand, and the court held that sufficient. For the note being set out in the declaration is admitted, and the only use of producing it is to see whether any payment is indorsed upon it.

Greene v. Hearne, 3 T. R. 301, (Chit. j 456). Upon a rule nisi to set aside an inquisition against the acceptor of a bill of exchange, it was urged that the bill, though produced before the jury, was not proved, but the court held, that by suffering judgment, the defendant admitted the acceptance of the bill, and was

(z) Pell v. Brown, 1 Bos. & Pul. 369; 2 liable to its amount; and Buller, J. said the only reason of producing the bill is to see whether any part of it is paid.

Mills v. Lyne, B. R. Hil. 26 Geo. 3, Bayl. 5th edit. 487, (Chit. j. 481). On a writ of inquiry in an action upon a note, the sheriff directed the jury to give nominal damages only, because the plaintiff could not prove the note. Lawrence insisted that the plaintiff was bound to produce the note (because a receipt of part might have been indorsed thereon), and to prove the defendant's signature; but per Buller, J. " If you had paid part, you might have pleaded it, but you have let judgment go for the whole," and the court set aside the inquisition.

(c) Anon. 3 Wils. 155; Snowden r. Thomas, 1 Bla Rep. 248: 2 Bla. Rep. 748; Shepherd r. Charter, 4 T. R. 275, (Chit. j. 480).

(d) Per Buller, J. in Greene v. Hearne, 3 T. R. 301, (Chit. j. 456); supra, note (b).
(e) East India Company v. Glover, 1 Str.
612; Shepherd v. Charter, 4 T. R. 275, (Chit. j. 450).

(f) Marshall v. Griffin, Ryan & Meody, 41, (Chit. j. 1206). Where there were four counts

⁽¹⁾ But the note should conform to the allegations of the declaration, otherwise it is not evidence on a writ of inquiry. Therefore, where the declaration did not allege when the note was payable, and the note produced was payable at 60 days, the variance was held fatal; for a note, in which no time of payment is mentioned, is payable on demand. Sheeley r. Mandeville, 7 Cranch Rep. 208.

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promissory notes, bank notes, bankers' cash notes, and checks on bankers, IV. Of Excould not be taken in execution under a writ of fieri facias(g); but by that ecution under a Fieri statute, these, among other things, are expressly made liable to seizure.

The twelfth section of the 1 & 2 Vict. c. 110, enacts, "That by virtue Sheriff emof any writ of fieri facias to be sued out of any superior or inferior court seize Moafter the time appointed for the commencement of this act or any precept in ney, Bank pursuance thereof, the sheriff or other officer having the execution thereof Notes. may and shall seize and take any money or bank notes (whether of the gover-Bills of Exnor and company of the Bank of England, or of any other bank or bankers), change, and any checks, bills of exchange, promissory notes, bonds, specialties, or oth- &c. er securities for money, belonging to the person against whose effects such c. 110, a. writ of fieri facias shall *be sued out, and may and shall pay or deliver to 12. the party suing out such execution any money or bank notes which shall be [* 592] so seized, or a sufficient part thereof; and may and shall hold any such and to pay Money or checks, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security or securities for the amount by such writ of Notes to fieri facias directed to be levied, or so much thereof as shall not have been execution otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when for amount the time of payment thereof shall have arrived; and that the payment to secured by such sheriff or other officer by the party liable on any such check, bill of ex- Exchange change, promissory note, bond, specialty, or other security, with or without and other suit, or the recovery and levying execution against the party so liable, shall Securities. discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such check, bill of exchange, promissory note, bond, specialty, or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be receivered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied: and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be issued; provided that no such sheriff or other officer shall be bound to sue Proviso as any party liable upon any such check, bill of exchange, promissory note, we made bond, specialty, or other security, unless the party suing out such execution Sheriff. shall enter into a bond with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expence of such bond to be deducted out of any money to be recovered in such action." has been observed, that this section applies only to money in the hands of the debtor, and not where the money is in the hands of a third party as trustee for the debtor(h).

on bills of exchange, and a demurrer as to the first and second counts, and joinder and general issue as to the rest of the declaration, and a venire as well to try as to assess contingent damages, &c. awarded, and upon the trial two bills only were produced; it was held the plaintiff was entitled to a verdict for the amount of the bills proved on the counts to which the defendant had plended, and for damages on those

demurred to; the defendant having admitted, by the demurrer, the existence of the bills declared on, and put himself to the judgment of the court as to his legal liability on them.

(g) See Tidd, 9th edit. 1003; Archbold's

Prac. by T. Chitty, 7th edit. 425.

(h) Per Parke, B. in Robinson r. Peace, 7 Dougl. P. C. 93, 94.

*CHAPTER IV.

OF THE DEFENCES-PLEAS-AND REPLICATIONS.

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I. OF THE DIFFERENT KINDS OF DEFENCES.

I. Of the different Kinds of Defences.

THE defences of which a defendant may avail simself in an action on a bill or note, &c. are founded either upon a mis-statement in the declaration of the cause of action; or on some defect in the right of action itself.

Those of the first description are also of two kinds, viz. such defects as are apparent on the face of the declaration itself, and which are to be taken advantage of by general demurrer, or motion in arrest of judgment, or writ of error, where there has been a substantial defect in the declaration; and by special demurrer when the objection is of a mere technical and formal nature; or such defects as are not apparent on the mere perusal of the declaration, but consist of a mis-description or mistake in stating the cause of action, and which are to be taken advantage of on the trial as a variance and

ground of non-suit under the plea of non-acceptance, &c.

Defences arising from a defect in the right of action itself are very various, and consist of the absence of some ingredient essential to its perfection; as 1st, The incapacity of the defendant to contract, or that all the defendants are not legally liable; 2dly, The want of a proper stamp; 3dly, an alteration in the bill or note; 4thly, A defect in the bill or note, as being payable on a contingency, &c. or not founded on an adequate or legal consideration; 5thly, A defect in the plaintiff's title to the bill; 6thly, A want of due presentment or notice of non-acceptance or non-payment; 7thly, That time was given to the maker of the note, or acceptor of the bill, and the defendant thereby discharged; 8thly, That the defendant was released from liability; 9thly, A release by a composition deed; 10thly, That defendant has been discharged by his bankruptcy and certificate, or by his discharge under an insolvent act; 11thly, By the statute of Limitations, or 12thly, that he has a set-off equal of itself, or equal with money paid into court to the plaintiff's demand.

Formerly, defences arising from a defect in the right of action itself were *594] brought forward either in the shape of a special plea, or were *given in evi-

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dence under the general issue of non-assumpsit; but, as we shall presently I. Of the see, the plea of non-assumpsit is now abolished in actions on bills and notes, different and each defence must be specially pleaded. They consist either in a de- Defences. nial that the plaintiff ever had cause of action, or, admitting that he once had, in an assertion, that it is either suspended or extinguished; and a plea to an extent in aid, stating, that the defendant had accepted a bill drawn upon him by the original debtor, and which did not become due till the day after the inquisition was taken, is good, although the defendant had refused payment, and the original debtor to the crown had been obliged to take it up(a).

Those of the first description are also divisible into two heads, namely, those defences which deny that the instrument declared on was made, indorsed, or accepted, or that the defendant was party to it; and those which admit such facts, but allege that the contract, supposed to have been raised by them, was void or voidable, on account of the incapacity of the defendant to contract, as in the case of infancy or coverture, or on account of the want of consideration, or the illegality of it, or of the plaintiff having received it under circumstances, that, in justice, ought to preclude him from recovering, or on the ground of an improper presentment for acceptance or payment, or neglect to give notice of the dishonour of the bill, or some laches of the holder or the person from whom he attempts to derive an interest in the instrument; or, admitting there once existed a valid contract, insist that it was performed by payment or otherwise: or, if unperformed, that there was some legal excuse for the non-performance of it, as a release or parol discharge before breach(b). But we have seen that a mere parol agreement to renew(c)(1), or a verbal engagement that the bill should be payable only in case a particular fund should be productive (d)(2), will be no defence.

Defences of the second description; namely, those which admit that the plaintiff once had cause of action, but insist that it no longer exists, are either such as allege that the plaintiff is under an existing disability to sue, by his being an outlaw, alien enemy, bankrupt, &c.; or that the defendant has been discharged from liability to be sued, either by his being an insolvent debtor(e), bankrupt, &c.(f.); or that the action is discharged by an accord

⁽a) The King v. Dawson, Wightw. 32, (Chit. j. 799).

⁽b) Ante, 309 to 314. (c) Hoare v. Graham, 3 Campb. 57, (Chit.

j 838); ante, 142, note (t).

⁽d) Campbell v. Hodgson, Gow's Rep. 74, (Chit. j. 1053).

⁽e) Andrew v. Pledger, Moo. & M. 508. See last Insolvent Act, 7 Geo. 4, c. 57, s. 40, 46; Chitty's Col. Stat. tit. Insolvent Debtors, 599; and see cases on Insolvent Act, post, Ch. VIII. Part II.

⁽f) Post, Ch. VIII.

⁽¹⁾ A promise to extend the time of payment of a note made subsequent to its creation, may be set up by way of defence; but not unless founded upon a good and sufficient consideration. The promise of a maker to pay part of a note when due, and payment in pursuance thereof, is not such sufficient consideration. Miller v. Holbrook, 6 Wend. Rep. 317.

⁽²⁾ Parol evidence is admissible in a suit by the indorsee against the indorser of a note indorsed in blank, to show that at the time of the indorsement, the indorsee received the note under an agreement that he would not have recourse upon it against the indorser. Hill v. Ely, 5 Serg. & Rawle, 363. It seems to be well settled, that in an action on a promissory note, parol evidence may be given to the maker, under the general issue, of a partial or total failure of consideration, to mitigate the damages or defeat the recovery; as fraud or a breach of warranty in respect to the consideration. Hills r. Bannister, 8 Cowen, 31.

And so, as between the original parties, parol evidence may always be given of the true consideration of a note or bill of exchange. And the rules of evidence are the same in the courts of common law as in equity, except in some particular cases, where parol evidence is let in merely with a view of affording a court of equity the means of exercising its peculiar jurisdiction. Hampton v. Blakely, 3 M'Cord, 469. See M'Creary v. Jaggets, Id. 473, note (a). Lawrence v. Stonington Bank, 6 Conn. Rep. 521.

I. Of the different Kinds of Defences.

and satisfaction (g), arbitrament, release (h), composition deed (i), former recovery for the same cause, after the bill sued upon became due(k), tender(l), set-off (m), or the Statute of Limitations (n)(1).

II. Of the Pleas.

II. OF THE PLEAS.

WITH respect to the mode in which these several defences must now be

Several Pleas not

allowed.

[*595] taken advantage of, the rule of court, H. T. 4 Will. 4, 1834, *r. 2, applicable to all the courts(o), after reciting (s. 5, General Rules and Regulations,) that by the mode of pleading thereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore, and that by the act of 3 & 4 Will. 4, c. 42, s. 23, the powers of amendment at the trial, in cases of variance in particulars not material to the merits of the case, are greatly enlarged (p), orders, that several pleas shall not be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each; and therefore pleas founded on one and the same principal matter, but varied in statement, description, or circumstances only, are not to be allowed: ex. gr. pleas of solvit ad diem, and of solvit post diem, are both pleas of payment, varied in the circumstance of time only, and are not to be allowed; but pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

Payment.

Accord and Satisfaction-Release.

Liability of third Party.

Pleas of an agreement to accept the security of A. B., in discharge of the

(g) See post, 605, what is not a satisfaction, Norris v. Aylett, 2 Campb. 329, 330, (Chit. j. 781).

(h) See ante, 416, and post, 607.

(i) Post, 606.

(k) Vere v. Carden, 5 Bing. 413, (Chit. j. 1244); Lamb v. Pratt, 1 Dowl. & Ry. 577.
(1) Ante, 522, note(t); what a sufficient

tender, Bevans v. Rees, 3 Jurist, 608.

(m) When not, Rogerson v. Ladbrooke, 1 Bing. 93; 7 Moore, 412; 1 Law J. 6, S. C.; and see Buchannan v. Findlay, 9 Bar. & Cres. 738; 4 Man. & Ry. 593, (Chit. j. 1441); and Thorpe v. Thorpe, 3 B. & Ad. 580, ante, 198, 211, as to right of set-off in case of bills remitted for a particular purpose. See also post, 606.

(n) See post, 608; Chievly v. Bond, 4 Mod. 105, (Chit. j. 181).

(0) This rule was made pursuant to 3 & 4 Will. 4, c. 42, s. 1; see the act, Chit. & II. Stat. 21; and by that statute all such rules, after they have lain six weeks before parliament, are to be binding and obligatory on the superior and all other courts of common law, and of the like force and effect as if the provisions contained therein had been expressly enacted by parliament. The courts, therefore, have no power to allow several pleas to be pleaded where they are inconsistent with these rules; see Bastard v. Smith, 1 Nev. & P. 242; 5 Ad. & El. 826, S. C.

(p) See ante, 567 to 569; and see per Parke, J. in Hanbury v. Ella, 1 Ad. & El. 61, 64.

As to the law relating to set-off, see Sargent v. Southgate, 5 Pick. 812. Braynard v. Fisher,

And in an action by the indorsee against the maker of a negotiable note, fraudulently indorsed by the payee after it was dishonored, the defendant was allowed to avail himself under the general issue, of notes given to him by the payee before the indorsement. Stockbridge v. Damon, 5 Pick. 223.

\(\frac{1}{10}\) an action on a promissory note payable in hats at a certain time and place, it is a good defence that the defendant had, at the time and place, the hats ready to deliver, conformably to the contract, but that no person attended to receive them; and that he had been always ready, and was still ready to deliver them, at the place on demand. Johnson v. Baird, 3 Blacks.

⁽¹⁾ A plea to an action on a note for the payment of money on a certain day, at a particular place, that the defendant was, at the day and place appointed, ready with his money to pay the note, but the payee was not ready to receive it, and that the money has ever since remained there for the payee's use, must conclude with a profert in curia. Curley v. Vance, 17 Mass. Rep. 389. Caldwell r. Cassidy, S Cowen, 271.

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plaintiff's demand, and of an agreement to accept the security of C. D. for II. Of the the like purpose, are also distinct, and to be allowed; but, pleas of an agree- Pleas. ment to accept the security of a third person, in discharge of the plaintiff's Agreement demand, and of the same agreement, describing it to be an agreement to forin considebear for a time, in consideration of the same security, are not distinct; for ration of. they are only variations in the statement of one and the same agreement, Liability of whether more or less extensive, in consideration of the same security, and third Party. not to be allowed.

These examples are given as some instances only of the application of the rules to which they relate; but the principles contained in the rules are not to be considered as restricted by the examples specified.

The sixth section of the same rule orders, that where more than one plea Departure shall have been used in apparent violation of the preceding rule, the opposite from these party shall be at liberty to apply to a judge, suggesting that two or more of taken Adthe pleas are founded on the same ground of answer or defence, for an order vantage of. that all the pleas introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that some distinct ground of answer or defence is bonû fide intended to be established in respect of each of such pleas, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the pleas mentioned in such application, which shall be allowed.

And the seventh section orders, that upon the trial, where there is more Costs of than one plea upon the record, and the party pleading fails to establish a distinct ground of answer or defence in respect of each plea, a verdict and judgment shall pass against him upon each plea which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such plea, including those of the evidence as well as those of the pleadings; and further, in all cases *in which an application to a judge has [*596] been made under the preceding rule, and any plea allowed as aforesaid, upon the ground that some distinct ground of answer or defence was bona fide intended to be established at the trial in respect of each plea so allowed, if the court or judge, before whom the trial is had, shall be of opinion that no such distinct ground of answer or defence was bona fide intended to be established in respect of each plea so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any plea with respect to which the judge shall so certify.

The same rule then proceeds to make regulations respecting the pleadings Effect of in particular actions; and FIRST, as to the action of Assumpsit, it is ordered, (s. 1,) that in all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be applied by law: ex. gr. in an Goods action of indebitatus assumpsit, for good sold and delivered, the plea of non sold. assumpsit will operate as a denial of the sale and delivery in point of fact; in Money had the like action for money had and received, it will operate as a denial both and receivof the receipt of the money and the existence of those facts which make such ed. receipt by the defendant a receipt to the use of the plaintiff.

II. Of the Pleas. Bills and Notes no general

Îssue.

And it is further ordered, (s. 2,) that in all actions upon bills of exchange and promissory notes, the plea of non assumpsit shall be inadmissible. such actions, therefore, a plea in denial must traverse some matter of fact; ex. gr. the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

In every Action of Assumpsit Matters in Confession and Avoidance to be Pleaded specially.

It is also ordered, (s. 3,) that in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; ex. gr., infancy, coverture, release, payment(q), performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

Nil debel. General Issue in Debt.

Secondly, as to the action of Debt, it is ordered, (s. 2,) that the plea of "nil debet" shall not be allowed in any action. And it is further ordered, (s. 3,) that in actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially as above directed in actions of assumpsit.

Matters in Confession and Avoidance to be pleaded specially.

Pleas in

other Cas-

*It is also ordered, (s. 4,) that in other actions of debt, in which the plea of nil debet has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and *597 | avoidance(r).

Plea of Payment of Money into Court. Rule T. T. 1 Vict.

As regards the plea of payment of money into court, the rule of court T. T. 1 Vict. 1838, after reciting that it is expedient that certain of the rules and regulations made in Hilary Term, in the fourth year of the reign of his late Majesty King William the Fourth, pursuant to the statute of 3 & 4 Will. 4, c. 42, s. 1, should be amended, and some further rules and regulations made pursuant to the same statute, orders, that from and after the first day of Michaelmas term then next inclusive, unless parliament shall in the meantime otherwise enact, the following rules and regulations, made pursuant to the said statute, shall be in force:-

17 & 19 Rules of H. T. 4 Will. 4, repealed.

First—It is ordered, that the 17th and 19th of the general rules and regulations made pursuant to the statute 3 & 4 Will. 4, c. 42, s. 1, be repealed; and that in the place thereof, the two following amended rules be substituted, viz:-

(q) In Ireland v. Thompson, 6 Scott, 601; 4 Bing. N. C. 716, S. C., the Court of Common Pleas compelled the defendant to deliver particulars of a plea of payment. But in a subsequent case the Court of Exchequer refused an application for such particulars, on the ground that it would be substantially requiring the defendant to state his evidence. Phipps v. Lothian, M. T. 1840, Exch. 4 Jurist, 294. The rule T. T. 1 Will. 4, s. 6, ante, 558, requiring the particulars of the defendant's set-off to be annexed

to the record, makes no mention of a plea of payment.

(r) In an action of delinue or trover to recover bill or proceeds, the plea of non definet will operate as a denial of the detention only. and not of the plaintiff's property therein, and no other defence than such denial will be admissible under that plea; and the plea of not guilty will operate as a denial of the conversion only, and not of the plaintiff's title thereto; see same rule, ss. 3, 4. See post, 823 (54).

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For the 17th rule, when money is paid into court, such payment shall be II. Of the pleaded in all cases, and as near as may be in the following form mutatis Pleas. mutandis(1):—

The —— day of ——. The defendant by —— his attorney [or "in person," &c.] says, Plea(s). for in case it be pleaded as to part only, add "as to £---, being A. B.) part of the sum in the declaration (or 'count') mentioned," or " as to the residue of the sum of £---,"] that the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of £--- ready to be paid to the plaintiff: and the defendant further says, that the plaintiff has not sustained damages [or in actions of debt, "that he never was(t) indebted to the *plaintiff"] to a greater amount than the said sum of, [*598] &c. in respect of the cause of action in the declaration for "in the introductory part of this plea"] mentioned: and this he is ready to verify: wherefore he prays judgment if the plaintiff ought further to maintain his action thereof(u).

For the 19th rule.—The plaintiff, after the delivery of a plea of payment Proceedof money into court, shall be at liberty to reply to the same by accepting ing by Plaintiff afthe sum so paid into court, in full satisfaction and discharge of the cause of ter Payaction in respect of which it has been paid in(n), and he shall be at liberty ment of in that case to tax his costs of suit, and in case of non-payment thereof with- Money into in forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply "that he has sustained damages [or 'that the defendant was and (x) is indebted to him' as the case may be to a greater amount than the said sum;" and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

(*) A plea of payment into court must follow the form given by the new rules; and if other pleas are pleaded to part of the plaintiff's de-mand, the plea of payment into court should be put last, and pleaded to the residue; Sharman v. Stevenson, 8 Dowl. P. C. 709; 2 C, M. & R. 75; 5 Tyrw. 564; 1 Gale, 74, S. C. A special demurrer to a plea of payment into court, that " it varies from the form given by the rule," is sufficient to raise an objection that the plea is bad for want of a proper conclusion of a prayer

of judgment; id. ib.

To a declaration for 31/. on a bill of exchange, and 1001, for money paid, lent, interest, goods sold, and on an account stated, the defendant pleads as to the 31/., and as to 12/., parcel of the 100l., for goods sold, and as to the 100l. on the account stated, payment into court of 511., and alleges that the plaintiff has not sustained damage to a greater amount, in respect of so much of those causes of action as in the plea mentioned. Quære, whether such plea is good on special demurrer? Semble, the defendant ought to have shewed distinctly what portion of the money paid into court was to be ascribed to the bill of exchange; Jourdain v. Johnson, 2 C.,

M. & R. 564; 5 Tyrw. 524; 4 Dowl. P. C. 534, S. C.; 1 Gale, 312.

As to the effect of payment of money into court as an admission, see Lechmere v. Fletcher, 1 C. & M. 623; 3 Tyrw. 450, S. C.; Reid v. Dickons, 5 B. & Ad. 499; 2 N. & M. 369, S. C. A plea of payment of money into court under the general indebitatus counts, only admits a liability upon some one or more contracts to the extent of the sum paid in; Kingham v. Robins, 5 M. & W. 94; and see Booth v. Howard, 5 Dowl. P. C. 438, 440, 441.

(t) Instead of "is not" as in former rule;

see Finleyson v. Mackenzie, 3 Bing. N. C. 824; 5 Scott, 20; 6 Dowl. 71; post, 599, note (f).

(u) Must conclude with a prayer of judgment: a conclusion with a verification will be bad on special demurrer; Sharman r. Stevenson, 2 C., M. & R. 75; 5 Tyrw. 564; 3 Dowl. 709; 1 Gale, 74, S. C.; ante, 597, note (s).

(r) If the plaintiff in his replication omit to notice a plea of payment into court, he may onter a nolle prosequi thereto at any time before final judgment; Fallows r. Bird. 2 C., M. & R. 457; 4 Dowl. 183; 1 Gale, 246, S. C.

(x) These words omitted in former rule.

⁽¹⁾ See post, 822, (53). 85

II. Of the need not be

The same rule further orders (z), that in any case in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit Payments in the particulars of his demand for any sum or sums of money therein adcredited in mitted to have been paid to the plaintiff, it shall not be necessary for the deof Demand fendant to plead the payment of such sum or sums of money.

pleaded (y). But Rule

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, not to apply without giving credit for any particular sum or sums.

to Claim of Balance.

Reduction

Payment shall not in any case be allowed to be given in evidence in re-Payment in duction of damages or debt; but shall be pleaded in bar.

If, since the rule of H. T. 4 Will. 4, the plea of non assumpsit be plead-

of Damages or Debt lowed (a). Non assumpsit.

not to be al-ed in an action on a bill or note, the plaintiff may sign judgment(b). But that rule is confined to actions upon the bill or note itself, that is, where the sole cause of action is the making of the instrument; and, therefore, if an executor declare on a bill or note payable to his testator, laying a promise [*599] to pay him, the executor, such promise may *still be denied by a plea of non assumpsit(c). And if the declaration proceed as upon an "agreement or instrument in writing," not being a promissory note, a plea that the defendant did not make the note, will be bad on special demurrer, although in the instrument itself it be described as a "note of hand," and there is a promise to pay(d). On the other hand, if the declaration be substantially upon a bill or note, a plea of non assumpsit will be informal, though the declaration profess to proceed on a different cause of action, as upon a Scotch judgment(e)(1).

Nil debet.

Notwithstanding the abolition of the plea of nil debet, it has been held, that if to a declaration in debt against the acceptor of a bill of exchange for 78l. 13s. 6d. the defendant plead payment into court of 5l. 3s. 6d., and that he is not indebted beyond that sum, and the plaintiff join issue and proceed to trial, it is competent to the defendant to make under this plea any defence applicable to the plea of nil debet, although the plea would have been ill on

(y) Considerable doubts had existed amongst the judges, as to whether or not payment of the whole or of a part of the plaintiff's demand, (whether before or after action brought,) might, under the rules of H. T. 4 Will. 4, be given in evidence under non assumpsit; see note, 6 Scott, 353; Lediard v. Boucher, 7 Car. & P. 1; — v. Padden, Sewell's Pr. Dig. 1835, 275, note; Cousins v. Paddon, 2 C., M. & R. 547; 4 Dowl. 488; Palfrey v. Sill, 2 Scott, 159, note; Shirley v. Jacobs, 2 Scott, 157; 2 Bing. N. C. 83; 4 Dowl. 136; 1 Hodges, 214; 7 Car. & P. 3; Richardson v. Robertson, 1 M. & W. 463; 1 Tyrw. & Gr. 279; 5 Dowl. 82; Goldsmith v. Raphael, 3 Scott, 385; 2 Bing. N. C. 310; Ernest v. Brown, 3 Bing. N. C. 674; 4 Scott, 385; 5 Scott, 491; Belbin v. Butt, 2 M. & W. 758; 6 Dowl. 167; Cooper v. Morecraft, 3 M. & W. 500; 6 Dowl. 562.

(2) The rule also provides for the general issue when given by statute, and requires it to be so stated in the margin of the plea.

(a) See Coates v. Stevens, 2 C., M. & R. 118; 5 Tyrw. 764; 3 Dowl. 784; Shirley v. Jacobs, 2 Bing. N. C. 88; 2 Scott, 157; Nicholl v. Williams, 2 M. & W. 758; 6 Dowl. 167; Kenyon v. Wakes, 2 M. & W. 764; 6 Dowl. 105; and supra, note (y).

(b) Kelly v. Villebois, Bail Court, cor. Littledale, J. Mich. T. 1839, 3 Jurist, 1172. Non assumpsit is not an issuable plea where the de-

fendant is under terms to plead issuably; id. ib.
(c) Timmins v. Platt, 2 M. & W. 720; 5
Dowl. 748, S. C. nom. Gilbert v. Platt. The new rule is confined to cases where the action is only on the note, and on the promise to pay contained in or implied by law from it: it is to be read as if it were thus—" in all actions on bills of exchange and promissory notes simpliciter, without any other matter;" per Park, B. ib.

(d) Worley v. Harrison, 3 Ad. & El. 669; 5 N. & M. 173; 1 Har. & Woll. 426, S. C. (e) Hay v. Fisher, 2 M. & W. 722, 730, 732.

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special demurrer (f). And where, before the new rules, in an action of II. Of the assumpsit on a bill of exchange, with the usual money counts, the defendant Pleas. pleaded nil debet to the count on the bill, but omitted to plead at all to the other counts, it was held, after a verdict for the plaintiff, that the defendant could not take advantage of his own mispleading in arrest of judgment(g).

We have seen that, where the defendant altogether denies the plaintiff's Non Acright of action on the bill or note, he must now traverse some matter of fact, 4c. such as the drawing, making, indorsing, accepting, presenting, or notice of Under the plea of non-acceptance, the defendant is at liberty to shew that the bill was written on paper improperly stamped with the old die, since the 3 & 4 Will. 4, c. 97, s. 17(h). So in an action on a banker's check, the objection that it was post dated, and not properly stamped(i), or that it was drawn by the defendant more than fifteen miles from the place where it was made payable, and falsely dated, in contravention of the 9 Geo. 4, c. 49, s. 15(k), may be taken under the plea that the defendant did not make the check. And if the defendant, instead of pleading that he did not accept or make the bill or note, were to plead that the instrument was duly stamped, or marked with any proper stamp or mark denoting that the lawful, requisite, and proper rate or duty chargeable or charged thereon had been or was duly stamped, marked, or impressed thereon, without shewing what the stamp on the instrument was, such plea would be bad on special demurrer, as leaving it in doubt whether the bill or note was altogether unstamped, or stamped with a stamp of higher or lower value than required by law(l). It is also a good defence under the plea of non acceptance, that after the defendant had accepted the bill generally, it was altered without his knowledge by *the addition of a memorandum making it payable at a bank- [*600] er's(m); or that a material alteration was made in the date of the bill(n); though such defence may be specially pleaded; but in so pleading care must be taken to aver that the alteration was made after acceptance, and it will not be sufficient to allege that the alteration took place whilst the bill was in full force and effect(o).

In traversing the indorsement of the bill or note, there is no material dis- Indonetinction between a plea denying the indorsement mode et forma, and one which denies the indorsement to a particular indorsee, as alleged in the declaration(p). And if in an action by indorsee against indorser the defendant, instead of traversing the indorsement, traverse the making and drawing of the bill, such plea cannot be treated as a nulity; because every indorser of a bill is in law a new drawer, and, therefore, such plea is good in substance, and can only be taken advantage of on special demurrer (q). we have seen(r) that this doctrine, as to the indorsement of a bill being

(f) Finleyson v. Mackenzie, 3 Bing. N. C. 824; 6 Dowl. 71, S. C.; 5 Scott, 20, S. C. The form of a plea of payment into court, as given by the rule T. T. 1 Vict. ante, 597, does not remove the difficulty suggested in this case as to the operation of the 17th and 4th sections of the rule H. T. 4 Will. 4, ante, 597.

(g) Harvey r. Richards, 1 Hen. Bla. 644.

(h) Dawson r. Macdonald, 2 M. & W. 26. (i) Field v. Woods, 7 Ad. & El. 114; 2 N. & P. 117, S. C.

(k) M'Dowall v. Lyster, 2 M. & W. 52; Jenkins v. Creech, 5 Dowl. P. C. 293.

(1) Haward v. Smith, 6 Scott, 438; 4 Bing.

N. C. 684, S. C.

(m) Calvert v Baker, 4 M. & W. 417. (n) Cock v. Coxwell, 2 C., M. & R. 291; 4 Dowl. P. C. 187; 1 Gale, 177, S. C. Where issue is taken on the indorsement, the plaintiff is not bound to explain an alteration in the date of the bill, the making of the instrument being admitted on the record; Sibley v. Fisher, 7 Ad. & El. 444; 2 Nev. & Perry, 430, S. C. (0) Langton v. Lazarus, 5 M. & W. 629.

(p) Waters v. Earl of Thanet, 7 Dowl. 251. (q) Allen r. Walker, 2 M. & W. 317; 5 Dowl. P. C. 460; 1 Mur. & Hurl. 44, S. C.

(r) Ante, 242, note (k).

II. Of the equivalent to a new drawing, does not hold in the case of a promissory note, and if the indorser of a note be sued as maker, he will be entitled to a verdict under a plea denying the making(s).

Several Pleas.

The rule H. T. 4 Will. 4 also forbids the use of several pleas, unless a distinct ground of answer or defence is intended to be established in respect of each:—that is, the defendant shall not be at liberty to state the same facts and circumstances in distinct pleas; but where the same facts lead to different legal conclusions, the defendant may still set forth those facts in separate pleas, shewing such different conclusions(t). Where in an action upon a bill, note, or check, the defendant applies for leave to plead several matters, the court will not allow such matters to be pleaded, or if pleaded will order the pleas to be struck out, if the defence thereby sought to be established is admissible under the plea that he did not accept or make the instrument de-So pleas which are contradictory(v) or vexatious(x) will clared upon(u). And in an action by the indorsee of a bill of exchange not be allowed. against the defendant as a public officer of a company, the latter applied for leave to plead, first, his bankruptcy, secondly, that he ceased to be a public officer before action brought, and thirdly, that the company did not indorse the bill, the court ordered the first two pleas to be struck out, upon an undertaking by the plaintiff that he would not take out execution against the defendant personally (y). But it is no objection that the pleas intended to be pleaded are inconsistent; because a defendant may have several defences to an action, each good in itself, though inconsistent with each other, and the [*601] object of the new rules was to prevent *the same desence from being repeated under several different forms(z). Neither is it any objection that the validity of the plea is questionable (a); nor will the court refuse permission to plead a particular defence, if it be doubtful whether such defence could be set up under another plea(b).

> Where a declaration, consisting of two counts, one on a bill of exchange accepted by the defendant, the other on an account stated, the defendant, without a rule to plead several matters, pleaded "that he did not accept the bill, and for a further plea, that he did not account," it was held, that the informality of omitting to confine each plea to the count to which it applied, In such case the objection did not authorise plaintiff to sign judgment(c). should be taken on special demurrer; and so if the defendant plead that he did not accept the bill of exchange in the declaration mentioned, taking no

(s) Gwinnell v. Herbert, 5 Ad. & El. 436; 6 N. & M. 723, S. C.

(t) Curry v. Arnott, 7 Dowl. 249, C. P. (u) Jenkins r. Creech, 5 Dowl. P. C. 293; M'Dowal v. Lyster, 2 M. & W. 52; Field v. Woods, 7 Ad. & El. 114; 2 N. & P. 117, S. C.; Dawson v. Macdonald, 2 M. & W. 26; supra And see Gardner v. Alexander, 1 Scott, 281; 3 Dowl. 146, S. P. Sed vide Langton v. Lazarus, 9 M. & W. 629; supra,

note (o) (v) See Steele r. Sterry, 1 Scott, 101; 3

Dowl. 133, S. C.

(z) See per Tindal, C. J. in Triebner v.

Duerr, 1 Scott, 102, 104; 8 Dowl. 183, 134.

(y) Wood v. Marston, 7 Dowl. 866. Sem-

ble, that in such action the court will not allow a plea denying that the defendant was a public officer without an affidavit of its truth.

(z) See Triebner v. Duerr, 1 Scott, 102; 1 Bing. N. C. 266; 3 Dowl. 133, S. C.; Wilkinson v. Small, 3 Dowl. P. C. 564; 1 Har. & Woll. 214, S. C.; Hart v. Bell, 1 Hodges, 6. See also Evans v. Davies, 3 N. & P. 464; 8 Ad. & El. 362, S. C.

(a) See Jaulerry v. Britton, 4 Scott, 380.

(b) See Thompson v. Bradbury, 3 Dowl. P. C. 147; 1 Bing. N. C. 326. (c) Vere r. Goldsborough, 1 Bing. N. C. 853; 1 Scott, 265, S. C. The rule of court H. T. 2 Will. 4, s. 84, expressly declares, that if a party plead several pleas, &c. without a rule for that purpose, the opposite party shall be at liberty to sign judgment. But the above case was not considered as falling within this rule, and to be more properly the subject of a special

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notice of the count on the account stated (d). However, where to a decla- 11. Of the ration on a bill of exchange, with the common counts, the defendant pleaded Pleas that the bill of exchange in the first count mentioned was paid when due; and Seceral also, as to the first count, that he did not promise; and as to the other counts, Pleas. that he put himself upon the country;—it was held, that the plaintiff was justified in treating each as a separate plea, though the second was declared inadmissible by the new rules, and the last put nothing in issue, and that he was therefore justified in signing judgment, there being no signature to the pleas, or rule to plead several matters(e). So where in an action against the indorser of a bill, the defence was that the indorsement was a forgery, and the plaintiff wishing for time to make inquiries, gave an undertaking not to sign judgment until after a further demand of plea; but the defendant, without waiting for such demand, pleaded several pleas without leave of the court, it was held, that the plaintiff was justified in signing judgment for the irregularity (f).

In an action by the drawer against the acceptor of a bill of exchange, a Duplicity. plea that the acceptance was made by force and duress of imprisonment, and that the defendant never had any value for accepting or paying the bill, is bad for duplicity (g). So a plea that the defendant's bankers paid the bill, and afterwards lost it, and that it came to plaintiff's hands without consideration, was held ill for duplicity and uncertainty (h). Nor is a plea containing two distinct defences the less a double plea, because one of the defences is badly pleaded(i).

The power of the courts to set aside a plea palpably sham or frivolous is Sham and now clearly established, though, as a general rule, the court will not try the Privolous Pleas. truth of a plea on affidavit, nor decide its validity in point of law on motion, except in extreme cases. In an action against the drawer of a bill of exchange the court struck out a plea which was manifestly a sham plea, and contained a variety of matters, without requiring *any affidavit of its falsi- [*602] ty(k). So, where to an action by the indorsee against the acceptor of a bill, the defendant pleaded that before the bill became due he accepted another bill at the request of the drawer, and upon his representation that he could prevail upon the holder to get the bill in the declaration mentioned withdrawn from circulation by means of the second bill, and that the defendant had no notice that the bill declared on had been indorsed to the plaintiff, the court set aside the plea as frivolous, without an affidavit of its falsity (1). So in an action by indorsee against acceptor, a plea that the drawer did not pay its amount to the drawee as the consideration of the acceptance, was held frivolous, and the court made absolute, with costs, a rule for signing judgment as for want of a plea(m). And where the defendant, who was

(d) Putney v. Swann, 2 M. & W. 72; 5 Dowl. 296, S. C.

(e) Hochley v Sutton, 2 Dowl. P. C. 700.

235, Lord Denman, C. J. " In Horner v. Keppel (infra, n. (p)) the plea traversed matter of fact alleged in the declaration in the form prescribed by the new rules. This plea is mere trifling and waste paper. We by no means abandon our summary jurisdiction over pleas of this kind, but think it better, at the same time, that parties should exercise their own discretion as to signing judgment, rather than call upon us to interfere; overruling Cowper v. Jones, 4 Dowl. P. C. 501, as to the jurisdiction of the courts. And see per Parke, B. in Bradbury v. Emans, 7 Dowl. P. C. 849, 852.

⁽f) Gould v. Whitehead, 6 Bing. N. C. 144. (g) Stephens v. Underwood, 4 Bing N. C.

^{665; 6} Dowl. 737, S. C.; 6 Scott, 402, S. C.

⁽h) Deacon v. Stodhart, 5 Bing N. C. 594.
(i) Stevens v. Underwood, 6 Scott, 402; supra, note(g).

⁽k) Balmanno v. Thompson, 4 Jurist, 43, C. P. Mich. T. 1889.

⁽¹⁾ Bradbury v. Emans, 7 Dowl. 849, Exch.; 5 M. & W. 595, S. C.

^{· (}m) Knowles r. Burward, 2 Perry & Dav.

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Frivolous Pleas.

II. Of the under terms to plead issuably, in an action by the indorsee against the defendant as acceptor of a bill, pleaded that he had received no consideration Sham and from the plaintiff, and the plea was delivered so late in Trinity Term that there was not sufficient time to get the demurrer argued that term, the court ordered the plea to be set aside, and that the plaintiff should be at liberty to sign judgment, unless the defendant consented to amend upon payment of all costs, and going to trial at the next sittings (n). And in another case, where the defendant pleaded a plea containing a number of facts, and calculated to perplex the plaintiff, the court, on an affidavit of its falsity, and no pretence being shewn for pleading it, ordered it to be set aside(o). But where to a declaration by the indorsee against the acceptor, the defendant, who was not under terms to plead issuably, pleaded that he had not notice of the indorsement to the plaintiff, and that he did not, at the time of indorsement, promise to pay the bill, and that the plaintiff did not at such time pay the full amount to his indorser, the court refused a rule to sign judgment for want of plea(p). And where in an action by the indorsee against the drawer of a bill, the defendant pleaded that J. E. made and indorsed the bills in the name of the defendant without any authority from him, to which the plaintiff replied, that the bill was not made or indorsed by the said J. E., the court refused to set aside a demurrer to the replication, and allow the plaintiff to sign judgment as for want of a plea(q)(1).

Want of Consideration(r)[*603]

In pleading the want of consideration or value to an action on a bill or note, the defendant must state affirmatively such facts as shew a *want of consideration; and a general plea of no consideration will be bad on special demurrer(s). And such plea has been held bad on special demurrer, although the defect in the statement of the consideration was not specially assigned as one of the causes of demurrer(t). But after verdict, a general averment of the want of consideration will suffice (u).

(n) Brown v. Austin, 4 Dowl. P. C. 161, Exch.

(o) Miley v. Walls, 1 Dowl. P. C. 648, Exch. But not where the truth of the plea is merely doubtful; id. ib. And see Edwards v. Greenwood, 5 Bing. N. C. 476: 7 Scott, 482, S. C. that the falsehood of a plea is no ground for setting it aside.

(p) Horner v. Keppell, 2 Per. & D. 234, Lord Denman, C. J. "We ought not to renounce our jurisdiction in these cases, nor ought we to exercise it on light grounds. A plea may be false and frivolous in fact; but, in order to interfere, we should have continually to institute a trial of facts on affidavit. In point of law a plea may be so absurd, that we should certainly interfere and punish the party in fault; but we will not interfere in this case." See Knowles v. Burward, 2 Perry & Dav. 235; supra note (m); Cowper v. Jones, 4 Dowl. P. C. 591; overruled so far as it repudiates the jurisdiction of the courts over these cases

(q) Walker v. Catley, 5 Dowl. 592, Exch. (r) See ante, 69 to 81, as to the want of consideration in general, and when or not a de-

(s) Stoughton v. Earl Kilmorey, 2 C., M. & R. 72; 3 Dowl. P. C. 705; 1 Gale, 91, S. C.;

Lacey v. Forrester, 2 C., M. & R. 59, 60; 3 Dowl. P. C. 668; 1 Gale, 139, S. C.; French v. Archer, 3 Dowl. P. C. 130; Low v. Chifney, 1 Bing N. C. 267; 1 Scott, 95, S. C.; Reynolds v. Ivemy, 3 Dowl. P. C. 453, Exch. And see cases in following notes.

(t) Graham v. Pitman, 3 Ad. & El. 521; 5 N. & M. 37, S. C.; Trinder v. Smedley, 3 Ad. & El. 522; 5 N. & M. 138; 1 Har. & Woll.

164, 309, S. C.

(u) Easton v. Pratchett, 2 C., M. & R. 542; 4 Dowl. 549; 1 Gale, 250, S. C. Lord Abinger, C. B. in delivering the judgment of the court below (1 C., M. & R. 806) said, "The new regulations do not justify the form of the plea. It was intended to make it incumbent upon a defendant to set forth the circumstances under which the bill is sought to be impeach-The plea of the general issue is forbidden by the new rules to be pleaded in an action on a bill of exchange. And the plea of the special matter, which according to the new rules is now to be pleaded, is not to be confined to the effecting the same purpose as a mere notice to prove the consideration. It was intended that the plaintiff should be apprized by the plea of the grounds upon which the defendant objects to the right of recovering upon the bill; as, for

A plea to an action by the indorsee against the drawer of a bill, that the II. Of the defendant's indorsement was in blank, that the defendant delivered the bill Pleas. to A. (not a party to the bill) only to get it discounted for him, and that A. Want of fraudulently, and in violation of that special purpose, delivered it to B. to Consideration. secure a debt due from A. to B., of all which the plaintiff had notice, was held bad on general demurrer, as not shewing distinctly that the defendant never had value for the bill(x). And where in an action by indorsee against the acceptor, the defendant pleaded, first, that the bill was accepted for the accommodation of the payee, and without any consideration, and that it was indorsed after it became due; and secondly, that the bill was indorsed after it became due, and *that the payee, at the time of the indorsement, was in- [*604] debted to the defendant in a larger sum than the amount of the bill, such pleas were held bad on demurrer (y)(1). And where a plea to a count by an indorsee against the drawer of a bill of exchange averred that the bill had been drawn and indorsed to L. for a specific purpose, who in fraud of that purpose had handed it to H., and that H. handed it to the plaintiff, not for

example, that it was given for the accommodation of the plaintiff, the onus of proving which lies on the defendant; or that it was given upon a consideration which afterwards failed, which in like manner the defendant must prove; or that it was given on a gambling transaction; and various similar cases may be readily sugtested. The intention then of these new regulations being to give the plaintiff due notice of the real defence which is to be set up, would manifestly fail if such a general plea as the one in question could be sustained; because the plaintiff would be left in the same state of uncertainty in which he formerly was before these rules of pleading were introduced. We are therefore of opinion, that this would have been a bad plea on special demurrer; but the question now is, whether after verdict it is to be considered by us as a bad plea, and we cannot hold that it is." And see per Parke, B. in Mills v. Oddy, 2 C., M. & R. 105, 106.

Mills v. Oddy, 2 C., M. & R. 103; 3 Dowl. P. C. 722; 1 Gale, 92, S. C. The plaintiff, who was an auctioneer, sold to the defendant by auction certain premises, and the defendant paid to the plaintiff as a deposit a check for 1001. There being a wilful misrepresentation in the description of the premises the defendant refused to pay the check, upon which the plaintiff brought an action against him on the check. The defendant pleaded that there was no consideration for making the check: held, that after verdict for the defendant, that evidence of the wilful misrepresentation was admissible under the plea, but that such plea would have

been bad on special demurrer.

In Paplief r. Codrington, 4 Dowl. P. C. 497, after a plen of "no consideration" to a declaration on a bill of exchange by which the plaintiff had been delayed the long vacation, the court, under special circumstances, allowed the defendant to withdraw his plea and plead de noro, and have an inspection of the bill without an affidavit of merits.

Easton v. Pratchett, 1 C., M. & R. 798; 3 Dowl. 472; 1 Gale, 30; 6 C. & P. 736. To a declaration on a bill of exchange, by an indorsee against an indorser, the defendant plended, that he indorsed the bill to the plaintiff, without having or receiving any value or consideration whatsoever for or in respect of his said indorsement; and that he, the defendant, had not at any time had or received any value or consideration whatsoever for or in respect of such indorsement: held, after verdict, that the plea was sufficient. Affirmed on error in the Exchequer Chamber.

(x) Noel r. Rich, 2 C., M. & R. 360; 4 Dowl. 228; 1 Gale, 225, S. C. Semble, that a replication to such plea " that the defendant broke his promise without the cause alleged by him in his plea" is good; id. ib. And see Isaac v. Farrar, 1 M. & W. 65; 1 Gale, 385, S. C.; Griffin v. Yates, 2 Scott, 845; 2 Bing. N. C. 579, S. C.; Reynolds v. Blackburn, 2 N. & P. 136; 7 Ad. & El. 161; 6 Dowl. 19, S. C.; post, 620, note (n).

(y) Stein r. Yglesias, 1 C., M. & R. 565; 3 Dowl. P. C. 252; 1 Gale, 98. See as to the second plea, Burrough v. Moss, 10 B. & C. 558; ante, 220, note (f).

 In an action by indorsee against drawers and indorsers of a bill drawn and accepted during partnership, it was held, that a plea, by one of the defendants, that the bill was indorsed by the other defendant after the dissolution of the partnership and after notice thereof to the indorsee, and without the privity and in fraud of the defendant, and for the separate purposes of the indorsing partner, raised an immaterial issue. Lewis v. Reilly, 5 Jurist, 98.

A plea, that the bill declared on, was accepted in payment of a debt to the drawer, who indorsed it in blank and delivered it to the plaintiff as agent for one to whom the drawer was indebted and in payment of such debt, and that the plaintiff in violation of his duty retained the bill, was held a good answer to the usual allegation of indorsement to the plaintiff. Adams v. Jones, 20 Leg. Obs. 286. }

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Want of Consideration.

II. Of the good and valuable consideration, and that the plaintiff was not a bon? fide holder, it was held, that this allegation, connected with the rest of the plea, meant only that the plaintiff had not given good consideration for the bill, and that fraud in the plaintiff could not be given in evidence under it; and even if the allegation had stood alone, it would not, it should seem, have raised the issue as to fraud(z). And in an action by the indorsee against the acceptor of a bill of exchange, it is no plea that the bill was accepted by the defendant only as a collateral security, and for the accommodation of the drawer, and that due diligence had not been used to recover the amount from A mere general allegation of fraud will not aid a plea of want of consideration, which amounts to an answer to part only of the declaration(b).

> (z) Uther v. Rich, 2 Per. & Dav. 579. Lord Denman, C. J. in delivering the judgment of the court said, "This was an action by the indorsee against the acceptor of a bill of exchange. The second plea stated that the bill had been accepted and indorsed to Levy for a special purpose, who, in fraud of that purpose, had handed it to Hunter, and that Hunter handed it to the plaintiff, not for good and valuable consideration, and that the plaintiff was not the bond file holder. The replication was de injurit. At the trial I held that these pleadings put in issue nothing but the fact of a consideration having been given, and that the defendant was not at liberty to shew that the plaintiff knew of fraud, but should have pleaded that knowledge in distinct terms. On the motion for a new trial other points were disposed of, and the only question now remaining is, what menning is to be given to the words in the plea that the plaintiff was not the bon's fide holder of the bill. With respect to the doctrine laid 'down in Gill v. Cubitt, 3 Bar. & Cres. 466, and other cases, we adhere to the more recent decisions, and to what is said in Goodman v. Harvey, 4 Ad. & Ellis, 870, (ante, 257, note (n)), that gross negligence alone would not be a sufficient answer-that it may he evidence of mali fides, but is not the same thing. It follows that, in pleading, mala fides must be be distinctly alleged; and the sole question is, whether mal's fides is alleged by the words 'that the plaintiff was not the bon't fide holder of the bill.' The case of Devas v. Venable, 3 Bing. N. C. 400, is not in point, for that was a decision upon the meaning of the words bonh fide in a particular act of parliament, which was construed with reference to the subject matter and the context. Neither is the case of Bramah v. Roberts, 1 Bing. N. C. 459, an express authority, as the decision turned on other words in the plea, and the question does not appear to have arisen in any other case. Now the words in question must he taken with reference to the other allegations in the same plea, and being so taken, their proper meaning would seem to be, that the plaintiff was merely a collusive holder, not really interested in the bill himself, but only lending his name to Hunter; and then they do not go beyond the allegation that he had not given good and valuable consideration, evidence of which was admitted. But it is contended that their meaning is, that the plaintiff

took the bill under such circumstances, that he must be considered to have known of the fraud set forth in the plea. We do not see how such a meaning can fairly be attributed to them. and are of opinion, that the only proper mode of implicating the plaintiff in the alleged fraud by pleading, is to aver that he had notice of it, leaving the circumstances by which that notice is to be proved directly or indirectly to be established in evidence, and we cannot treat the allegation that the plaintiff was not a boni fide holder as equivalent to such an averment. It is not necessary to give any opinion on any supposition that the words should be taken without reference to the other allegations in the plea, but we wish it to be understood that we by no means intend to say that even if taken simply they would have any other meaning than that which we have now given them."

(a) Angell r. Ihler, Exch. M. T. 1839, 4

Jurist, 196.
(b) Connop v. Holmes, 2 C., M. & R. 719; 4 Dowl. 451, S. C. Assumpsit by the indorsea against the drawer of a bill of exchange accepted by B. Plea, that B., being in want of a loan of money, applied to the plaintiff to advance it, which he was unwilling to do, unless B. agreed to accept it in two thirds money and one third wine, and unless the plaintiff had the security of a bill drawn by the defendant and accepted by B., that B. agreed to the said terms; and thereupon the bill declared on was drawn by the defendant and accepted by B., and that the defendant never received any consideration or value, nor did any consideration move or pass from either of the said parties to the defendant for his drawing the bill, except as aforesaid; and that the said wine had not been delivered, and that the said contract for the sale and delivery thereof was a gross fraud on the defendant: held bad, on special demurrer, because, the plea averring only a non-delivery of the wine, it was to be assumed that the money was paid, and was therefore an answer only as to one third of the amount of the bills; and that the allegation of fraud, not shewing in what the fraud consisted, could not be applied to any thing stated in the declaration.

As to illegality of consideration, see ante, 81 to 97. Illegality of consideration, whether by statute or common law, must be specially pleaded, rule H. T. 4 Will. 4, Assumpsit, a. 3; see Martin v. Smith, 6 Scott, 268; 4 Bing. N.

C. 436, S. C.

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*To an action by the indorsee against the drawer of a bill of exchange, the II. Of the defendant pleaded that the bill was given in payment of the price of seven- Pleas. teen pockets of hops, sold by the plaintiff to the defendant as hops of a cer- Failure tain grower, and answering certain samples, to be delivered by the plaintiff of Consideration to the defendant within a reasonable time; that although a reasonable time had elapsed, the plaintiff had not delivered to the defendant any hops answering the samples, or any hops whatever; and that there was no consideration for the bill except as aforesaid. It appeared that the plaintiff had delivered to the defendant seventeen pockets of hops, but inferior to the sample, and it was held that the general allegation in the plea that the plaintiff had not delivered any hops whatever was immaterial, and might be rejected, and that without it, the plea shewed a total failure of consideration, and was an answer to the action (d)(1).

To an action by the indorsee against the acceptor of a bill of exchange Accord for 43l., it is a good plea that after the bill became due one G. P., the draw- and Satiser of the bill, made his promissory note for 44l., and delivered the same to the plaintiff, in full satisfaction and discharge of the bill, although the note So in an action by the indorsee against acceptor, a plea that the drawer indorsed the bill to B., who indorsed it to C., in whose hands it remained when due; that C. being unable to obtain payment of it, returned it to B., who continued the holder of it until the defendant, before the indorsement to the plaintiff, delivered to B. another bill, drawn by the same party, and accepted by the defendant, for a greater amount, which B. accepted in full discharge and satisfaction of the former bill, was held a sufficient answer to the action, although it did not appear that the second bill was pay-But where to an action by the payce against the maker able to order (f). of a promissory note, the defendant pleaded that after the making of the note and accruing of the debt in respect thereof, the plaintiff drew a bill of exchange upon the defendant, which he accepted and delivered to the plaintiff, who took it for and on account of the note, and afterwards indorsed it to a person unknown to the defendant, and who at the time of the commencement of the suit was the holder thereof, and entitled to sue the defendant thereon, it was held, on special demurrer, that the plea was bad, inasmuch as it did not aver that the bill was giren as well as taken in satisfaction of the note(g). A plea of payment of a smaller sum of money in bar of a claim for a larger sum is bad, even after verdict(h)(2).

*A defendant has the same right of set-off in an action on a bill or note, Set-off (i).

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(c) See ante, 76 to 79. (d) Wells v. Hopkins, 5 M. & W. 7. (e) Sard v. Rhodes, 1 M. & W. 153; 1 Gale, 376; 4 Dowl. 743; 1 Tyrw. & G. 298,

(f) Lewis r. Lyster, 2 C., M. & R. 704; 4 Dowl. 377, S. C. In this case the plea went on to aver that the latter bill was indorsed by B. to A., and that after it became due the defendant paid the amount of it to A. in satisfaction and discharge of that bill, and of all dama-

ges sustained by the plaintiff by reason of the non payment thereof when due: but it was held, that all this might be rejected as surplusage and did not vitiate the plea.

(g) Crisp r. Griffiths, 2 C., M. & R. 159; 8

Dowl. 752; 1 Gale, 106, S. C.

(h) Down r. Hatcher, 2 Perry & Dav. 292;

3 Jurist, 651, S. C.
(i) The rule T. T. 1 Will. 4, s. 6, ante, 558, requires the particulars of the defendant's

set-off to be annexed to the record.

(1) See post, 928, (57).

⁽²⁾ See post, 820, (20) a plea that the defendant, &c. See also Bartrum v. Caddy, 9 Adol. & El. 275; Corbett v. Swinburne, 8 Id. 673. }

Before pleading a set-off, the defendant should be II. Of the as in other cases (j)(1). Pleas. satisfied that he is sufficiently prepared to establish it in evidence, for where a verdict is found against a defendant on a plea of set-off, he is estopped Set-off. from suing the plaintiff for the demand specified in such plea; and this, although the defendant offer no evidence in support of his plea of set-off (k). In case, therefore, a defendant, after having put such a plea upon the record, discovers that he is unable to prove it, his proper course is to apply to the court or a judge for leave to withdraw the plea on payment of costs; and

he is at liberty to make this application even at the trial (l).

A plea of set-off is in general an indivisible plea(m), and, consequently, if under a plea of set-off to the whole declaration, the defendant prove a debt less than the amount of the plaintiff's claim, he is not entitled to have a verdict entered for him for the amount which he has so proved, but the issue must be found for the plaintiff (n). Where, however, the plaintiff's claim has been partly answered by other pleas, and the defendant proves a set-off exceeding the reduced amount, he is entitled to have a verdict entered for him on the plea of set-off, and the issue must be found wholly for the de-

(j) See generally, Chitty on pleading, 6th edit. vol. i. p. 568, vol. iii. p. 802; and Chit. j. Precedents in Pleading, p. 387.

(k) Eastmure v. Laws, 5 Bing. N. C. 444; 7 Scott, 461, S. C.

(1) Id. ibid.

(m) Moore r. Butlin, 7 Ad. & El. 595; 2

N. & P. 436, S. C.
(n) Tuck v. Tuck, 5 M. & W. 109; 3 Jurist, 680, S. C.

(1) Where a note not payable to order has been assigned to a third person for a valuable consideration, and the maker has actually promised such third person to pay the contents; he is not to be permitted in an action upon the note against him in the name of the payee to avail himself of claims he may have against the payee as a set-off. Wiggin v. Damrell, 4 New Hamp. Rep.

A note, not payable to order, made by A. and payable to D., at a future day, was transferred by C., before the note became due, gave notice to A. of the transfer. only said shortly that he would see about that, but said nothing of any set-off which he had against B. In a suit upon the note in the name of B., for the benefit of C., it was held that A. was precluded from availing himself of any set-off he might have against B. Albee v. Little, 5 ld. 277.

In a suit on promissory note, indorsee v. maker, the defendant has the same right to file his declaration on book account in off-set, on an account existing before notice of the indorsement, as

if sued by payce. Martin v. Trobridge et al., 1 Verm. Rep. 447.

The decision in this case is made under statutes authorizing the defence which it sustains. The court add—"We have nothing to do with the policy of these statutes; while they are in force the indorsee must take the note subject to the rights of the maker against the payee, and rely upon his security upon the indorsement." Ibid.

The maker of a promissory note when sued by an indorsee, will not be allowed an off-set of notes which he has purchased against the original payee of the note on which he is sued, unless he has perfected his right of action agaist such payee, by giving him notice that he is the holder of said notes, previous to the assignment to the plaintiff. Parker r. Kendall, 3 Id. 540.

The demands proper to be pleaded in off-set, in such cases, must be such as the defendant

could have pleaded if the action had been brought by the original payee of the note. Ibid.

When the maker of a promissory note payable to A. B. or bearer, is sued by one, as bearer, the defendant will not be allowed to plead any demand in off-set except such as he may have against the plaintiff in the action Ibid.

It seems in an action by an indorsee of a promissory note, commenced previous to the revised statutes, the defendant may avail himself of a set-off against the payee, when, by the pleadings, the very right of the plaintiff to the note is denied; as where the transfer is charged to have been fraudulent, with the view of defeating the set-off. Savage v. Davis, 7 Wend. Rep. 223.

Where one makes a promissory note negotiable at bank, and the bank becomes its purchaser, no set-off can be allowed against it in favor of the maker against the payee. Emanuel r. Atwood, 6 Port. 384. Nor is a set-off allowable in favor of the maker against an intermediate indorser, unless there has been a contract between the parties, founded on some new consideration,

so as to allow it. Kennedy v. Manship, I Ala. Rep. N. S. 43.
In a suit by T. against M. & B. a note executed by T. and another and payable to M. alone,

would be a good set-off. Carson v. Barnes, Id. 93.

False representations in the sale of a chattel for which the note was given, are admissible by way of reduction of damages. Harrington v. Stratton, 22 Pick. 511. }

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fendant(o). And the same rule applies whether the form of action be debt II. Of the or assumpsit(p).

Although, in general, a creditor who separately agrees to take less than Composihis entire demand, is not legally bound by such engagement for want of ade-tion(q). quate consideration (r), yet where several creditors, on the faith of each others stipulations, enter into an arrangement of that nature, whether by deed or unstamped memorandum, each is legally bound by it, and he cannot either privately receive(s) or sue his debtor for a larger dividend than the rest(t). And one of the makers of a joint *promissory note is at liberty to show that he [*607] was a mere surety for the other party, and so known to the plaintiff, the payee of the note, and that the plaintiff has taken a composition from the principal debtor without the defendant's consent(u). And where A. advanced 100l. to B. on the joint and several promissory note of B. and C., the latter at the time owing A. 651., on his own account, and C. failed, and at a meeting of his creditors, A. and others entered into a resolution that C. should assign certain property for the benefit of his creditors, and that his creditors should give him a release, and A. at this meeting stated his debt to be 651. and af-

(0) Id. 1bid. And see the judgment of the court in Moore v. Butlin, 7 Ad. & El. 595; 2 N. & P. 436, S. C.

(p) Consins v. Paddon, 2 C., M. & R. 547; 5 Tyrw. 555, S. C.; Tuck v. Tuck, 5 M. & W. 109.

(q) See in general, Montagu on Debtor and Creditor; 3 Chit. Commercial Law; Harrison's Index, tit. Debtor and Creditor, iv. vol. 2, p. 883, vol. 3, p. 2440; Jones v. Senior, 4 M. & W. 123; post, 621, n. (o). And as to the effect of a Scotch deed of composition, see Woodham v. Edwards, 5 Ad. & El. 771; 1 Nev. & Perry. 207, S. C.

(r) Fitch v. Sutton, 5 East, 230; see Down v. Hatcher, ante, 605, note (h).

(s) Ants, 85, note (g); Stone v. Compton, 5 Bing. N. C. 142; Cowper r. Smith, 4 M. & W. 519; ante, 86, note (n). See also ante, 421 to 423.

(t) See Good v. Cheeseman, 2 B. & Ad. 328; 4 Car. & P. 513, S. C. A debtor being unable to meet the demands of his creditors, they signed an agreement (which was assented to by the debtor) to accept payment by his covenanting to pay two thirds of his annual income to a trustee of their nomination, and give a war-The rant of attorney as a collateral security. creditors never nominated a trustee, and the agreement was not acted upon, and one of the creditors brought an action against the debtor for his demand. The debtor appeared to have been always willing to perform his part of the engagement: held, that the agreement, though not properly an accord and satisfaction, was still a good defence on the general issue, as it constituted a valid new contract between the creditors and the debtor, capable of being immediately enforced, and the consideration for which to each creditor was the forbearance of the rest, and as there appeared no failure of performance on the part of the debtor.

Cork v. Saunders, 1 Bar. & Ald. 46. A. being insolvent, by agreement, stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the next meeting, and that then the property should be divided among them. The insolvent assigned his effects. At the next meeting several of the creditors, who had signed this instrument, agreed that the business should be carried on by the trustees for a further time: it was held that a creditor who had signed the first agreement, although he had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement.

Tatlock v. Smith, 6 Bing. 339; 3 Moo. & P. 676. By an agreement between defendants and their creditors, all defendants' stock in trade was placed in the hands of trustees for the benefit of creditors, and defendants were to execute to the trustees a conveyance of all their estate, in which deed were to be inserted all other usual clauses. The trustees carried on the defendants' business, and paid the creditors 10s. in the pound. They then tendered for execution by defendants a conveyance of all their estate. containing a clause of release, which defendants objected to as insufficient, and refused to exe-The instrument, not cute the conveyance. having been executed by all the creditors, a meeting, at which the defendants were called on to execute was adjourned, that the signature of every creditor night be lobtained. It was held, that the plaintiffs, who, as creditors, were parties to the above agreement, could not sue for their original debt, at least till the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants.

Emes r. Widdowson, 4 Car. & P. 151. An assignment of property for the purpose of securing debts due and to be due, with a power of sale, upon giving six months notice, is only a collateral security, and, without a special clause to that effect, does not suspend the remedy by action against the debtor. And see Laucaster v. Harrison, 6 Bing. 726; 4 M. & P. 561, S. C.

As to tender of composition notes, see ante,313. (u) Hall r. Wilcox, 1 Moody & R. 58.

Pleas. Composi-

II. Of the terwards received a dividend on that sum, it was held that A. could not, on the subsequent failure of B., sue C. on the promissory note(v). But in order to render the deed or agreement of composition binding on the creditor, it must be shewn that all, or at least the general body of the defendant's creditors, agreed to accept the composition; and if it appears that one creditor only besides the plaintiff was induced to enter into the arrangement, the plaintiff will not be precluded from recovering his original demand (w). And where by an agreement entered into between the plaintiffs, together with other creditors, and the defendant, the defendant agreed to pay a composition of 15s. in the pound by two instalments; and a surety, in consideration of the creditors agreeing to discharge the defendant from all debts and demands on receiving such composition of 15s. in the pound, agreed to pay a sum of money in part payment of the first instalment, and to accept a bill of exchange drawn by the defendant in part payment of the second, the creditors agreeing to exonerate and discharge the defendant on payment of the said 15s. in the pound; and it was also agreed that several bills of exchange, the amount of which was equal to the residue of the sum payable on the composition, which had been before indorsed by the defendant and handed over to the plaintiffs, should be considered as part payment of the said 15s. in the pound; it was held that the bills left in the hands of the plaintiffs were not, under this agreement, to be considered as an absolute payment, unless they were paid when at maturity, and, one of them having been dishonoured, that the defendant remained liable on his indorsement (x). So, if it be part of the condition of the deed that the debtor shall make a full disclosure of his property, and he conceals a portion of it, the creditors signing the deed may [*608] still proceed against him(y); or if a creditor compound *with his debtor under a false impression, in which the debtor knowingly leaves him, as to the extent of the debtor's estate, the creditor is not estopped from suing for the balance of his debt(z). And a creditor who is refused permission to come in under a composition deed, is remitted to his former rights, notwithstanding he may have previously bound himself to enter into such deed(a)(1).

(v) Seager v. Billington, 5 Car. & P. 456. (w) Reny v. Richardson, 2 C., M. & R. 422. As to proof of an agreement to compound, see ib. It is usual in a deed or agreement of composition to insert a clause, that unless all the creditors above a certain amount shall, within a specified time, enter into the deed or agreement the same shall be void.

(x) Constable v. Andrew, 2 C. & M. 298; and see ante, 312, note (1).

(y) Wenham v. Fowle, 3 Dowl. P. C. 43.

(z) Vine v. Mitchell, 1 Mood. & Rob. 337.

(a) Garrard v. Woolner, 5 Moore & S. 327;

S Bing. 258, S. C. The plaintiff attended a meeting of the defendant's creditors and concurred in certain resolutions for the execution of a release to the defendants on their executing an assignment of all their effects to trustees, for distribution amongst their creditors. The defendants and the trustees at first disputed the amount of the plaintiffs debt, but subsequently altogether refused to allow him to come in under the deed: it was held, that his having signed the preliminary resolutions was, under the circumstances, no bar to his right to sue the defendants for his original debt.

⁽¹⁾ The payee of a note for \$4,310, agreed with the maker, that if the maker would convey to him certain land, the the sum of \$3,200 should be allowed to him on the note, and if any sum should be paid in cash or otherwise, double the amount paid should be indorsed upon the note; and that upon receiving a conveyance of the land and the maker's note for \$500, payable in one year with interest, the first note should be given up; and in this agreement was the clause, "the above arrangement is to be carried into effect in three months." The land was conveyed within the three months, and the \$3,200 indorsed as paid on the note; but no other payment and no note for \$300 was made or tendered within the three months. It was held that the note was not a penalty to enforce the performance of some other obligation, but that it was evidence of a subsisting debt to the amount of it, and that the agreement was in the nature of a composition, the conditions of which must be strictly complied with, and that the maker had not complied with the conditions of the agreement, and therefore the payee was entitled to re-cover the balance of the note after deducting the \$3,200. Makepeace v. Harvard College, 10 Pick. 298.

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The Statutes of Limitations, as far as respects bills and notes, &c. are II. Of the the 21 Jac. 1, c. 16, ss. 3 and 7; 4 & 5 Ann. c. 16, s. 19, and the 9 Geo. Pleas. 4, c. 14, ss. 1, 3, and 8. The 21 Jac. 1, c. 16, s. 3, enacts, that all ac-Statutes of tions upon the case, other than for such accounts as concern the trade of Limitations(b). merchandise between merchant and merchant(c), their factors or servants, all actions of debt, grounded upon any lending or contract, without specialty, shall be commenced and sued within six years next after the cause of such action or suit, and not after. But sect. 7, provides, that if any person or persons, that is or shall be entitled to any such actions, shall be at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, fême covert, non compos mentis, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of full age, discovert, of sane memory, at large or returned beyond the seas, as other persons having no such impediment should have done.

The 4 & 5 Ann. c. 16, s. 19, enacts, that if any person or persons against whom there is or shall be any such cause of suit or action for seamen's wages, or against whom there shall be any cause of action upon the case or of debt, grounded upon any lending or contract, without specialty, or any of them, shall be at the time of any such cause or suit, or action given or accrued, fallen or come, beyond the seas, that then such person or persons, who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person or persons after their return from beyond the seas, so as they take the same after their return from beyond the seas within such time as are respectively limited for the bringing of the said actions before by this act and by the said other act made in 21 Jac. 1.

The 9 Geo. 4. c. 14, s. 1, after reciting the statute of James for England, 9 Geo. 4, and of Charles for Ireland, then recites as follows: And whereas various c. 14. questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking cases out of the operation of the said enactments, and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof; and enacts, That in actions of debt *or upon the case, grounded upon simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise, made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever:



⁽b) A defence under this statute must always have been specially pleaded, independently of the new rules; see Chitty on Pleading, 6th edit. vol. i. p. 479.
(c) Since the 9 Geo. 4, c. 14, accounts not

in writing are not sufficient to take a case out

of the statute of limitations; but there must be a part-payment in cash, or what is equivalent to it, to have that effect; Williams v. Griffith, 2 C., M. & R. 45; Mills v. Fowkes, 5 Bing. N. C. 455; 7 Scott, 444, S. C.

II. Of the provided also, that in actions to be commenced against two or more such Pleas. Statute of Limitations.

joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise judgment may be given, and costs allowed for the plaintiff as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiff.

Sect. 3 enacts, That no indorsement or memorandum of and payment, written or made after the time appointed for this act to take effect (d) upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either

of the said statutes.

Sect. 8 provides, That no memorandum or other writing made necessary by this act shall be deemed to be an agreement within the meaning of any statutes relating to the duties of stamps(e).

When gins to run.

The statutes of limitation, it will be observed, require the action to be Statute be- commenced within six years next after the cause of action accrued, not within six years after the making of the contract (f). Therefore the statute begins to operate only from the time when the bill became due, and not in general from the date(g)(1); and, therefore, the plea in an action against the ac-[* 610] ceptor of a bill, or maker of a note, when payable *after date, should be actio non accrevit, and not non assumpsit infra sex annos(h).

Where the payee of a bill was dead at the time it was accepted, the court held that the statute did not begin to run till his administrator had taken out administration(i). But if a party act as executor de son tort, as he may be sued immediately as such, the statute runs in that case, and his subsequently

(d) 1st January, 1839. See Bosworth and Parr v. Cockett, in House of Lords, 6th May, 1824, and other cases before this act, Searle r. Lord Barrington, 2 Stra. S20; 2 Ves. sen. 43,

(e) This section applies only to instruments which might be stamped with an agreement stamp; and, therefore, a promissory note improperly stamped is not admissible in evidence Jones v. Ryder, 4 M. & W. 32. But the following memorandum "I acknowledge to owe M. 36l. which I agree to pay him as soon as my circumstances will permit" is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the statute of limitations, the debt itself being proved by other evidence; Morris v. Dixon, 4 Ad. & Ellis, 845; 6 Nev.

& Man. 438; 2 Har. & W. 57, S. C.

(f) Ante, 608.
(g) Whittersheim v. Carlisle, 1 H. Bla. 631; Renew v. Axton, Carth. 3, (Chit. j. 174). As to the point when the statute of limitations begins to run on a note payable on demand; see post, 610; and Topham r. Braddock, 1 Taunt. 575, 576; Sir W. Jones, 194; Godb-437; 12 Mod. 444; 15 Ves. 487; see Savage v. Aldren, 2 Stark. R. 232, (Chit. j. 1007), from which it seems, that where a note was not to be delivered to the payee till certain conditions had been performed, the statute does not run till the delivery of note; and see Irving v. Veitch, 3 M. & W. 90; post, 611, note (v). (h) Jocelyn v. Luserre, 10 Mod. 294, (Chit.

j. 232). (i) Murray v. E. I. Company, 5 B. & Al.

212, (Chit. j. 1121).

(1) Limitation is from the accruing of the action, not the assumpsit. Withers r. Richardson, 5 Monroe's Rep. 94. Keith v. Harrington, 2 Verm. Rep. 174.

A promise to pay certain notes signed by the promisee and another, is broken, when those notes become payable, and the statute of limitations then begins to run. Crofoot v. Moore, 4 Id. 204.

Such a contract is not a contract of indemnity, but an action will lie upon it as soon as the pay-day arrives, without payment by the promissor. Ib.

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taking out letters of administration will not alter the case (k). And if after II. Of the the cause of action accrued, and after the statute had begun to run, the debt- Pleas. or within six years die, and, by reason of litigation as to the right to probate, Statute of an executor of the will is not appointed until after the expiration of the six tions. years, the statute will be a bar, though plaintiff sue such executor within a When reasonable time after probate granted (l).

Statute be-

Where an agent seeks to recover from his principal the amount of a bill of gins to run. exchange drawn by the former upon the latter, which the agent has been obliged to pay in consequence of the non-acceptance of the principal, and the action is founded upon the implied contract of the principal to indemnify the agent against loss, the statute will only begin to run from the time of damnification, viz. when the agent was called upon to pay(m). But as a surety is entitled to sue his co-surety for contribution as soon as he has paid a sum exceeding his proportion of the whole debt, if two persons become sureties on a promissory note, and one of them, who has been compelled to pay considerably more than one-half of the debt, sue his co-surety for contribution, and it appear that a large portion of the money, exceeding one-half of the original debt, has been paid more than six years previous to the commencement of the action, he will only be entitled to recover the amount paid by him within six years (n).

If goods be sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option, this is in effect a nine months' credit, and, consequently, an action for goods sold and delivered, commenced within six years from the end of the nine months, is in time to

save the statute of limitations (o).

Where a bill or note is payable a certain time after sight, no debt accrues until it has been presented to the drawee, therefore the statute of limitations is no bar to such a note, unless it has been presented for payment more than Bills and six years before the action was commenced (p).

With respect to promissory notes payable on demand, it has been held sight. that the statute runs from the date of the note, and not from the time of the demand(q)(1). So although the note be payable with interest *on demand(r). Notes pay-

Notes payable at or a/ler

able on Demand. [*611 |

(k) 10 Ves. 93.

(1) Rhodes v. Smethurst, 4 M. & W. 42; see post, 823, (58).

(m) Huntley v. Sanderson, 1 C. & M. 467; 3 Tyrw. 469, S. C.

(n) Davies v. Humfreys, 4 Jurist, 250, Hil.
T. 1840, Exch. see post, 823, (59).
(o) Helps v. Winterbottom, 2 B. & Ad.

431, Parke, J. dubitante on the ground of the

option given with respect to the bill.

(p) Dixon v. Nuttall, 1 C., M. & R. 307; 6 C. & P. 320, S. C.; ante, 365, note (i); and see per Parke, B. in Norton v. Ellam, 2 M. & W. 462; Holmes v. Kerrison, 2 Taunt. 323, (Chit. j. 791); ante, 365, note (h).

(q) Christe r. Fonsick, C. P. London sittings after M. T. 52 Geo. 3, cor. Sir J. Mansfield, Selw. 9th edit. 351; Capp v. Lancaster, Cro. Eliz. 548; Rumball r. Ball, 10 Mod. 38; 3 Salk. 227, (Chit. j. 231); Anon. 15 Vin. Ab.

103; ante; Tidd, 9th edit. 17, n. (g); 1 Ves. 344, accord; but see Harris v. Ferraud, Hardr. 36; Buckler v. Moor, 1 Mod. 39; Vin. Ab. tit. Limitations, p. 14, semb. con; and quære, if payable in the body at a particular place, a demand there is not essential; and semble the statute could only run from the time of such demand; see Saunderson v. Bowes, 14 East, 500; Carter v. Ring, 3 Campb. 549; Topham Percowe, Sir W. Jones, 194; Godbolt, 437; Collins v. Benning, 12 Mod. 444; Ex parte Dewdney, 15 Ves. 487. It seems that in the case of a note payable twelve months after notice, notice must be given; Clayton v. Gosling, 5 Bar. & Cres. 360; S D. & Ry. 110, (Chit. j. 1287); see judgment of Parke, B. in Norton v. Ellam, 2 M. & W. 464.

(r) Norton v. Ellam, 2 M. & W. 461. But

in Gascoyne v. Smith, M'Clel. & Younge, 338,

⁽¹⁾ The statute of limitations begins to run from the date of a promissory note payable on demand. Little v. Blunt, 9 Pick. Rep. 488. | Smith v. Bythewood, Rice's Law Rep. 245. |

II. Of the But if a note be payable "twenty-four months after demand," the statute is Pleas. no bar if the note be presented for the first time within six years before the action commenced(s).

Account stated.

It has been considered, that the statement of an account and striking a balance within six years, which the debtor promises to pay with interest, creates such a new cause of action that it suffices to sue within six years after, although all the items are of longer date, and though the account be stated since the passing of the 9 Geo. 4, c. 14, which in general requires an acknowledgment in writing(t). But a mere parol statement of an antecedent debt, without any new contract or consideration, made within six years before action brought, does not constitute a sufficient cause of action to prevent the operation of the statute of limitations (u).

Where the defendant was indebted to the plaintiffs in a balance of 22451, for which they held his over-due promissory note, and in 1827 it was agreed between them that the defendant should pay the balance as follows, viz. 2451. in cash, and the remainder by annual payments of 3001. a year out of his salary as a consul abroad, and by the proceeds of certain wines consigned by him to India, and that the plaintiffs should hold his promissory note as a security for the payment of the account; and 2451. was paid, and the 300l. was also paid in 1828 and 1829, but the defendant made default in payment of it in September 1830, it was held, that the plaintiffs were entitled at any time within six years from September 1830 to sue

paid, was held not to be payable instantly, and, therefore, not to be treated as overdue in the hands of an indorsee; and it was observed, that if the parties meant to secure something demandable instantly, it would have been absurd to stipulate for the payment of interest. The same point was determined in Barough o.

White, 4 Bar. & Cres. 325.

(a) Thorpe v. Coombe, Ry. & Moo. 388; 8

Dow. & Ry. 347, (Chit. j. 1295); Sturdy v.

Henderson, 4 B. & Ald. 592, S. P.

(t) Smith v. Forty, 4 Car. & P. 127. An administratrix sued for a debt due to the intes-It appeared that the debt accrued more than six years before the commencement of the action, but that within six years the defendant and the agent of the administratrix went through the account together, and struck a balance, which the defendant promised to pay with

a note payable on demand, with interest until interest as soon as he could, and it was held that the administratrix was entitled to recover on a count upon an account stated with her, and that the statute of limitations was no bar. Vaughan, B. said, "I think that the plaintiff has shewn a good cause of action on the count upon an account stated with the administratrix. The plaintiff does not go upon the original debt at all. I take the statute 9 Geo. 4, c. 14, to apply to cases where you go for the original debt, and then give some evidence of an acknowledgment to rebut the presumption raised by the statute of limitations, that the debt has been satisfied in the course of six years since it Verdict for plaintiff. And see occurred."

post. 616, note (h); but see cases, next note.
(u) Jones r. Ryder, 4 M. & W. 32; and see observations in Willis v. Newham, 3 Younge & Jer. 523, 524

But where an action will not lie without a previous demand, as on a promise to deliver goods, or perform some service on demand, the statute begins to run from the time of making the de-

In the case of a promissory note, payable on demand, the time when the statute of limitations begins to run, should be computed from the making of the note, and not from the time when the holder shall make an actual demand of payment. Larason and Hoppock v. Lambert, 7 Halsted's Rep. 247.

There is no difference between a note payable "when demanded," and one payable on demand, and in both cases the statute of limitations begins to run from the date of the note. Kingsbury v. Butler, 4 Verm. Rep. 458.

When the statute of limitations is plended to an action on promissory note payable "when demanded" the plaintiff will not be allowed to prove the note had been lest for a time, in order to rebut the presumption that a demand had been made. Ib.

Where bills of exchange are made payable at a particular place, no action can be maintained until after a demand at that place, and dishonor there. Therefore the statute of limitations begins to rnn from the time of such demand, and not from the time when the bills were pavable, according to their tenor. Picquet v. Curtis, 1 Sum. 478. }

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the defendant on the promissory note, or for the balance remaining due, on II. Of the a count upon an account stated(v).

Before the 9 Geo. 4, c. 14, a verbal acknowledgment of one of several What a drawers of a joint and several promissory note, was holden sufficient to take sufficient the case out of the statute as against all or any one of the other drawers in a acknow-ledgment separate action on the note against him(x)(1); and this although the latter before 9 And in an action against *A. on the joint and sever- Geo. 4, c. were only a surety (y). al promissory note of himself and B., to take the case out of the statute of 14, to take limitations, it was held enough to give in evidence a letter written by A. to Statute of B. within six years, desiring him to settle the debt(z). But where an ac-Limita-

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(v) Irving v. Veitch, 3 M. & W. 90.

(x) Whiteomb v. Whiting, Doug. 652, 653, (Chit. j. 409).

Moore, 568, (Chit. j. 1226).
(z) Halliday v. Ward, 3 Campb. 32; and see Rex v. Hardwick, 11 East, 585; Nicholls

(y) Perham v. Raynal, 2 Bing. 306; 9 v. Dowding, 1 Stark. 81.

(1) The same point has been ruled in the United States, even when the acknowledgment was made after the dissolution of the partnership. Smith v. Ludlow, 6 John. Rep. 267. See Clements v. Williams, February Term, 1814. MSS. Sup. Court. { See also Austin v. Bostwick, 9 Con. 496; Patterson v. Choate, 7 Wend. 441. Contra. Searight v. Craighead, 1 Pen. Rep. 137. }

But, where an action was brought against A. and B., and C. his wife, upon a joint promiseory note made by A. and C. before her marriage, and the promise was laid by A. and C. before her marriage, and the defendant pleaded the statute of limitations, whereupon issue was joined; it was held, that an acknowledgment of the note by A. within six years, but after the intermarriage of B. and C., was not evidence to support the issue. Pittam v. Foster, 1 Barn. & Cresw. 248. And see 11 Wheat. Rep. 316. 3 Cain. 133.

The acknowledgment, by one of two partners, of a debt against the partnership, as just and still due, is admissible evidence in an action against both, to remove the bar of the statute of limitations, although such acknowledgment was made after the dissolution of the partnership, and the party making it was then insolvent. Austin et al. r. Bostwick et al., 9 Conn. Rep. 496.

If it appear that such acknowledgment was made by one partner, with a view of fixing a liability on his late co-partner, it will be entitled to little weight; but if it were made honestly, and will operate against him who made it, it will not be considered destitute of weight. Ib.

Where the evidence relied on to take a joint debt out of the statute of limitations, consists of acknowledgments made by both of the debtors, no joint act by them is necessary, to render such acknowledgments effective. Ib.

Where the attorney of the plaintiff, nieeting one of the defendants, observed to him, that the plaintiff's account against him was in his hands, to which such defendant replied, "it was one of the old co-partnership debts; the plaintiff ought to do with it as the other creditors had doneaccept fifteen cents on the dollar-he would pay that at any time;" it was held that this was an acknowledgment of a debt still due. Ib

The acknowledgment of a previous debt due from a firm, made by one partner after the diseclation, binds the other partner so far as to prevent him from availing himself of the statute of limitations; such acknowledgment is sufficient to repel the presumption of payment of a debt which is shown to have once existed against the firm, although not competent to create a debt: so held in this case, where the admission was made twelve years after the dissolution. Patterson v. Choate, 7 Wend. Rep. 441.

Where the testimony was, that the partner said that the balance was due at the time of dissolution, and had not been paid to his knowledge, and then the witness added, on examination, that the expression was, "that the balance was due at the time of the dissolution, and still is due," or "that it was then due, and had never been paid;" it was held that it amounted to an admission of a subsisting indebtedness.

The acknowledgment of a debt, by one joint debtor, is admissible evidence against all, to take the case out of the statute of limitations. Coit v. Tracy et al., 8 Conn. Rep. 268.

But such acknowledgment is not, under all circumstances, sufficient for this purpose. Ib. And see same case, 9 Conn. Rep. 1. See also Getch v. Hearld, 7 Greenleaf's Rep. 26.

A joint note made in 1815 by two promissors, being shown in 1830 to one of them, he said at first that he thought he was a witness to the note, and was not aware, till he saw the note, that he had signed it, or any other note, with the other promissor. He admitted that he signed the note, and said that he did not know that it had been paid, but presumed it was due. Held that this

was not sufficient to take the case out of the statute of limitations. Cambridge v. Hobart, 10 Pick. Rep. 232. But in the case of a sole debtor, such admissions might be considered as strong evidence of the present existence of the debt. Ib.

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Pleas. Statute of Limita-

tions.

What a sufficient Acknowledgment before 9 Geo. 4, c. 14, to take Statute.

II. Of the tion was brought against A. and B. and C. his wife, upon a joint promissory note made by A. and C. before her marriage, and the promise was laid by A. and C. before her marriage, it was held, that an acknowledgment of the note by A. within six years, but after the intermarriage of B. and C., did not take the case out of the statute(a); and it was clear, before the 9 Geo. 4, that after the death of one of several joint or joint and several contractors, his executors could not be prejudiced or rendered liable after six years, by an admission or part-payment of the demand by the surviving debtors after the death (b). So the acknowledgment by one partner to bind the other must have been clear and explicit, and therefore it was held not sufficient, Case out of in order to take a case out of the statute of limitations, in an action on a promissory note, to shew a payment by a joint maker of the note to the payee within six years, so as to throw it upon the defendant to shew that the payment was not made on account of the note(c). But where the acceptor of a bill of exchange had acknowledged his acceptance, and that he had been liable, but said he was not liable then, because it was out of date, and that he would not pay it, and that it was not in his power to pay it, this was deemed sufficient to take the case out of the statute(d). where the acknowledgment made by the acceptor of his liability on the bill, was accompanied with a declaration that he was not liable to the drawers of the bill, there being no consideration for acceptance, it was held not sufficient to bar the statute in an action by the drawers(e). It was also held, that where one of two drawers of a joint and several promissory note having become a bankrupt, the payee received a dividend under the commission on account of the note, that was sufficient to prevent the other drawer from availing himself of the statute in an action brought against him for the remainder of the money due on the note, the dividend having been received within six years before the action brought (f). But in a subsequent case, where one of two joint drawers of a bill of exchange became bankrupt, and under this commission the indorsee proved a debt (beyond the amount of the bill) for goods sold, &c. and they excepted a bill as a security they then held for their debt, and afterwards received a dividend; it was held, that in an action by the indorsees of the bill against the solvent partner, the statute of limitations was a good defence, although the dividend had been paid by the assignees of the bankrupt partner within six years (g).

What Acknowledgment in Writing is now required. *613]

The conflicting decisions on the former statute of limitations occasioned the passing of the 9 Geo. 4, c. 14, since which act no verbal acknowledgment or promise is any longer available, even against the *party making it; and a written acknowledgment or promise must be signed by the party himself, and not by an agent(h), and a perfect written acknowledgment will affect

(a) Pittam v. Foster, I Bar. & Cres. 248; 2

Dow. & Ry. 363, (Chit. j. 1169).
(b) Atkins v. Tredgold, 2 Bar. & Cres. 23; \$ Dow. & Ry. 200, (Chit. j. 1183); and see Slater v. Lawson, 1 B. & Ad. 396; post, 615, note (t); Ex parte Woodward, 3 Mont. & Ayr. 609, 614.

(c) Holme v. Green, 1 Stark. R. 488, (Chit. j. **98**0).

(d) Leaper v. Tatton, 16 East, 420, (Chit.

(e) Easterby v. Pullen, 3 Stark. R. 186.

(Chit. j. 1163); and see the decisions in the Court of King's Bench in Easter and Trinity Terms, 1827.

(f) Jackson v. Fairbank, 2 H. Bla. 340, (Chit. j. 527); but see next note.

(g) Brandram v. Wharton, 1 Bar. & Ald. 463, (Chit. j. 1024); and see Ex parte Woodward, 3 Mont. & Ayr. 609, 615.

(h) Hyde v. Johnson, 2 Bing. N. C. 776, S. C.; 3 Scott, 289; 2 Hodges, 94; Irving v. Veitch, 3 M. & W. 98; post, 616, note (d).

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ji Ba W Far K IK only the party who made it, and not a partner or third person(i)(1). Nor II. Of the will an unstamped promissory note be receivable in evidence to take a case Pleas. out of the statute (j). But if there has been a sufficient signed acknowledg. Statute of ment or promise in writing, and it has been lost, it should seem that parol Limitaevidence of its contents would be admissible (k).

The statute 9 Geo. 4, c. 14, is silent with respect to the terms or lan-knowledgguage of the written acknowledgment, and therefore recourse must be had to ment in the principle and to the cases before that act(l), to ascertain what acknow- Writing ledgment would be sufficient, and what shall be deemed conditional only. is now required. The written acknowledgment must contain an unqualified admission of the debt from which a promise may be inferred (m)(2); or if qualified or conditional, the event on which the payment was to be made must be shewn to have happened, as where the promise is to pay to him when able, the ability to pay must be averred and proved (n)(3). A promise in writing to pay the

and another, 3 Car. & P. 83.

(j) Jones v. Ryder, 4 M. & W. 32; ante, 609, note (e).

(k) Haydon v. Williams, 7 Bing. 163; 4 Moore & P. 811, S. C.; see Waters v. Tomp-

kins, 2 C., M. & R. 723; post, 615, note (y).
(1) See them collected, Stark. on Evid. vol. ii. 892 to 899; 2 Saunders, by Patteson and W. 63 to 64; 3 Bing. 331; Chitty's Col. Stat.

(m) Per Lord Tenterden, in Tanner v. Smart, 6 Bar. & Cres. 603; 9 Dow. & Ry. 549, (Chit. j. 1471).

(n) Laing v. Mackenzie, 4 Car & P. 463. A. having become bankrupt in August, 1819, wrote in November, 1826, a letter to B., in which he spoke of a debt of 981. 15s. due from him to B., and said inter alia as follows:—
"By the end of next month I shall have my bankers' account here, and I shall remit the sum due to you in a draft on them:" it was held, in an action of indebitatus assumpsit by B. against A. for the sum mentioned, that the

(i) Ante, 605; and see Marten v. Bridges letter contained a sufficient promise to answer a plea of the statute of limitations, and also a plea of bankruptcy; and that to render the plea of bankruptcy applicable to the case, it must be shewn that the debt existed prior to the bankruptcy.

So a letter written by the defendant to the plaintiff within six years, stating " I can never be happy until I have not only paid you every thing but all to whom I owe money;" and ' your account is quite correct: and oh! that I were now going to enclose you the amount of it;" is evidence to go to the jury of an acknowledgment taking the case out of the statute of limitations: and it was held, that such promise, accompanied by this expression "it is impossible to state to you what will be done in my affairs at present; it is difficult to know what will be the best, but immediately it is settled you shall be informed;" is an absolute unconditional promise, and not a qualified or conditional promise; Dodson v. Mackey, 4 Nev. & Man 327. Though, it should seem, that proof of such letters together with proof of a

(1) A promise to a holder of a chose in action taking a case out of the statute of limitations is available in action by a subsequent holder. Soulden v. Van Rensselaer, 9 Wend. Rep. 233.

The principle clearly to be deduced from the decisions of this court on the statute of limitations, is, that in addition to the admission of a present subsisting debt, there must be either an express promise to pay, or circumstances from which an implied promise may fairly be presumed. Morse r. The Bank of Columbia, 6 Peters' Rep. 86.

And generally, as to what will or will not amount to a sufficient acknowledgment, see Pinkerton v. Bailey, 8 Wend. 600; Olcott v. Scales, 3 Verm. 173; Peebles v. Mason, 2 Dev. 367. Russell's Am'rs v. Gass, 1 Martin & Verger's Rep. 270. Frey v. Kirk, 4 Gill & John. 509. Rogers v. Waters, 2 Gill & Johns. Rep. 64. Gallagher v. Milligan, 3 Penn. Rep. 179. Church v. Feterow, 2 Penn. Rep. 301. Bradley v. Field, 3 Wend. 272. Jamison v. Lindsay, 4 McCord, 93. Falls v. McKnight, 3 Dev. Rep. 421. Buswell v. Roby, 3 N. Hamp. 467. Rice v. Wilder, 4 Idem, 836. Russell v. Copp, 5 Idem, 154. Dean v. Hewitt, 5 Wend. 257. Atwood v. Coburn, 4 Verm. 315. Read v. Hurd, 7 Wend. 408. Hancock v. Bliss, Idem, 267. (3) In debt on a promise grey note negotiable at bank, by holders, against independent the independent.

(3) In debt on a promissory note negotiable at bank, by holders against indorsers, the indorsor pleads the general issue, with leave to give the statute of limitations in evidence; and, at the trial, the plaintiffs prove a conditional promise made by the indorser to pay the debt, within the period of limitation. Held, such conditional promise does not suffice to take the case out of the statute, unless performance of the condition be shown. Farmers' Bank v. Clark, 4 Leigh's R. 603. { See post, 823, (60). }

⁽²⁾ The acknowledgment of a defendant, to take the case out of the operation of the statute of limitations, must be an unequivocal and positive recognition of a subsisting claim in favor of the plaintiff; it must be an admission of a previous subsisting debt which he is liable and willing to pay; and must not be accompanied by circumstances repelling the presumption of a promise to pay the debt. Purdy v. Austin, 3 Wend. Rep. 187. Stafford v. Bryan, 2 Paige's Chan. Rep. 45. S. C. 3 Wend, 532.

Limita-

tions.

II. Of the balance due is enough *under this act to take the case out of the statute, although the writing does not express the amount of the balance; but if the whole evidence be proof of the writing, and of the original cause of action, Statute of

the plaintiff can only recover nominal damages(o).

In an action on a promissory note, where the statute of limitations is pleaded, a letter expressed in ambiguous terms, not referring to the note sued upon, or to any other transaction in particular, is proper evidence to be left to the jury to determine whether it relates to the note, so as to amount to a sufficient acknowledgment to take the case out of the statute; and if the jury find that it does so relate, their verdict is conclusive (p). And where a letter acknowledging the existence of a debt, which is produced for the purpose of taking the case out of the statute of limitations, does not contain any date, the time when the letter was written may be supplied by parol evidence(q).

What a sufficient Part-payment to take Case tute.

Although the 9 Geo. 4, c. 14, has altered the law respecting verbal promises, and prevents them from taking a case out of the statute of limitations, it seems to leave the authority of the decisions relating to the payment of prin-

out of Sta- bill drawn more than six years ago by the plaintiff on the defendant, and accepted by the latter, will not entitle the plaintiff to recover more than nominal damages; id. ibid; and see infra, note (o).

But in another case the following acknowledgment, "I cannot pay the debt at present, but I will pay it as soon as I can," was holden not sufficient to entitle the plaintiff to a verdict, no proof having been given of the defendant's ability to pay; Tanner v. Smart, 6 Bar. & Cres. 603; 9 Dow. & Ry. 549, (Chit j. 1471); Scales v. Jacobs, 3 Bing. 638, S. P.; Burrough

and Park, J. dissentiente.

So where in an action on a promissory note payable with interest, the words in the letter acknowledging the debt were, "I shall be most happy to pay you both interest and principal as soon as convenient," it was held, that this was a conditional promise, and that the plaintiff was bound to give some evidence to shew that the defendant was able to pay or that it was convenient for him to do so; Edmunds v. Downes, 2 C. & M. 459; 4 Tyrw. 173, S. C. It is sufficient, however, in the case of a conditional promise to declare as upon an absolute promise, where there is evidence of the condition having been performed; see per Parke, B. in Irving c. Veitch, 3 M. & W. 112, 113.

Fearne r. Lewis, 4 Car. & P. 173; 6 Bing. 343; 4 Moore & P. 1, (Chit. j 1471). Assumpsit on a bill, plea, statute of limitations. Two letters written by defendant were proved, to take the case out of the statute, addressed to a third person; the first stated that defend-ant should be much obliged to plaintiff to withdraw his outlawry, and added, that as soon as his situation would allow, the plaintiff 's claim, with others, should receive that attention that, as an honourable man, he considered them to deserve. The second letter expressed his readiness to do any thing to satisfy the plaintiff and all his creditors. No evidence was given of any proceeding to outlawry hav-ing been taken with respect to the debt the plaintiff sought to recover. It was held at Nisi Prius (the trial being since the 9 Geo. 4.

c. 14,) that under these circumstances the letters were not sufficiently connected with that debt to entitle the plaintiff to a verdict, and he was nonsuited, but leave was given for a mo-tion to set aside the nonsuit. On application afterwards to the Court of Common Pleas, the nonsuit was confirmed, and a rule nisi for setting it aside was refused, and the court said, that the letters did not amount to an unqualifiel acknowledgment from which the court could imply a sufficient promise to pay to take the case out of the statute; and see Haydon v. Williams, 7 Bing. 168; 4 M. & P. 811, S. C.

(o) Dickinson v. Hatfield, 1 Mood. & Rob. 141; 5 Car. & P. 46, S. C.; and see Dodson v. Mackay, 4 N. & M. 327; ante, 613, note

(n), as to damages.

Dabbs v. Humphreys, 4 Moore & S. 295; 10 Bing. 446, S. C. Assumpsit for the balance of a bill of exchange. Plea the statute of limitations. In order to take the case out of the statute, a letter was given in evidence, written by the defendant to the plaintiff, in which the defendant said "I cannot send you the 201., I have no money by me now, nor shall I have till after the fair; your better way will be to give up that bill which you hold, and draw another for 301. 9s. 9d. which will be the balance of the account, which shall be honoured when due:" held, that this was a sufficient acknowledgment to take the case out of the statute: the jury having found that the balance spoken of in the letter related to the bill in question.

(p) Frost r. Bengough, 8 Moore, 180; I Bing. 266; I Law J. 96, C. P. Where a letter which is put in to take a case out of the statute, contains a clear admission of an existing cause of action, a judge is warranted in telling the jury, "that after such letter the statute is out of the question," provided he do not altogether withdraw the letter from their consideration; Colledge v. Horn, 10 Moore, 431; 3 Bing. 119, S. C.

(q) Edmunds v. Downes, 2 C. & M. 459; 4 Tyrw. 173, S. C.

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cipal or interest unaffected, and therefore recourse must still be had to those II. Of the decisions. Actual payment of a part of the principal-money or of interest Pleas. made by any person whatever, having authority to pay, and whether on a Statute of joint or several bill or note, would as well before as since the act take the tions. case out of the statute as against all persons living, and sui juris at the What a time such payment was made(r). The legislature considered that a pay-sufficient ment of any part *of the principal-money or interest is so substantial an ad- Part-paymission of liability that it might be well admitted as an exception to the necessity for requiring a written admission, and it was not considered that it is out of as easy to swear falsely that the defendant made a small payment, as that he Statute. promised to pay(s). But after the death of one maker of a joint and seve- [*615] ral promissory note signed by two, a payment upon it by the executor of the deceased party will not take the case out of the statute of limitations as against the survivor, because the joint contract was served by the death, and therefore the payment could only operate upon the separate contract(t)(1). where a joint and several note was signed by S., to whose signature there was a subscribing witness, and afterwards by the defendant as surety for S., and the defendant, being sued alone on the note, pleaded the statute of limitations, and at the trial, to take the case out of the statute, it was proved that a person named S. had made payments on the note, evidence, but not

(r) Burleigh r. Stott, 8 Bar. & Cres. 36; 2 Man. & Ry. 93; Dans. & Ll. 53, (Chit. j. 1380); Pease v. Hirst, 10 Bar. & Cres. 122, (Chit. j. 1456).

Burleigh and others v. Stott, 8 Bar. & Cres. 86. To an action upon a joint and several promissory note of A. and B. (the latter being a mere surety) brought by payee against the administrator of B., the defendant pleaded that the cause of action did not accrue within six years, upon which the plaintiff took issue. The plaintiff proved that within six years, and during the life-time of B., A. made a payment on account of the note. B. afterwards died. Held, that such payment operated as a new promise by B. to pay according to the nature of the instrument, and that his administrator was liable on the note. In this case the payment was made within six years from the contracting of the debt, and, consequently, before debt barred; see Ex parte Woodward, 3 Mont. & Ayr. 609, 615. But this makes no difference; Channell r. Ditchburn, 5 M. & W. 494; post,

616, note (f).

And see Pease r. Hirst, 10 Bar. & Cres. 122; 5 Mun. & Ry. 88, (Chit. j. 1546). Payment of part of the principal or of the interest within six years, by A., the principal, on a joint and several promissory note, is a sufficient acknowledgment by all the makers of the note (though the rest; were mere sureties) to take the case out of the statute. S. P. ruled by Parke, J. in Chippendale v. Thurston, Mood. & M. 411; 4 Car. & P. 98, (Chit. j. 1468); and see Perham v. Raynal and another, 2 Bing. 306; 9 Moore, 566, S. C.; Bealy v. Greenslade, 2 C. & J. 61, S. C.; 2 Tyr. 121; 10 Law J. 1, Exch.; Wyatt v. Hodson, 1 Moore & S. 442; 8 Bing. 309, S. C.; and cases in the following notes.

(s) Instances of such perjury have occurred

since the act 9 Geo. 4, c. 14.
(t) Slater v. Lawson, 1 B. & Adol. 396, (Ch. j 1508). Lord Tenterden, C. J. now delivered the judgment of the court: "It appears to us that this case is not essentially different from Atkins v. Tredgold, 2 Bar. & Cres. 23; 3 Dow. & Ry. 200, (Chit. j. 1183); ante, 612, note (b). There the action being against the executor of a deceased contractor, the payment relied upon to take the debt out of the statute of limitations was made by the surviving contractor; here in an action against the survivor, the payment proved is by the executrix of the one deceased. But the same principal appears to us applicable in both cases, and we think that where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representative of the other to take the debt out of the statute as against the survivor. The contract here was severed by the death of Warwick, and the act of his executrix could not bind the defendant." Rule re-

An acknowledgment, by a personal representative of a deceased person, that a demand against the estate of the deceased, barred by the statute of limitations, is due, will not take the case out of the statute. Peck v. Botsford, 7 Conn. Rep. 172.

To make an acknowledgment of a person sued as administrator, available to take a note drawn by his intestate, out of the statute of limitations, it should be shown that he was administrator at the time of the alleged acknowledgment. Larason v. Lambert, 7 Halst. 247.

⁽¹⁾ In the case of a joint and several note made by two promissors, a partial payment made within six years by the administrator of one of them, will not take the note out of the statute of limitations as against the remaining promissor. Hathaway v. Haskell, 9 Pick. Rep. 42.

Pleas. Limitations.

What a sufficient Part-payment to take Case out of Stat-

II. Of the that of the subscribing witness, having been offered to shew that the name S. on the note was in the hand-writing of the party who made the payment, it Statute of was held, that this could not be proved without calling the subscribing witness, and that without such proof there was no prima facie case in answer to the plea(u). And in order to take a case out of the statute by a part payment, it must appear that the payment was made on account of the debt for which the action is brought, and that it was made as part payment of a larger debt; because the principle upon which a part-payment takes a case out of the statute is, that it admit a larger debt to be due at the time of the part-payment: unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt(x). The appropriation, however, of such part-payment of principal, or of payment of interest, to a particular debt, may be shewn by any medium of proof, and does not require an express declaration of the debtor at the time of the payment to establish it; it may, therefore, be proved by previous or subsequent declarations of the debtor, although the fact of the payment must be proved by independent evidence(y), and a mere verbal admission on the part of the debtor that he has made a part-payment within six years will not be sufficient (z). though where a debtor owes his creditor some debts from a period longer than six years, and others from a period within six years, and pays a sum ment on account, to take out of the statute the debts due longer than six years, yet the creditor may, at any time before action, apply such payment

[*616] without appropriating it to any particular debt, such payment is not *a payto the debts due longer than six years(a).

And if the parties to a bill of exchange agree that goods shall be supplied Delivery of Goods. in part payment, and they are supplied and taken accordingly, that is part payment, so as to prevent the operation of the statute(b).

Where a debtor draws a bill of exchange to be applied in part payment Delivery of of the debt, and the bill is paid when due by the drawee to the creditor, it operates as part payment to defeat the statute from the time of the delivery of the bill by the debtor, and not from the time of its payment; the delivery of the bill being the fact from which the implied promise to pay the residue of the debt is to be inferred(c). And a mere agent on whom such bill is drawn cannot, by paying it, make such an acknowledgment as will prevent the operation of the statute in favour of the principal (d).

Payment of Money

Payment of money into court on a count on a promissory note payable by into Court. instalments, is only an admission by the defendant that money to the amount paid in was due on the promissory note, it does not bar the statute of limitations as to the further sum claimed to be due on the same note(e).

> (u) Wylde v. Porter, 1 Adol. & Ellis, 742; itor at the time, is to be applied to the more 3 Nev. & Man. 585, S. C.

(x) Tippets v. Heane, 1 C., M. & R. 252; Waters v. Tompkins, 2 C, M. & R. 723; 1 Tyrw. & G. 137, S. C.
(y) Waters v. Tompkins, 2 C., M. & R. 723;

1 Tyrw. & G. 137, S. C.

(z) Willis v. Newham, 3 Younge & Jer.

(a) Mills r. Fowkes, 5 Bing. N. C. 455; 7 Scott, 444, S. C. See the judgment of Tindal, C. J. where the principle of the civil law, that a general payment not appropriated by the credburdensome of two debts, is denied to be the rule of our law. And see generally as to the application of payments, ante, 402 to 408.

(b) Hart r. Nash, 2 C., M. & R. 337; and see Hooper v. Stephens, 7 C. & P. 260.
(c) Irving v. Veitch, 3 M. & W. 90, 98.

(d) Id. ibid; and see Hyde v. Johnson, 2 Bing. N. C. 776; 8 Scott, 289; 2 Hodges, 94.

(e) Reid r. Dickons, 5 Bar & Adol. 499; 2 Nev. & Man. 869, S. C.

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Payment of interest by one of two makers of a joint and several promis- II. Of the sory note, though made more than six years after it became due, is sufficient Pleas. to take the case out of the statute of limitations as against the other (f); and Statute of the statute 9 Geo. 4, c. 14, has not altered the law in this respect; and if Limitations. this interest was one of the items in an account of which the party paid the What a balance, that is a sufficient payment of interest(g). And where A. and B. sufficient had given a joint promissory note for 600l. to C. it was held in an action by Payment of C. against A. and B. that an account in which B., as between himself and Interest to take C., took credit for interest upon a sum of 600l., was evidence to oust the Case out of statute of limitations (h). So if A. and B. sign a formal promissory note, Statute. by which they promise, "as churchwardens and overseers," to pay C. or order a sum, with interest, which sum is in fact the amount of a loan made by C. for the use of the parish, the payment of interest on such note from time to time by the vestry is sufficient to take the case out of the statute; and a fortiori, where B. has audited the parish accounts, in which payments of interest on the note are entered(i)(1). And in an action on a promissory note bearing interest, proof that the defendant, being sent to by the plaintiff for money, paid 11. and said, "this puts us straight for last year's interest all but 18s., some day next week I will bring that up," is a sufficient answer to a plea of the statute of *limitations, no evidence being given of any other [*617] debt due from the defendant to plaintiff (j).

Payment of interest upon a promissory note by the makers to the personal representative of the payee, within six years before the commencement of the action, is a sufficient acknowledgment to take the case out of the statute of limitations, although the letters of administration, under which the party to whom the payments were made claims, were not obtained in the diocese in which the note was bona notabilia(k). And if trustees for the payment of legacies at a distant period lend to a third person, on his promissory note, a portion of the money appropriated to the payment of the legacies, a payment by such third person of interest, or of part of the principal, to the legatees will be sufficient to take the case out of the statute in an action by the trustees on the note (l).

The interest due on a promissory note made payable with interest cannot be treated as constituting a distinct and substantive cause of action, and, therefore, where the declaration stated that the defendant, sixteen years before, delivered his promissory note payable on demand with interest, to the plaintiff, but neglected to pay, except interest, which he paid up to a day within six years, a plea that the cause of action did not accrue within six years, was held sufficient (m); the allegation as to the payment of interest being prematurely introduced into the declaration, and at most amounting to matter of evidence.

We have seen, that an indorsement or memorandum in the hand-writing Indorse. of the holder of the bill or note, of the receipt of interest, or of part of the ment, &c.

ment.

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(f) Channell v. Ditchburn, 5 M. & W. 494; Ad. & El. 196, S. C.
3 Jurist, 1107, S. C.
(g) Chippendale v. Thurston, 4 Car. & P. 98; Mood. & M. 441, (Chit. j. 1468); Ex parte
Woodward, 3 Mont. & Ayr. 609, 614.
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(j) Evans v. Davies, 4 Ad. & Ellis, 840. (k) Clarke v. Hooper, 4 Moore & S. 353;

10 Bing. 480, S. C.
(1) Megginson v. Harper, 2 C. & M. 822; 4
Tyrw. 94, S. C.

(m) Hollis v. Palmer, 2 Bing. N. C. 713; 8 Scott, 265; 2 Hodges, 55, S. C.

⁽h) Mandertson v. Robertson, 4 M. & R. 440, (Chit. j. 1435).

⁽i) Crew r. Petit, 3 Nev. & Man. 456; 1

II. Of the Pleas.

Statute of Limitations.

Statute of Limitations.

And if a witness, who says he settled all kind of accounts for the defendant, admit that an account containing a memorandum of a payment of interest on the part of the defendant is in his own hand-writing, but says he cannot recollect the fact of payment (p).

In Equity. In courts of equity it is considered, that when real estates are devised in trust for the payment of debts, in aid of the personal estate, the statute of limitations does not run after the death of the testator(q); nor does it run after the death of the testator in case of a trust or charge for the payment of debts(r). So under a commission of bankruptcy, which constitutes a trust for the benefit of all creditors, debts otherwise barred by the statute may be proved(s). But a devise for the payment of debts does not revive a debt upon which the statute of limitations had previously taken effect, by the expiration of the time *before the testator's death(t)(1). And sometimes when proceedings at law have been delayed or suspended by proceedings in equity, the latter court will prevent the defendant from availing himself of the plea of the statute of limitations(u)(2).

Foreign law(x).

It has been held, that with respect to simple contracts not under seal, whatever may be the law of a foreign country, or of Scotland, where they were made, yet if they be sued upon in England, the English statute of limitations (six years) will in general apply(y); though a different doctrine is

(n) 9 Geo. 4, c. 14, s. 3; ante, 609.

(a) Smith v. Battens, 1 Mood. & Rob. 341; Anderson v. Weston, 6 Bing. N. C. 296, 302, 303

(p) Trentham v. Deverell, 3 Bing. N. C.

397; 4 Scott, 128, S. C.

(q) Hughes v. Wynne, 1 Turn. & R. 307; See Chitty's Eq. Dig. tit. Trust to pay Debts, and Limitations, Statute of.

(r) Hargreaves v. Mitchell, 6 Madd. 326. (s) Ex parte Ross, in re Coles, 2 Glyn & Jam. 336; but see Ex parte Dewdney, 15 Ves.

(t) Burke v. Jones, 2 Ves. & B. 275, over-

ruling Bac. Ab. tit Limitations.

(u) Sirdefield v. Price, 2 Younge & J. 73. On a bill by a creditor against an executor for payment of his demand, and an account of the testator's estate, the court, in consequence of some doubt respecting the validity of the debt, retained the bill for a year, with liberty for the plaintiff to bring an action; and the statute of limitations having taken effect between the filing of the bill and the decree, the court restrained the defendant from insisting at law on the benefit of that statute; and see Bac. Ab. tit. Limitations, E. 6; 2 Ch. Ca. 217; 2 Vern. 73,

74. Sed quære, the general practice is, for a court of equity not thus to interfere, and there must be some special circumstance to justify any interference.

(x) See ante, 167 to 172, 225, 226.

(y) Ante, 170; The British Linen Company v. Drummond, 10 Bar. & Cres. 903; cited in De la Vega v. Vianna, 1 B. & Ad. 284; Huber v. Steiner, 2 Bing. N. C. 202; and see Hawkes v. Borwich, 1 Younge & J. 376, (Chit. j. 1333).

In Hay and another v. Fisher, 2 M. & W. 722, which was an action to recover the amount of a bill of exchange drawn by the plaintiffs upon and accepted by the defendants in Scotland, more than six years before the commencement of the action; the plaintiffs, to bar the statute of limitations, introduced a count stating the drawing and acceptance of the bill, and setting forth at length the making and registering of a protest of non-payment in the court of session in Scotland, and the issuing and executing of letters of horning and poinding on the defendant, charging him to make payment of the amount of the bill and interest to the plaintiffs, according to the law of Scotland, and his default thereto; and alleging, that by virtue of the

⁽¹⁾ A clause in a will directing all the just debts of the testator to be paid, will not save a debt barred by the statute of limitations from the operation of that statute. Peck v. Botsford, 7 Con. 172.

⁽²⁾ The statute of limitations is a good plea in bar in equity as well at law. Stafford v. Bryan, 1 Paige's Chan. Rep. 239. Lewis et al. v. Marshall, 5 Peters' Rep. 407.

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entertained in France(z). In France, the time within which proceedings 11. Of the must be commenced against the drawer and indorsers on a bill, is five years, Pleas. and three years in the case of a lost bill(a). By the 189th article of the Statute of Code de Commerce it is declared that "all actions relative to letters of exchange and to bills to order, subscribed by merchants, tradesmen, or bankers, or for matters of commerce, are prescribed (se prescrivent) by five law. years, if the debt has not been acknowledged by an 'acte séparé:' nevertheless the supposed debtors shall be held, if required, to affirm upon oath that they are no longer indebted; and their widows, heirs, or representatives, that they bona fide believe that there is nothing more due:" This prescription merely operates in bar of the remedy, and not as an *extinguishment of the [* 619] right or contract itself; but a special plea setting up this prescription as an absolute bar, without qualification, is bad, the article containing an exception, that the debt is not "acknowledged by an acte sipar $\ell(b)$." In an action on a promissory note drawn in a foreign country, and due about twenty years since, the defendant pleaded the statute of limitations, and the plaintiff replied that he resided abroad until within six years of the commencement of the The court afterwards (upon terms) allowed the defendant to add a plea setting up a provision of the law of the country where the note was made and the parties resided, similar in its effect to the statute of limitations(c)(1).

several premises the defendant became liable to

pay the plaintiffs the amount of the bill with interest, and being so liable promised to pay the same: at the trial Mr. Mackenzie, a Scotch advocate, who was examined for the plaintiffs, as to the proceedings necessary in such a case, by the law of Scotland, to bar the statute of prescription, 12 Geo. 3, c. 72, (continued by 23 Geo. 3, c. 18,) stated that, according to the Scotch law, a bill of exchange is usually protested on the third day of grace, or, against the acceptor, within six months from that day; then the protest may immediately be recorded in the books of the court of session, or of the sheriff, and thereupon a warrant of execution may be immediately issued from the court of sessions against the debtor. If no action is raised, or execution issued, within six years from the last day of grace, the bill is affected by the statute of limitations; but if diligence is raised and executed, or action commenced, within the six years, the statute of limitations is barred, and the party may commence an action at any time within forty years. The witness then de-

scribed the forms of the process of diligence by protest, registering the same in the books of court, and the issuing and execution of the letters of horning and poinding; and stated that the diligence is complete, so as to bar the prescription, when the debtor has been charged by the messenger to make payment, and of which charge the legal evidence is the return of the officer written on the letters of horning. On cross examination be said, that the original protest recorded in court was held to be a judgment, and the judgment was complete upon the registration: held, that such count did not disclose a sufficient cause of action as upon a judgment in Scotland, as it did not aver either that the registration was equivalent to a judgment or decree, or that there was a judgment or decree.

(z) 4 Pardess. 223; ante, 171, note (e).

(a) 1 Pardess. 436, 442.

(b) Huber v. Steiner, 2 Scott, 304; 2 Bing. N. C. 202; 1 Hodges, 206, S. C.

(c) Huber v. Steiner, 4 Moore & Scott, 828; 2 Dowl P. C. 781.

⁽¹⁾ The following statement of the time within which actions upon bills, &c. must be procecuted, after the right to bring them accrues, in the states below mentioned, may not be wholly unuseful. The periods of limitation in the different states are indicated by the number of years specified in connection with their respective names. Vermont, 6 years on notes not attested by one witness or more, and 14 years on notes thus attested. New-Hampshire, 6 years. Connecticut, 17 years, on specialties and promissory notes not negotiable; 6 years, on negotiable notes. Rhode Island, 6 years. New-York, 6 years. North Carolina, 8 years. Pennsylvania, 6 years. Virginia, 5 years. Ohio, 6 years. Illinois, 5 years. Georgia, 6 years. Iadiana, 5 years. Massachusetts, 6 years. Witnessed notes, when suit is between original parties, are left at common law. Alabama, 6 years; specialties, 16 years; ordinary accounts, 8 years. Missouri, 5 years. Mississippi, 6 years; specialties, 16 years. In Louisiana, all personal actions may be presented against after 80 years; those payments generally which are to be made by the year may be presented against in 5 years; bills and notes would seem to have thirty years to run. Tennessee, 8 years, on bills, &c.; 2 years, on accounts proved by plaintiff, and 5, on those proved by witnesses. South Carolina, 4 years. Maryland, 3 years. Maine, 6 years. Delaware, 8 years. Kentucky, 5 years. New Jersey, 6 years. Griffith's Register, passim.

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II. Of the Pleas. Bankruptey and Insolvency.

The defences under the Bankrupt and Insolvent Acts will be considered in a subsequent chapter (d). These defences, even before the new rules, must have been pleaded, and could not have been given in evidence under the general issue, though it sufficed to plead the defendant's discharge generally(e); and the principal on which this rule proceeded was, that the discharge was a statutory answer to the plaintiff's demand, and did not go to the destruction of the debt(f).

III. Of the Replication.

To Plea of

tion, &c.

III. OF THE REPLICATION.

WE have seen that a general plea of want of consideration will be bad on special demurrer (g), but if instead of demurring the plaintiff take issue upon Considera- the want of consideration, it will be sufficient to reply generally that there was a sufficient consideration; thus, where to a declaration on a bill of exchange by the indorsee against the acceptor the defendant pleaded that no value or consideration had been given for the successive indorsements, and the plaintiff replied that his immediate indorser did not indorse the bill without value or consideration for so doing, but that he took it for a good and valuable consideration, concluding to the country; it was held, on special demurrer, that the replication was sufficient, and that it was not necessary to state the nature of the consideration (h). So, to a plea by the acceptor of a bill of exchange, that it was, to the knowledge of the holder, negotiated by fraud, and that no consideration was given for the indorsement to the holder, it is sufficient for the holder to reply generally that he had no notice of the fraud, and that the bill was indorsed to him for a good consideration(i).

Where in an action on a bill of exchange the defendant pleaded a plea of want of consideration, concluding with a verification, and the plaintiff, in-

(d) Post, Chap. VIII. (ε) See Chitty on Pleading, 6th edit. vol. i.
 479; Bircham v. Creighton, 3 Moore & S.

345; 10 Bing. 11, S. C. (f) Per Tindal, C. J. in Bircham r. Creighton, 3 Moore & S. 348.

(g) Ante, 602, 603.

(h) Prescott v. Levi, 1 Scott, 726; 3 Dowl. 403, S. C.

(i) Bramah v. Roberts, 1 Bing. N. C. 469; 1 Scott, 350, S. C.

It is a well settled principle that the statute of limitations does not run against a state. Linds-

lev et al. v. Miller, 6 Peter's Rep. 666. Treasurer v. Weeks, 4 Vermont Rep. 315.

The disability of marriage cannot be added to the prior disability of infancy, to avoid the operation of the statute. Carlisle v. Stiller, 1 Penn. Rep. 6.

It is a well settled principle, that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction. M'Clunny v. Silliman, 3 Peters' Rep. 276.

A plea of the statute of limitations of the State where the contract is made, is no bar to a suit brought in a foreign tribunal to enforce the contract; but a plea of the statute of limitations of the State where the suit is brought, is a good bar. Lincoln v. Battelle, 6 Wend. Rep. 475.

Whether accounts between copartners are in any case barred by the statute of limitations?

Qu. Nair v. Ragland, 1 Devereux's Eq. Rep. 533.

It seems, that a plea of the statute of limitations would be a bar to an action by the second indorser against the first indorser, for monies paid after the statute of limitations had actually run as against the defendant. Wright v. Butler, 6 Wend. Rep. 284.

Where a debt was contracted in a foreign country, between subjects thereof, who remained there until the debt became barred by the law of limitations of such country, it was held, that our statute of limitations could not be pleaded in bar to an action upon the debt, brought within

six years after the parties came into this commonwealth. Bulger r. Roche, 11 Pick. Rep. 36.
Where a legacy to a daughter was payable on her marriage, or when she became of age, and she married before arriving at full age, in a suit brought by her and her husband for the legacy, after the lapse of six years, it was held, that the statute of limitations did not run against her, she coming within the exception in the statute in favor of femes covert. Wood and wife v. The executors of Riker, 1 Paige's Chan. Rep. 616.

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stead of replying by taking issue on the plea, merely added the similiter, the III. Of the court, after verdict for the plaintiff, held that the record was imperfect and Replicathat there must be a repleader, but to save expense the plaintiff was allowed to amend on payment of costs(k). And if in an action on a bill of exchange, where there is a plea that there was no consideration, it appear at the trial that the plaintiff has not put any replication on the record, the judge will not allow any *replication to be added at the assizes without the consent of the [*620] defendant, but will order the case to be struck out of the list(l).

Although formerly the replication de injuria seems to have been consider- De Injued as applicable to cases of tort only, yet a different doctrine now prevails, riz. and if in an action on a bill or note the defendant plead mere matter of excuse for the non-performance of his contract, the replication de injurid will be proper(m)(1). Thus in an action by the payee of a promissory note against the maker, a plea that the note was made and delivered to the plaintiff in consideration of money and goods then agreed to be thereafter lent and supplied by the plaintiff to the defendant, but that the plaintiff had not lent or supplied the money and goods, and that the defendant had not received any other consideration for the note, a replication that the defendant broke his promise, without the cause in his plea in that behalf alleged, has been held good on special demurrer; nor is the omission in such replication of the words "of his own wrong," any ground of special demurrer(n). But if the

(k) Wordsworth v. Brown, 3 Dowl. 689.

(1) Rowlinson v. Roantre, 6 Car. & P. 551. (m) Isaac v. Farrar, 1 M. & W. 65; S. C. 1 Tyrw. & G. 281; 4 Dowl. P. C. 750; 1 Gale, 385; Griffin v. Yates, 2 Bing. N. C. 579; 8. C. 2 Scott, 845; 4 Dowl. P. C. 647; 1

Hodges, 387; and cases in the following notes. (n) Watson v. Wilks, 5 Ad. & Ellis, 237; 6 Nev. & Man. 752; see Noel v. Rich, 2 C., M. & R. 360; S. C. 4 Dowl. P. C. 228; 1 Gale, 225.

Isaac v. Farrar, 1 M. & W. 65. Assumpsit by the indorsee against the maker of a promissory note for 250%, payable three months after date to the maker's order, and by him indorsed to one H. R. who indorsed it to the plaintiff. The plea began by stating that an advertisement had been inserted in a newspaper offering money to be lent upon personal security, on application to Mr. A, 12 Fludyer street, Westminster; and that in consequence of that advertisement the defendant called at that place and saw A., and in consequence of representations made to him by A., he, the defendant, was induced to and did draw and deliver to A. two promissory notes, by each of which the defendant promised to pay to his own order the sum of 2501. three months after the date thereof, (one of them being the note in the declaration mentioned,) upon the faith of and promise from A. that the said notes should be renewed when due, for the space of two years; and that he should receive from the said A., on a certain day, to wit, the Friday then next following, being, to wit, the first of May, 1835, the amount of the said notes, deducting discount and stamp. And the defendant averred that the said A. did not, either on Friday, the 1st of May, 1835, or

at any other time, although often requested, pay to the defendant the amount of the said notes, deducting as aforesaid, or any sum of money whatever, but on the contrary thereof that he, the said defendant, on the 1st day of May, 1835, by appointment of the said A., went to the said place, to wit, 12, Fludyer street, but the said A. was not, nor was any such person, either then or at any time afterwards there to be found; and that the said transaction was a gross fraud and imposition upon him the defendant; and that the note was indorsed to the plaintiff without consideration, and that he held the same without value or consideration, and that there never was any consideration or value on the said note between any parties thereto. The plea then went on to aver that H. R. and the plaintiff, at the respective times when the note was so indorsed to them respectively, were privy to and had full knowledge and notice of the said transaction in the plea detailed, and of the said fraud and imposition, concluding with a verification. To this plea the plaintiff replied de injurii. It was held, on special demurrer, that the replication was good, inasmuch as the plea amounted only to matter of excuse for the non-performance of the promise, and to one ground of defence only.

Reynolds r. Blackburn, 7 Ad. & Ellis, 161; 2 Nev. & P. 136; 6 Dowl. 19, S. C. Assumpsit by indorsee against acceptor of a bill of exchange. Plea, that the bill was accepted for accommodation of the drawer, that after the bills were due the drawer give plaintiff, and plaintiff accepted from him, other bills of exchange of larger amount, and plaintiff agreed, in consideration thereof, to give the drawer time as to the bills now sucd upon for three months,

^{(1) {} See also to the same point, Humfreys v. O'Cornell, 5 Jurist, 271. }

III. Of the *defence set up be not mere matter of excuse, as if it be in discharge or denial of the plaintiff's right of action, then the replication de injurid will be It is now settled, however, that if the replication de injuria be improperly replied, the objection can only be taken advantage of on special demurrer(p).

To a plea of payment of a certain sum in satisfaction and discharge of the To Plea of Accord defendant's promise, the plaintiff may take issue as well upon the payment and Satisin satisfaction, as upon the receipt in satisfaction(q). But where to an acfaction. tion on a promissory note the defendant pleaded, that after the making the note the plaintiff drew a bill on the defendant, which the defendant accepted, and plaintiff received in satisfaction of the note, and the plaintiff replied that he did not draw, that the defendant did not accept, and that the plaintiff did not receive the bill in satisfaction, the court refused to set aside a demurrer to the replication as frivolous, upon an affidavit that the plea was totally And a general replication of de injuria to a plea of accord and

Where to a declaration against the defendant as the maker of a promisso-To Plee of Release. ry note, the defendant pleaded that the note was a joint and several note by defendant and A., and that A. had been released, and the plaintiff replied, that A. had been so released at the defendant's request, and that the defendant, in consideration of such release at his request, ratified the promise in

> and until default in payment of the new bills; that the new bills were given and received in payment of the bills now declared upon, and that the agreement was unknown to defendant. Replication de injuri? Demurrer on the ground that the replication attempted to put in issue more than one matter of defence: held, that the defendant having, up on his own shewing, set up the two matters of defence in his pleu, could not take this objection: held also by Patteson, J. that the replication of de injuria here was not bad as pleaded to a plea partly in denial, for that the plea contained no denial.
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> Quære, whether in an action of assumpsit,

satisfaction is bad(s).

where the plaintiff does not reply de injurià generally to the facts stated in the plea, the circumstance of his only taking issue on one of them entitles the jury to treat the facts alleged in the plea, and not denied in the replication, as admitted; Noel v. Boyd, 4 Dowl. P. C. 415.

(o) See Solly v. Neish, 2 C., M. & R. 355; Whittaker v. Edmonds, 2 Bing. N. C. 859; S.

C. 2 Scott, 567; 1 Hodges, 318.

Jones v. Senior, 4 M. & W. 123. To a declaration on bills of exchange for 5201. drawn by M. upon and accepted by the defendant, and indorsed by M. to the plaintiffs, the defendant pleaded, that before the accepting of the bills he was indebted to M. in a larger amount, and that they were accepted on account of 5201. part of the debt; that after the acceptance, and before the bills became due, the defendant was also indebted to other persons named, and was embarrassed in his circumstances and unable to pay his debts in full; and thereupen by an instrument in writing made between M. and the said other persons of the one part, and the defendant of the other, and subscribed by M. and the several persons whose debts were set against

their names, they agreed to receive from the defendant a composition of 7s. in the pound on their respective debts, payable on a day named (which was after the bills became due). The plea then averred payment of the composition by the defendant to M. and the other subscribing creditors; and also, that afterwards, and before the commencement of this suit, M. paid to the plaintiffs, and they received from him, divers sums of money, amounting to a sum sufficient to satisfy all consideration whatever for or in respect of the indorsement of the bills in the declaration mentioned, and all money due from M. to the plaintiffs, in respect of the bills or otherwise, and all claims and demands of the plaintiffs, in respect of the bills or otherwise, on M. in full satisfaction and discharge of the bills and of all claims and demands whatever in respect of them or otherwise; and that the plaintiffs then became, and thenceforth continued holders of the bills without consideration, and in fraud of the defendant and his creditors. Replication de injuria: it was held on demurrer that the replication was bad; for that the plea

amounted to matter of discharge, not of excuse.

(p) Parker v. Riley, 6 Dowl. P. C. 375.
In Curtis v. Headfort, ib. 496, de injurià to a plea, in an action on a check, that it was given for a gambling debt, was held good on general demurrer; and see Noel v. Rich, 2 C., M. & R. 360.

(q) Webb v. Weatherby, 1 Bing. N. C. 502; S. C. 1 Scott, 477; 1 Hodges, 39.

(r) Edwards v. Greenwood, b Bing. N. C. 476; 7 Scott, 482, S. C.

(s) Id. ib. per Coltman, J.; and see Crisp v. Griffiths, 2 C., M. & R. 159; S. C. 8 Dowl. P. C. 752; 1 Gale, 106; Jones v. Senior, 4 M. & W. 128; supra, note (o).

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PART II

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the declaration, and promised that he would remain liable on the note, as if III. Of the there had been no such release; it was held, that the replication was bad, as Replicasetting up a parol contract to avoid the release (t).

Where a plea of set-off stated that the plaintiff made his promissory note To Plea of payable to A. C., which was duly indorsed and delivered to the *defendant that Debt after A. C.'s death by A. C.'s administrator, and was unpaid; and the plain-barred by tiff replied, that the supposed cause of set-off on the said note did not accrue Statute of to the defendant within six years, in manner and form, &c.; it was held, that Limitathe replication admitted not only the making of the note, but the indorsement [*622] of it to the defendant by A. C.'s administrator, and that the defendant might, therefore, avail himself of memorandums of the payment of interest, written on the note by A. C., (before Lord Tenterden's Act(u)), to bar the statute of limitations; and that if the plaintiff meant to deny that the set-off accrued to the defendant at all, he should have replied something equivalent to the general issue (x).

In trover for a bill of exchange, where the defendant pleaded that the In Trover. plaintiff indorsed the bill in blank, and that R. became the holder, and the defendant, believing that he had authority to dispose of it, took it as a pledge or security for a debt; and the plaintiff replied that the defendant knew that R. had no authority to pledge or deposit the bill; the court held the replication good, as traversing the material allegation in the plea(y).

To an action on a bill of exchange against an indorser the defendant plead- Similiter. ed that he had no notice of the presentment, and concluded his plea to the country; the plaintiff omitted to add the similiter; and after a verdict for the plaintiff, the defendant moved for a new trial because there was no issue joined: but as the plea concluded with an "&c.," it was held, that after verdict, the "&c." might be considered to include the similiter, and that the record was sufficient(z)(1).

(t) Brooks v. Stewart, 1 Per. & Dav. 615. (u) 9 Geo. 4, c. 14, s. 3, ante, 609. (x) Gale v. Capern, 1 Ad. & Ellis, 102; 8

Nev. & Man. 863, S. C.

(y) Hilton v. Swan, 7 Dowl. 417; 5 Bing.

N. C. 413; 8 Scott, 898; 8 Juriet, 842. (z) Swain v. Lewis, 8 Dowl. 700; 2 Crom. & M. 261, S. C.

(1) See post, 824, (62).

*CHAPTER V.

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I. IN GENERAL WHAT FACTS MUST BE PROVED, AND HOW.

I. In gene- The evidence to be adduced in an action on a bill or note, &c. is to be ral what Facts must considered with reference, first, to the plaintiff's cause of action; and secbe proved, ondly, the defendant's answer to the action.

The evidence which the plaintiff should adduce in support of his declaration, in which the bill, &c. is set forth, may be considered with reference to the facts which must be proved, and to the manner of proving those facts.

With respect to the facts which must be proved, the evidence is in all cases governed by the pleadings, it being necessary to prove every thing put

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in issue, and no more; unnecessary averments need not be *proved(a). And I. In genesince the new rules of pleading, requiring the defendant to traverse specially ral what some matter of fact(b), the evidence in an action on a bill or note is much be proved, narrowed, it being only necessary to prove the particular point referred to the and how. jury, for whatever is not expressly denied is admitted by the pleading; and on the same principle, where the issue lies only on the defendant, as where it is joined on the plea of infancy, and there is no other plea, it is not incumbent on the plaintiff to adduce any evidence in support of his declaration.

We will consider each of the above heads in their natural order, and the

mode of proof to be adduced in support of them.

First. The bill or note, and the allegations respecting it, must be proved First. as described in the declaration, in terms, or in substance, whoever may be Proof of the defendant, and any material variance will be fatal(c); though the power the Bill or Note. given to the judges to allow amendments in cases of variance, is now very What liberally exercised where the amendment does not affect the merits of the should be case, and the defendant is not prejudiced thereby (d). If there be any mis-proved. take in the date or circumstances of the instrument necessary to be explained, then evidence must be adduced accordingly. And in an action by the indorsee against the acceptor of a bill, the date of which appears to have been altered, it lies on the plaintiff to shew that the alteration was made previous to the indorsement by the drawer, to whose order it was made payable(e); and without some evidence to this effect, the jury cannot, on a bare inspection of the instrument, determine at what time the alteration took place (f). And if the plaintiff sue on a *promissory note, which [*625]

(a) See Tanner v. Benn, 4 Bar. & Cres. 312; 6 Dow. & Ry. 338, (Chit. j. 1261); Freeman v. Kennell, Guildhall, 25th May, 1826, per Abbott, C. J. et post, 625, note (i).

(b) See ante, 596.

(c) Ante, 560 to 569.

(d) See ante, 567, as to Amendments.

(e) Johnson v. Duke of Marlborough, 2 Stark. 313, (Chit. j. 1020); Bul. N. P. 255; Herman v. Dickenson, 5 Bing. 183; 2 M. & P. 289, (Chit. j. 1416); ante, 189.

(f) Knight v. Clements, S Ad. & Ellis, 215; 3 Nev. & P. 375, S. C. A bill was drawn upon a two months' stamp and had begun with the words "Three months after date," but the word "three" had been defaced (as if blotted while the ink was wet) and "two" written upon it, and "two" written again underneath, and the plaintiff, who put in the bill at nisi prius, offered no evidence to account for the alterations: it was held, that the document, by itself, was no evidence to go to the jury, of the alterations having been made at the original writing of the bill; and (issue having been joined on a plea of non accepit) that the plaintiff must be nonsuited. Lord Denman, C. J. in delivering the judgment of the court, said, "This was an action on a bill of exchange at two months: plea non accepit. The plaintiff produced the bill, which had the word two (before months); but the letters of that word were written over the word three, and the strokes composing the letters of the latter word appeared to have been blotted. The stamp was good for a two months' bill, bad for one at three months. The defendant's counsel objected that P. 55; and in banc, 1 Dans. & Ll. 83; see the party producing a document is bound to ex-

plain such an ambiguity appearing on the face of it, and to shew distinctly that the alteration was made before the bill was negotiated. The plaintiff's counsel, not disputing this rule, argued that the inspection of the bill was alone sufficient to prove the alteration so made, inasmuch as the word three plainly appeared to have been blotted out while wet and in the course of the writing; and my learned brother who tried the cause placed the bills in the hands of the jury, and asked their opinion whether they thought so, directing a verdict for the plaintiff if they did. They found that the alteration was completed in time; and their verdict was entered for the plaintiff, subject to a motion for a nonsuit if the question was improperly submitted to them. This point was argued, and has been considered by us. We think the rule for a nonsuit must be made absolute. The plaintiff was bound to prove a bill accepted payable at two months: that which he produced was accepted payable either at two or three months, with no evidence whether it was the one or the other. The mode of obliteration might have furnished arguments in favour of one or the other supposition, and material confirmation to any proof adduced as to that fact. But standing by itself, it was obviously no better than a conjecture; for the alteration might have been too late, and accompanied with a fresh marking by wet ink rubbed over on the instant. The case of Bishop r. Chambre, (M. & M. 116; Lord Denman, C. J. in the course of the argument referred to the same case at nisi prius as reported in 3 Car. & ante, 189, 190, note (p), in which the point

or Note. What should be proved.

I. In gone- purports to be payable to a person of a different name, he should be preparral what ed with evidence that he was the person intended (g). In an action against Pacts must be proved, the drawer or indorser of a bill, for default of payment, if it be unnecessarily alleged that the bill was accepted, yet the acceptance need not be prov-First, proof $\operatorname{ed}(\tilde{h})$. Nor is it necessary in an action against the acceptor, if his acceptof the Bill ance be unnecessarily stated to have been made payable at a particular place, and there is an averment of presentment there, to prove such presentment(i). If the bill were in foreign money, it should be proved what was the rate of exchange and value of such money at the time when the bill became due(k); and if the bill were payable at usances, the duration of such usances should be proved. It seems doubtful whether in an action of assumpsit where the plaintiff does not reply de injuria generally to the facts stated in the plea, the circumstance of his only taking issue upon one of them entitles the jury to treat the facts alleged in the plea, and not denied in the replication, as admitted(l).

How proved.

With respect to the MODE of proving the bill, and the allegations respecting it, according to the rule that the plaintiff must adduce in support of his action the best evidence in his power, he must in general produce the instrument declared on, in proof of the allegations that it was made, and in the case of a foreign bill drawn in sets, both sets should be produced(m)(1). And we have already seen, that proof of the mere loss of the bill will not in general excuse the non-production of it(n); for the defendant may be called on again to pay the amount to a bona fide holder. Where, however, it can be proved that the original bill has been destroyed(o), or that it is withheld by the defendant p), or, in case of loss, that it was not negotiable, or not indorsed, or only specially indersed(q), it will suffice to produce a copy, or to give parol evidence of its contents; and where the defendant tore his own note of hand, a copy was admitted as good evidence(r)(2). But in these

taken in the principal case, as to the question to be considered by the jury, does not appear to have come under discussion,) was cited on the trial for the plaintiff, and the marginal note appears favourable to him. But Lord Tenterden's proceeding on that occasion, was, in truth, the other way: he permitted the jury to inspect the bill, to see if there had been any alteration, which there manifestly had, and then decided against the party producing it for want of proof that it was made before the instrument was complete." Rule absolute. Semble, over-ruling Taylor r. Moseley, 6 C. & P. 273; ante. 190, 191, note (y).

(g) Willis v. Barrett, 2 Stark. Rep. 29, (Chit.

j. 989); ante, 156.

(h) Tanner v. Bean, 4 Bar. & Cres. 312; 6 Dow. & Ry. 338, (Chit. j. 1261); over-ruling Jones v. Morgan, 2 Campb. 474, (Chit. j. 807).

(i) Freeman v. Kennell, Guildhall, 25th May, 1826, cor. Abbott, C. J. Dickenson, attorney

(k) See Delegal v. Naylor, 5 M. & P. 443; 7 Bing. 460, S. C.; post, Ch. VI. Sum Recor-

erable.

(1) Noel v. Broyd, 4 Dowl. P. C. 415.

(m) See 2 Stark. on evidence, 227, 228. The bill must be produced to entitle the plaintiff to interest; Fryer r. Brown, Ry. & Moo. 145, (Chit. j. 1227). When necessary in action for money had and received, to recover amount of bill improperly paid by defendant into his own bankers, who have given him credit thereon; Atkins r. Owen, 2 Ad. & El. 35; 4 N. & M. 123, S. C. But see as to right of action, ante, 251, note (z).

On an application by the defendant for a commission to examine witnesses abroad, the court refused to make it a part of the rule to call upon the plaintiff to produce a bill of exchange in his possession at the time of executing the commission; Cunliffe r. Whitehead, 3 Dowl.

(n) Ante, 253 to 271, as to the loss of bills.

(o) Ante, 268.

(p) Ante, 265.

(q) Ante, 268. (r) Per Holt, C. J. Anon. Ld. Raym. 731.

⁽¹⁾ Wells v. Whitehead, 15 Wend. 527, S. P }
(2) Secondary evidence of the contents of a note, is admissible where it appears the original is destroyed or lost. Benner v. Bank of Columbia, 8 Wheat. 596. See Hindadale c. Miles. 5 Conn. Rep. 331.

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cases, the plaintiff must shew sufficient probability to satisfy the court that I. In genethe original note was genuine(s). Where A. deposited with B., a banker, ral what Facts must a promissory note as a security for advances, it was held that B. might re- be proved, cover on the note, although before it became due he parted with the posses- and how. sion to enable A. to procure payment from the maker, and "although the First, note remained in A.'s hands till his bankruptcy, and then came into the pos- Proof of session of his assignees (1). And in an action by the indorsee of a bill, ac-the Bill or cepted in a foreign country, against a party in London, who undertook to How negotiate it, for not paying over the proceeds which he held after the bill be-proved. came due, parol evidence may be given of the particulars of the bill(u). It [*626] has been decided, however, that when the original note is in the hands of the defendant, the plaintiff must give him notice to produce it, and prove the service of such notice, or he will not be allowed to go into evidence of its loss or contents(x); and this rule has even been considered as applying to an action of trover for a bill of exchange in the possession of the defendant(y); but it is now established, that in such action of trover, or in any other proceeding, as on an indictment for stealing a bill, or for forging a note, which the defendant swallowed, which necessarily imports that the plaintiff means to charge the defendant with the possession of the instrument, no notice to produce need be served upon him(z). Where a notice has been given in order to let in the secondary evidence, the service of such notice, and the destruction or detention by the defendant, of the instrument, must be proved(a). If a check drawn by one of the parties in a cause be proved to be in the hands of the banker of such party (having been paid), the opposite party need not, if he wish to have it put in evidence, call the banker's clerk to produce it, but may call for it under a notice to produce, because bankers are the agents of the parties who draw on them (b).

The payment of money into court, generally, precludes the defendant from disputing the validity of the bill, or the defendant's liability to that extent, or the plaintiff's right, and from shewing that it is improperly stamp-In such case the plaintiff should on the trial produce the rule, and it will not suffice to call the attorney to prove that he took the money out of court(d).

In the absence of evidence to the contrary, a bill of exchange must be taken to have been drawn at the time it bears date(e)(1).

Secondly. It must be proved that the defendant was a party to the bill or How de-In an action against the acceptor of a bill, it must be proved that the fendant bedefendant accepted the bill; and we have already seen what is an accept- came Parance(f).

ty to Bill or Note. What should be

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(s) Goodier v. Lake, 1 Atk. 446, (Chit. j.
284).
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(t) Bruce v. Hurley, 1 Stark. 23.

(u) Hunt r. Alewyn, 3 Car. & P. 284; 1 Moore & P. 433, (Chit. j. 1389).

(x) Phil. on Evidence, 3 edit. 389; and as to the usual proof to warrant the introduction of secondary evidence, see 1 Stark. on Evidence,

(y) Cowen r. Abrahams, 1 Esp. Rep. 50, (Chit. j. 513).

(z) How r. Hall, 14 East, 274; Phil. on proved. Evid. 3d edit. 391.

(a) Phil. on Evid. 3d edit. 390.

(b) Burton v. Payne, 2 Car. & P. 520, (Chit. j. 1316).

(c) Israel v. Benjamin, 3 Campb. 40, (Chit. j. 837); post, 637, note (c). (d) II. ibi I.

(e) Anderson v. Weston, 6 Bing. N. C. 296. { S Scott, 583, S. C. }

(f) Ante, 287 to 303.

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^{(1) {} A written memorandom given by the drawer to the acceptor of a bill, stating that it is drawn altogether for his accommodation, is evidence to show that it is an accommodation hill, even as between the acceptor and a bona fide indorsee. Reeves v. Toome, 5 Jurist, 870.

I. In geneand how. Secondly, How Defendant became Party to Bill or note. What should be

proved. As against Acceptor

If the acceptance was made by an agent, it must be shewn that he was leral what gally authorised by the principal(g); if the authority was in writing, the inbe proved, strument must be produced and proved(h); and in general *the agent himself should be subpænaed; but it is not in all cases necessary to subpæna the agent himself: thus in an action on a policy of insurance, the affidavit of a person, stating that he subscribed the policy on the behalf of the defendant, which affidavit the defendant himself had previously used on a motion to put off the trial, was, under the particular circumstances, admitted as proof of the agency; for the defendant having used the affidavit for such a purpose, must be considered as having known and adopted its contents, though the single circumstance that the affidavit purported to have been made by a person as agent, would not have been a sufficient proof of his being invested with that authority (i); and when it has been proved that A. is agent of B., or Maker. whatever A. does or says, or writes, in the making of a contract as agent of [*627] B. is admissible in evidence, because it is part of the contract which he makes for B. and which therefore binds him, but it is not admissible as the agent's account of what passes (k). And the declaration of an agent can only be evidence against the principal where it accompanies the transaction about which he is employed, and if made at another time it is not admissi-If it be averred in the declaration that the defendant became a party by accepting, drawing, or indorsing a bill, "his own proper hand-writing being thereunto subscribed," it will nevertheless suffice to prove a signature by an authorised agent(m).

> In an action against several acceptors of a bill or makers of a note, the hand-writing of each must be proved (n); (one of whom is competent to prove the hand-writing of the other's (o)); or it must be shown that a partnership existed at the date of the instrument, or time of acceptance, and that the partnership name was written by one of the partners or their agent(p)(1). If the partnership be established, then it will suffice to prove an admission by one of the defendants of the hand-writing of one of the partners to the acceptance in the name of the firm(q); and it will not be necessary to prove

(g) Johnson v. Mason, 1 Esp. Rep. 90; Coore v. Callaway, 1 Esp. Rep. 115. As to such evidence, see Stark. on Evid. tit. Agent. As to how far an agent is authorized, see ante,

In an action against a defendant as acceptor of a bill of exchange, no evidence being given in whose hand the acceptance was written, it was held that the circumstance of the bill having been paid by the drawer, and the amount of it obtained on discount by defendant's wife, having been applied by her in discharge of his debts, was not sufficient to prove that he had sanctioned the acceptance; Goldstone v. Tovey, 894, S. C.

(h) Id. ibid.

(i) Johnson v. Ward, 6 Esp. Rep. 48; Phil. on Evid. 8d edit. 79.

(k) Per Gibbs, J. in Langhorn v. Allnutt, 4 Tnunt. 519; Phil Evid. 8d edit. 78.

(1) Retham v. Benson, Gow Rep. 48, 49.

(m) Booth v. Grove, Mood. & Mal. 182; 3 Car. & P. 335, (Chit. j. 1395); Helmsley r. Looder, 2 Campb 450, (Chit. j. 799); ante,

(n) Gray v. Palmer, 1 Esp. Rep. 135, (Chit. j. 525); per Lawrence, J. in Sheriff v. Wilks, 1 East, 52.

(o) York v. Blott, 5 M. & Sel. 71, (Chit. j. 957).

(p) Thwaites v. Richardson, Peake Rep. 16. (q) Gray v. Palmer, 1 Esp. 135, (Chit. j. 525); Wood v. Braddick, 1 Taunt. 104; Phil.

Evid. 3d edit. 75; Hodenpyl v. Vingerhoed. Hodenpyl v. Vingerhoed and another, cor. Abbott, C. J. 3d July, 1818, Guildhall. Assumpoit on a promissory note, dated at Rotter-dam, and drawn in Dutch for the payment of 900 guilders to the plaintiff, and subscribed by the firm of "Vingerhoed and Christian." The declaration stated several christian names of each defendant. A witness swore that he knew the firm of Vingerhoed and Christian, and that

⁽¹⁾ Evidence that it was not generally known in the place where a certain partnership was carried on, that T. was a partner, is admissible to the jury, where the inquiry is, whether the plaintiff knew that defendant was a partner in order to make him liable. General evidence that he was known as a partner, is also admissible under such circumstances. Bernard v. Torrence, 5 Gill & John. 388.

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that the defendants were of the christian names stated in the declaration (r). I. In gene-And this doctrine has been carried so far, that in an action against three ral what persons as drawers of a bill of exchange, purporting to have been drawn by be proved, an agent of the firm upon one of the partners, it was held, that the accept- and how. ance by the drawee was evidence against three partners of the bill having Secondly, been regularly drawn, and rendered it unnecessary to prove the authority of How Dethe agent(s). So the admission by one partner *of his partnership with the fendant became co-defendants, who were sued with him as acceptors of a bill of exchange, Party to and who had been outlawed, has been received as proof against him of a joint Bill or promise by all(t). The rule has even been extended in actions so far as to Note. admit the declarations of one partner to be evidence against another, con-What cerning joint contracts and their joint interest, although the person who has should be proved. made such declarations is not a party to the suit; as where in an action by As against a creditor against some of the partnership firm, the answer of another party Acceptor to a bill filed by the other creditors was received in evidence against the defendants, not indeed to prove the partnership, but that being established, as [*628] an admission against those who are as one person with him in interest (u). And the admission of a partner, though not a party to the suit, is evidence as to joint contracts against any other partner, as well after the determination of the partnership as during its continuance (x). But in a joint action against three persons as acceptors of a bill of exchange, as a joint liability must be proved, the circumstance of two of the defendants having been outlawed will not dispense with proof of their joint liability, although the defendant, who alone pleaded to the action, was in justice liable to pay the $debt(\eta)$. So in an action against two persons, as makers of a note, if one of them suffer judgment by default, his signature must nevertheless be proved on the trial against the other (z). We have already seen what evidence of facts are necessary to be proved to constitute a parol acceptance in the case of a foreign bill(a). In an action against the acceptor of a bill, payable after sight, it is in general necessary to prove the date or time of the acceptance; but if his signature as acceptor is proved, the date of the acceptance appearing over it, although in a different hand-writing, will be presumed to have been written by his authority (b). Evidence, it seems, is admissible to shew that a bill with a cancelled acceptance upon it has been accepted by mistake; so

there were two persons of those surnames in the firm, but that he did not know their christian names: and that in a conversation with Vingerhoed, he admitted that the note was subscribed by him in the name of the firm. This was held sufficient to establish the action against both defendants. Blunt and Bowman, for plaintiffs. But see post.

(r) Id. ibid.

(s) Porthouse r. Parker and others, 1 Campb. 82, (Chit. j. 741). This was an action by payee against the drawers of bill, which purported to be drawn by one Wood, as the agent of George, James, and John Parker, upon John Parker. There was no proof that Wood had authority from the defendants to draw the bill; but a witness swore that he, as the agent of John Parker, the drawer, and one of the defendants, had accepted it on his account. Lord Ellenborough held, that the bill having been accepted by order of one of the defendants, this was sufficient evidence of its having been regularly drawn; and further, that the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove that the defendants had received express notice of the dishonour of a bill, as this must have necessarily been known to one of them, and the knowledge of one was the knowledge of all; Bayl. 5th edit. 462

(t) Per Lord Ellenborough, in Sangster v. Mazarredo, 1 Stark. 161; Phil. Evid. 3d ed.

(u) Grant r. Jackson, Peake, 203; Wood v. Braddick, 1 Taunt. 104; Nichol v. Dowding, 1 Stark. Rep. 81.

(x) Wood v. Braddick, 1 Taunt. 104. In equity the answer of one partner is not admissible in evidence against the other; see Booth v. Quin, 7 Price, 198, (Chit. j. 1059); ante, 54, note (q).

(y) Sheriff v. Wilkes, 1 East, 48, (Chit. j.

(z) Gray v. Palmer, 1 Esp. Rep. 135; ante. **627**, note (q).

(a) Ante, 295 to 299. (b) Glossop v. Jacob, 4 Campb. 227; 1 Stark. Rep. 69, (Chit. j. 944); ante, 292, note

ral what Facts must be proved, and how. Secondly. How Da. fendant became Party to Bill or Note.

As against Drawer or Indorser. [*629] Mode of Proof.

I. In gene- proof may be given that a check has been cancelled by mistake, and it may be returned unpaid(c).

> In an action against the drawer or indorser of a bill or note, the hand-writing of the defendant, or a signature by his agent, having power to bind him, must be established in evidence in like manner as in an action against the acceptor of a bill(d); and if an indersement on a promissory note purports to have been attested by a subscribing witness, such witness must be called(e); but if the defendant pay money *into court generally, or upon the count on the instrument, the signature and its validity is admitted, and need not be proved, and the only question to be tried will then be the quantum (f).

The MODE of proving that the defendant was a party to the bill or note has already beed partially considered (g). If there be one invariable mode in which bills of exchange are drawn between particular parties, this may be proved by parol evidence, without any of the bills being produced (h). In an action against the acceptor of a foreign bill, his acceptance, if by parol, must be proved by the witness who heard him accept; and if the answer, which it is insisted amounted to an acceptance, was given by a clerk or third person, that person must be subprenaed; or it must be proved that the defendant has previously recognised his general authority to accept for him; and it has been held, that proof of an answer given at the house of the drawee, that the bill would be taken up when due, is not sufficient proof of an acceptance, but it must be shewn that the answer was given by the drawee, or by his authority (i). If the acceptance was in writing, it must be produced, and the signature proved. An acceptance in writing of an inland bill may be valid although given since the 1 & 2 Geo. 4, c. 78, and not signed; but the plaintiff may, it has been supposed, in that case be required to prove that it was intended to operate as a complete acceptance (k). The latter supposition seems, however, scarcely tenable (l). Proof that the acceptance was written whilst the bill was in blank affords no objection(m). tion against the drawer or indorser of a bill or note, his signature must also The signature may be established by a witness who can swear be proved. to the hand-writing, or to an admission of it by the party sued.

(c) Ante, 308, 309.

(d) Gutteridge v. Smith, 2 Hen. Bla. 374, As to authority of wife to in-(Chit. j. 534). dorse in name of husband, see ante, 22, 23; and see Goldstone v. Tovey, 6 Bing. N. C. 98; ante, 626, note (g).

(e) Stone v. Metcalf, 1 Stark. Rep. 53, (Ch.

j. 943). (f) Gutteridge v. Smith, 2 Hen. Bla. 374, (Chit. j. 534); ante, 626.
(3) Ante, 625 to 628.

(h) Spencer v. Billing, 3 Campb. 310; 1

Rose, 362, S. C.
(i) Sayer v. Kitchen, 1 Esp. Rep. 209, (Chit. j. 535). Assumpsit against acceptor of a bill, drawn upon him by one Holland, and also a further sum for goods sold and delivered. The plaintiff was unable to prove the handwriting of the defendant subscribed to the bill by any witness who was acquainted with it, but offered the following as an admission by him, tantamount to proof of his acceptance. This evidence was that of a clerk of the banking house into which the bill in question had

been paid, and who had brought the bill to the defendant's house for acceptance. The defendant was not then at home; but the clerk received for answer at the house, that the bill would be taken up when due. Mingay, for the plaintiff, contended, that this answer so received at the house of the defendant to a bill, upon which his name appeared as drawee, was a sufficient acknowledgment of the acceptance, upon which to charge him. Lord Kenyon ruled, that it alone, without some proof of the defendant's hand writing, or something to shew that the acknowledgment came from him, was insufficient; the plaintiff having no further evidence to that point, the count on the note was abandoned.

(k) Dufaur v. Oxenden, 1 Moo. & Rob. 90, (Chit. j. 1566); but quære as to the propriety of leaving the question to the jury. Note, I Moo. & Rob. 92; and id. 119.

(l) Id. ibid.

(m) Leslie v. Hastings, 1 Moo. & Rob. 119, (Chit. j. 1567); Schultz v. Astley, 2 Bing. N. C. 544; 2 Scott, 815, S. C.; ante, 214, note (0).

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The simplest and most obvious proof of hand-writing, is the testimony of I. In genea witness who saw the defendant subscribe the bill or note; but (unless there ral what was a subscribing witness, who, as we shall hereafter see, must be subpœnaed(n)), this evidence is not essential, and it will suffice to call a witness and how. who is acquainted with the defendant, and who, from seeing him write even Secondly, his surname or other writing(o), or from correspondence with him, has ac- How Dequired a knowledge of his hand-writing, and can swear to his belief that the fendant became Parsubscription is the *defendant's(p); and this knowledge may be acquired, ty to Bill though it seems the witness has only seen the party write once; and in an ac- or Note. tion on a foreign bill, to prove the hand-writing of the defendant, it is evi- Proof of dence to go to a jury, that a person who saw him write once thinks the hand- Handwriting alike, though he has no belief on the subject (q). This suffices, be-writing cause in every person's manner of writing there is a certain distinct prevail- [*630] ing character, which may be easily discovered by observation, and when once known, may be afterwards applied as a standard to try any other species of writing whose genuineness is disputed. A witness may therefore be called and asked whether he has seen the defendant write, and afterwards whether he believes the signature to the bill or note to be the defendant's hand-writing (r); but it is reported to have been decided at hisi prius, that a person who has only seen a party write his surname, is not competent to prove his hand-writing to the christian as well as surname to an acceptance(s); but in a subsequent case, the contrary was ruled(t); and an instrument executed by mark may be proved by a person who has seen the party so execute instruments (u). The usual course is to subpose a witness who

(n) Post, 633.

(o) Lewis r. Sapio, Mood. & M. 39, (Chit. j. 1326).

(p) Bul. Ni. Pri. 236; Lord Ferrers v. Shirley, Fitz. 195; Willes v. Sagar, Esp. N. P. C. 144; 2 Stark. on Evid. 651.

(q) Garrells v. Alexander, 4 Esp. Rep. 37, (Chit. j. 639). Assumpsit on a foreign bill of exchange. To prove the hand-writing of the defendant, the plaintiff called the clerk of the defendant's attorney. His evidence was, that he had seen the defendant sign the bail bond in the cause, but had never seen him write on any other occasion. Being asked whether he believed the acceptance to be the hand-writing of the defendant, he said he could form no belief on the subject; it was like the hand-writing in which the bail-bond was subscribed, and was about to compare them together. Lord Kenyon told him he must form a judgment without such comparison of hands. He then looked on the bill again, and said it was like the handwriting in which the defendant had subscribed the bail-bond, but that he could not speak to any belief further than he had already done. Garrow, for the defendant, objected that there was not sufficient evidence, and that it would be of dangerous consequences to allow such loose evidence of a hand-writing to charge a party with a debt.

Lord Kenyon, "This is the case of a foreign bill of exchange, and I think there is evidence to go to the jury, and that I am bound to leave it to them. To be sure, mere comparison of hands is not admissible evidence of itself: that was Algernon Sidney's case; but there the witness had never seen him write; and the only evidence in the case was mere comparison

of hands; but in the present case, the witness has seen the defendant write, and he speaks to the likeness of the hand-writing, in which the bill is accepted, bears to that which he has seen the defendant actually write; I therefore think that it is evidence to go to the jury."

But it has been holden, that a witness who has only seen the drawee write his name, pending the action, for the purpose of shewing the witness his usual mode of writing his acceptance, is not an admissible witness for such drawee to disprove his hand-writing to the bill, on which he is sued, because the defendant might write differently before the witness purposely to establish a defence; Stranger r. Searle, 1 Esp. Rep. 14, 15, (Chit. j. 509).

(r) Peake's Evid. 4th edit. 109, 110; Phil. Evid. 3d edit. 422; 2 Stark. on Evid. 652.

(s) Powell v. Ford, 2 Stark. 164, (Chit. j. 998).

(1) Lewis v. Sapio, 1 Mood. & M. 39, (Chit. j. 1326). (u) George v. Surrey, Mood. & M. 516,

(Chit. j. 1499). Assumpsit by the indorsee against the acceptor of a bill of exchange drawn by Ann Moore to her order, and indorsed by her to the plaintiff. Ann Moore drew the bill by her mark, and it was indorsed by mark; the writing, " Ann Moore, her mark, on the indorsement, being in the plaintiff's hand. A witness was called to prove the indorsement, who stated he had frequently seen Ann Moore make her mark, and so sign instruments, and he pointed out some peculiarity. Tindal, C. J. after some hesitation, admitted the evidence as sufficient, and the plaintiff had a verdict.

Secondly, How Decame Party to Bill or Not e. Proof of Handwriting. [*631]

I. In gene- can swear he knows the defendant, and that he has seen him write frequentral what ly, or has frequently addressed letters to him and received answers in return; be proved, and from the knowledge he has thus acquired of his hand-writing, he believes the particular signature to be the defendant's hand-writing. A knowledge of the hand-writing acquired by a witness in the course of correspondence with the defendant, is sufficient to enable him to swear to his belief of the tendant be-hand-writing, though he has never seen him write; as if the witness has paid bills *according to the written directions of the defendant, and for which he afterwards accounted; or where letters are sent directed to a particular person on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose hand-writing it purports to be(x); but barely having seen letters, purporting to have been franked by him, or other papers, which he has no authentic information are of the defendant's hand-writing, is not sufficient(y); and to support evidence of this nature evidence of the identity of the defendant is essential.

When comparison of hand-writing inadmissible.

In forming this belief it has been observed, that a witness, when called to speak to the indentity of the defendant's hand-writing, ought to judge solely from the impression which the hand-writing itself makes upon his mind, without taking any extrinsic circumstances into his consideration(z). erally speaking, evidence by comparison of hands is not admissible; and though in an action on a bill, which the defendant contended to be a forgery, other bills were handed to the jury for their inspection, being illiteral, to compare the hand-writing(a), a contrary practice now prevails(b). Therefore where a witness said, "that looking at the hand-writing, he should have thought it to have been that of the party whose name it bore, but from his knowledge of him he thought he could not have signed such a paper," it was held, that this was prima facie evidence of the hand-writing(c); and on the same principle, where it was contended that the paper produced was the forgery of a third person, evidence that such third person had forged the defendant's name to other instruments of a similar nature was held to be inadmissible(d); and even in one case which came before the court, a party who contended that the hand-writing was a forgery was only permitted, after a great deal of other evidence, to examine a clerk at the post-office, whose business it is to inspect franks and detect forgeries, to prove, that from the appearance of the hand-writing, it was, in his opinion, a forgery, and not a genuine hand-writing (e); and in a subsequent case (f), Lord Kenyon said that such evidence was wholly inadmissible, and observed, that though in Revett v. Braham it was admitted, yet that in his direction to the jury he had laid no stress at all upon it. And in a later case it was holden, that the opinion of the inspectors of franks at the post-office, whether a writing is written in a natural or a feigned character, is of little weight, and the Court of King's Bench refused to grant a new trial, which was moved for on the ground that such evidence had been rejected (g). And in another case Lord

(x) See Phil. Evid 8d edit. 422 to 424, 427, 428; Peake's Evid. 4th edit. 110.

(y) Cary v. Pitt, Peake's Evid. 4th edit. 110; Peake's Rep. Add. 130, S. C. (z) Peake's Evid. 4th edit. 110; 2 Stark. on

Evid. 653, 654.

(a) Allesbrook v. Roach, MS. Peake's Add. 27; 1 Esp. Rep. 351, (Chit. j. 546).

(b) Allesbrook v. Roach, MS. Peake's Add.
28, note (a); Clermont v. Tullidge, 4 Car. &
P. 1; and id. notes 2 and 3, S. P.; and Cary v. Pitt, Peake Rep. Add. 130.

(c) Da Costa v. Pym, Sittings at Guildhall, after Trin. Term, 37 Geo. 3; Peake's Evid. 4th edit. App. 85; 2 Stark. on Evid. 654.

(d) Balcetti v. Serani, Peake's Rep. 142, (Chit. j. 497); Crast v. Lord Brownlow Bertie, Sittings at Westminster, after T. T. 1777, MS.; Peake's Evid. 4th edit. 110.

(e) Revett v. Braham, 4 T. R. 497. (f) Cary v. Pitt, Peake's Evid. 4th edit. 110; Peake's Repp. Add. 130, S. C.

(g) Gurney v. Langlands, 5 B. & Ald. 380.

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Tenterden said, "It was formerly held that persons conversant with hand- 1. In genewriting could be asked whether certain letters were genuine or not, but it has ral what been long since held that this is not evidence (h)."

It has been observed, that the analogies of law appear strongly to support and how. the admissibility of this evidence, for opinion founded on *observation and Secondly. experience, is received in most questions of a similar nature. There is a How Decertain freedom of character in that which is original, which imitation seldom fendant became attains, and the want of that freedom is more likely to be detected by one Party to whose attention has been directed to the subject, than by another who has Bill or never given his mind to such pursuits. It should seem therefore that such Note. evidence is not wholly inadmissible, though it certainly ought to be received When with great caution, and meet with little attention, unless as corroborating oth-

er and stronger evidence.

The true distinction as to the admissibility of such evidence seems to have writing inbeen taken by Mr. Baron Hotham on the trial of The King v. Cator(i), where the defendant being indicted for publishing a written libel, and a person from the post-office, who had never seen him write, being called as a witness, that judge permitted the witness to give general evidence that the writing appeared to be in a feigned hand; but when the witness was asked whether, on comparing such handwriting with papers proved by others to be the genuine hand-writing of the defendant, he could say it was the disguised hand of the same person, his lordship rejected the evidence attempted to be introduced by such examination, because it arose only from comparison of The case of Revett v. Braham(k) may therefore still be considered as an existing authority to shew, that for the purpose of proving generally and in the abstract that a hand-writing is not genuine, for the want of freedom in the hand-writing, such evidence is admissible, though deserving of little attention (l). And the painting of the letters, as it was called by the witness in that case, may arise from the infirmity of the writer, or his not having formed a fixed character, or many other causes which a person unacquainted with the genuine hand-writing cannot take into consideration. tradesman who is daily making entries in his books will acquire a more free and steady character than an illiterate person who can but just write his name; and a man whose habits of life lead him to write much oftener and with less care, will still get more of a peculiar character in his hand-writing; all which circumstances should certainly be taken into the consideration of a jury before they give weight to such evidence.

It has been well observed, that inasmuch as the mind arrives at the belief of hand-writing merely by recollection of the general character from an acquaintance by frequently seeing it, and and not from the formation of particular letters or a single inspection, courts of justice have wisely rejected all evidence from bare comparison of hands, unsupported by other circumstances; they will not therefore permit two papers, one of which was proved to be the hand-writing of a party, to be delivered to a jury for the purpose of comparing them together, and thence inferring that the other is also of his hand-writing(m); but where witnesses have been called to prove the similitude of hand-writing, and other witnesses have from the same premises drawn a different conclusion, this rule has been relaxed in favour of a jury

Peake's Rep. 20, note (a).

be proved.

⁽h) Clermont v. Tullidge, 4 Car. & P. 1, 2. 2 N. & P. 16, S. C.

⁽i) 4 Esp. Rep. 117.

⁽k) 4 T. R. 497; ante, 631, note (e).

⁽¹⁾ Gurney v. Langlands, 5 B. & Ald. 380; and see Doe v. Suckermore, 5 Ad. & El. 708;

⁽m) Macferson v. Thoytes, Peake's Rep. 20, (Chit. j. 469); Brookhard v. Woodley,

and how. Secondly, How Defendant bety to Bill or Note.

I. In gene- whose habits of life have accustomed them to the sight of hand-writing(n); and in a late case a jury were allowed by Lord Tenterden to judge of a disbe proved, puted hand-writing by comparing it with other documents already *in evidence in the cause for other purposes(o), and admitted to be the hand-writing of the defendant(p); but this mode of proceeding seems rather a departure from the strict rules of evidence, and before an illiterate jury would proba-See post, 824 (63). bly not be adopted (q).

In some cases, where the antiquity of the hand-writing makes it impossible for any living witness to swear that he ever saw the party write, compar-[*633] ison of hand-writing with documents known to be in his hand-writing has

been admitted (r)(1).

(n) Allesbrook v. Roach, Sittings at West-minster after T. T. 1795, MS.; 1 Esp. Rep. 351, (Chit. j. 546); Da Costa v. Pym, ante, 631, note (c).

(o) See Doe v. Newton, 5 Ad. & El. 514; 1 N. & P. 1, S. C. See also Doe v. Suckermore, 2 N. & P 16; 5 Ad. & El. 703, S. C.

(p) Solita v. Yarrow, 1 Moo. & Rob. 133;

and see Smith r. Sainsbury, 5 C. & P. 126.

(q) Peake's Evid. 4th edit. 110 to 115. (r) Per Le Blanc, J. Roe v. Rawlings, 7 Enst. 202; Bul. N. P. 236; and see Taylor v. Cooke, 8 Price, 653, as to comparison of handwritings of former rectors with entries in regis-

(1) It is a general rule, that evidence by comparison of hands is not admissible, when the witness has had no previous knowledge of the hand-writing, but is called upon to testify merely from a comparison of hands. Kelly r. Jackson et al., 6 Peters' Rep. 662.

The jury may find that a party signed an instrument not witnessed, by comparing the handwriting to such instrument with the hand-writing to another instrument, which the party admits he signed. Gifford v. Ford, 5 Verm. Rep. 532.

A bill may be proved to be counterfeit, by persons who know the signatures of the president and cashier of the bank, by having seen bills in circulation. The State v. Carr, 5 New Hamp.

The evidence of a witness as to hand-writing, who has formed an acquaintance with it, from seeing the party write or from a course of correspondence, is not rendered incompetent nor its weight impaired, by his having referred to papers in his own possession, known to be written by the party, to refresh his (the witness') memory. Redford's Adm'r v. Peggy, 6 Randolph's

Upon the trial of issue on plea of non est factum whether the party's signature to the instrument in question be genuine or no: Held inadmissible to lay other proved specimens of the party's hand-writing before the jury, that it may judge by comparison thereof with the writing in question whether this be genuine. Such comparison of hand-writing is not proper evidence. Rowt's Adm'x. v. Kiles' Adm'r., 1 Leigh's Rep. 216.

B. is appointed adm'r of S. at a time when S. was supposed to have died without a will; a will is afterwards found; B. had never seen S. write; but acquired a knowledge of his bandwriting from an examination of his papers after his death, and testifies from his knowledge of the hand-writing thus acquired, that the will is wholly in S.'s hand: Held, this is competent evidence of the hand-writing in the court of probate. Sharp v. Sharp, 2 Id. 249.

Proof of hand-writing of the indorser of a note, going no farther than that the witness believed it to be the hand-writing of indorser, founded upon the facts of having seen him write his name two months before the trial, and also having seen him write five years before the trial, stating at the same time that he would not have been able to have testified to the hand-writing from the fact alone of having seen him write five years ago, and expressing doubts as to a part of the signature, would scarcely be sufficient to uphold a verdict, if the question as to its sufficiency had been properly submitted to a jury. Utica Ins. Co. v. Badger, 3 Wend. Rep. 102.

Where a judge upon such evidence in an action by the indorsees of a promissory note, charged the jury that the plaintiffs were entitled to a verdict, instead of leaving it to them, under proper instruction, to say whether the indorsement was or was not the hand-writing of the party, a new

trial was granted.

Where the plaintiff in an action for a libel, to prove that the paper alleged to be libellous, was in the hand-writing of the defendant, introduced witnesses who had seen him write, who testified, that they believed the paper to be in the hand-writing of the defendant, but who, upon their cross-examination, said, that they did not know that they were sufficiently acquainted with his hand to determine, except by comparing it with other writings of his proved to be genuine; it was held, that such testimony was admissible. Lyon v. Lyman, 8 Conn. Rep. 55.

Where the plaintiff in such action offered the testimony of cashiers of banks, who had never seen the defendant write, and who had no knowledge of his hand-writing, but who compared the paper in question with other writings proved to be his, and who testified that they were written by the same hand, and that such paper was in a disguised hand; it was held, that such cashiers, as persons of skill in their art, were competent witnesses to establish these points. Ib.



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Although the declaration expressly allege that the defendant's own proper I. In genhand-writing was subscribed, it will nevertheless suffice to prove a subscriperation by agent(s)(1). And where in an action against John K., on "a bill be proved, accepted by Joseph K. in the name of John K. and Co.," it was proved and how. that the acceptance was in the hand-writing of Joseph, and that he had done Secondly. business in the name he signed, it was held that the plaintiff was entitled to How Defendant berecover(t).

came Party to Bill

If there was a subscribing witness to the bill or note, or to an indorsement or Note. thereof then in an action against the drawer of the bill, or the maker of the In case of note, it will be necessary to subpæna such witness, and if there be any doubt Witness. as to his proving that he saw the defendant write his name, the subscription must be proved by some other evidence, which will in that case be admissible(u)(2); and if a person who sees a defendant sign a promissory note,

(s) Both r. Grove, Mood. & Mal. 182; 3 Car. & P. 335, (Chit. j. 1395); ante, 627, note (m).

See as to the introduction of the words " his own proper hand being thereunto aubscribed,

ante, 570, Declaration.

Semble, that a count on a guarantee for the repayment of bills, &c. drawn and subscribed by M. and E., must allege that the bills were subscribed by M. and E., although it be averred that they accepted the bills, and by a memorandum added to such acceptance expressed the same to be payable at a particular place; Corlett v. Conway, 5 M. & W. 653.

(t) Wilde v. Keep, 6 Car. & P. 235. (u) Lemon r. Dean, Lancaster Lent Assizes, 1810, cor. Le Blanc, J. 2 Campb. 636. Action on a promissory note, which appeared to be witnessed by one Bentley. Bentley was called and swore that he did not see the defendant subscribe the note, but the defendant merely desired him to try to write his name upon the paper, and that he did not observe whether any thing was at that time written on it. Plaintiff's

Where the plaintiff in such action, to prove the genuineness of the alleged libel, offered other writings proved to be in the hand-writing of the defendant, to go to the jury, to be compared by them with the paper in dispute; it was held, that such writings were admissible for that purpose. Ib. Respecting this point, Daggett, J., remarks: "It is not denied, that the general rule found in our elementary writers, is opposed to this decision. Swift, in our own state, and Starkie and Phillips, and many others, concur in declaring such testimony inadmissible. Mr. Day, in a learned note to his edition of Esp. Rep. vol. 4, p. 273, examined all the cases on this subject, and came to the same result. The treatises of Starkie and Phillips have appeared since the note of Mr. Day; and several cases are cited by those writers in favor of the admissibility of this species of evidence. In Abbe v. Daniels, Worcester county, Mass. Sept. term, 1811, Parsons, Ch. J. admitted skillful witnesses, who had never seen the defendant write, to swear that the signature in dispute was not, in their opinion, a natural one, nor written by the same person who made other signatures, which were produced and acknowledged to be the defendant's. 2 Stark. Ev. 658, n. 1, by Metcalf. In Massachusetts and Maine, comparison of hands is always admitted.

Homer v. Wallis, 11 Mass. Rep. 309. Hammond's case, 2 Greenl. 33. In New-York, it is doubtful whether genuine papers can be delivered to the jury to determine, by comparison, the genuineness of the paper in question. Titford v. Knott, 2 Johns. Ca. 211. In Pennsylvania, such evidence is received in corroboration. M'Corkle v. Binns, 5 Binn. Rep. 340, 349. Pennsylvania v. M'Kee, Addis. Rep. 33. The same evidence has been recognized in South Carolina, where it is offered in aid of other proof. Boman's adm'r v. Plunkett, 2 M'Cord, 518. The only reported case on that subject, in Connecticut, is that of the State v. Brunson, 1 Root, 307, where this species of evidence was admitted in a criminal case. I am aware, that there have been contradictory decisions on this point, at the circuits; but it has never come before this court until now. Under these circumstances, the court may, without embarrassment, resort to the reason of the rule." He then states and answers the arguments in favor of the rule. "An unfair selection of specimens may be made for the purpose of comparison. 2 Stark. Ev. 656. But " the party whose hand-writing is questioned, may be presumed to know more sources of the proof of his own writing, than the party who is bound to establish it." A contrary rule might open the door to a great deal of collateral evidence. 2 Stark. Ev. 656." But "this objection lies with equal force against many other kinds of proof, which is daily admitted." But "the great objection, and the only one suggested by the courts in the adjudged cases, is the ignorance of the jury on the subject of writings." This objection Justice Daggett conceives to have no force in Connecticut, and he says it has always appeared to him to be very feeble. Ib.

(1) Where a promissory note is stated in a declaration to have been made by the defendants, proof that it was made by one of the firm in the partnership name, supports the declaration. Vallett r. Parker, 6 Wend, 615. Mack r. Spencer, 4 Wend, 411.

(2) A note, although referred to in an instrument produced by the opposite party, cannot be

ral what Facts must be proved, and how.

Secondly, How Defendant became Party to Bill ot Note.

Witness.

[*634]

I. In gene- but is not desired by the parties to attest it, he cannot, by afterwards putting his name to it, prove it as an attesting witness (x)(1).

> Where there are several subscribing witnesses, it suffices to call one of them; but if there be any doubt as to proof of signature, it is best to call

all(y).

If the subscribing witness be dead, proof of his death and hand-writing, and that the defendant was present when the note was prepared, is sufficient, without proving the hand-writing of the defendant(z): and this even where the defendant signed by mark(a). And in an *action on a promissory note, to which there was a subscribing witness, who had since become insane, it subscribing was held, that proof of his hand-writing was sufficient to establish the making of the note (b); so in case of blindness (c): and proof of the hand-writing of the witness when dead has been considered sufficient without any other further proof whatever of the identity of the parties(d). But it was always deemed most prudent in such cases to be prepared with proof of the hand-writing of the acceptor or maker, and of the subscribing witness, in order to establish the identity of the former; and in the first-mentioned case, where the witness was dead, it was doubted whether the mere proof of his hand-writing, without the evidence of the defendant's having been present when the note was prepared, would have sufficed(e). And it is now settled, that in an action on a bill or note, the subscribing witness to which is dead or resident abroad, although it is not necessary, in addition to proof of the hand-writing of the subscribing witness, to prove the hand-writing of the acceptor or maker; yet some evidence of the identity of the party sued with

> counsel then proposed to call witness to prove the defendant's hand-writing. Williams objected, that there being a subscribing witness to the note, who was not incompetent, no other evidence of it could be given. He cited Phipps v. Parker, 1 Campb. 412. Le Blanc, J. "I will make no observation upon that case. It may be distinguishable, as there the instrument was a deed. But I am quite clear, that if the subscribing witness to a note, when called, cannot prove it, by reason of his not having seen it drawn, the plaintiff may proceed to prove by other means." Vide Fasset v. Brown, Peake's Rep. 23; Grellier v. Neale, id. 146; Burr. 2224, 2225. And see Wylde v. Porter, 1 Ad. & El. 742; ante, 615, note (u), as to necessity of calling subscribing witness.

(x) M'Craw v. Gentry, 3 Camph. 232. (y) Stra. 1254; Bur. 2224.

(z) Nelson v. Whittall, 1 Bar. & Ald. 19, (Chit. j. 998); Barnes v. Tromposki, 7 T. R.

(a) Mitchell v. Johnson, Mood. & M. 176. (b) Per Lord Ellenborough, Currie v. Child, 3 Campb. 283; cited in Nelson v. Whittall, 1 Bar. & Ald. 22, note (a), (Chit. j. 998); and

see Gough v. Cecil, Selw. 9th edit. 547, n. (c) Wood v. Drury, Ld. Raym. 734. See

post, 824 (65).
(d) Page v. Mann, Mood. & M. 74; Kay v. Brookman, id. 286; 3 Car. & P. 555, S. C.

To dispense with the necessity of calling the subscribing witness to a deed, it is sufficient to shew that he expressed an intention of leaving the country; that he had reason for doing so to avoid a criminal charge, and that his relations had not seen him since he expressed, his intentention of going. It is not necessary in the absence of the subscribing witness to prove the hand-writing of the party executing the deed; it is enough to prove the hand-writing of the witness

(e) Per Bayley, J. in Nelson v. Whittall, 1 Bar. & Ald. 21, (Chit. j. 998). It is laid down in Mr. Phillips's Treatise on the Law of Evidence, that the proof of the hand-writing of the attesting witness is in all cases sufficient. I always felt this difficulty, that that proof alone does not connect the defendant with the note. If the attesting witness himself gave evidence, he would prove, not merely that the instrument was executed, but the identity of the person so executing it; but the proof of the hand-writing of the attesting witness establishes merely that some person, assuming the name which the instrument purports to bear, executed it, and it does not go to establish the identity of that person; and in that respect the proof seems to me defective. In this case, however, there is evidence sufficient to connect the defendant with the note, for he was present in the room when it was prepared.

read in evidence, without production of the subscribing witnesses, or accounting for their absence, especially where the note offered in evidence purports to be a sealed note, and the fact whether sealed or not has an important bearing upon the issue of the cause. Jackson v. Sackett, 7 Wend. Rep. 94.

(1) See post, S24, (64).

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the party who appears to have executed the instrument must be given (f). I. In gene-And the same rule appears to have prevailed in the case of a bond, where, ral what on issue on a plea of non est factum, some evidence must have been given be proved, of the identity of the party executing the deed, which was not to be assum- and how. ed from its having been executed by a person in his name, in the presence Secondly, of the attesting witness, who was unacquainted with him(g).

If the witness is abroad out of the process of the court, whether he be resident there(h) or not, as if he be in Ireland(i), or he cannot be found on ty to Bill diligent inquiry (k), proof of these facts lets in other evidence of hand-writ- or Note. ing. And if the subscribing witness to the acceptance of a bill of exchange, being one of the acceptor's family, cannot be served with a subpœna in consequence of the conduct of that family, the bill may be read without his evi-And it should seem that where a copy of the bill or note is ad-

missible (m), the plaintiff will be entitled to recover without calling the sub-

scribing witness(n).

*By the General Rules of Hilary Term, 2 Will. 4, (1832) reg. vii. it is No Costs ordered, that the expense of a witness called only to prove the hand-writing of proving hand-writto, or the execution of, any written instrument stated upon the pleadings, ing without shall not be allowed, unless the adverse party shall, upon summons before a previous judge, a reasonable time before the trial, (such summons stating therein the to admit it. name, description, and place of abode of the intended witness), have neg-Rule H. T. lected or refused to admit such hand-writing or execution, or unless the 2 Will. 4. judge, upon attendance before him, shall indorse upon such summons that $\mathsf{L}^{ullet6.35}$ L he does not think it reasonable to require such admission(o).

came Par-

(f) Whitelock v. Musgrove, 1 Crom. & M. 511. The same point is stated to have been ruled in another case which stood over for the decision of this; ib. note (a).

(g) See per Dampier, J. in Middleton v.

Sanford, 4 Campb. 84.

(h) Prince v. Blackburn, 2 East, 250; Coghlan v. Williamson, Dougl. 93.

- (i) Hodnett v. Forman, 1 Stark. Rep. 90. (k) Cunliffe v. Seston, 2 East, 183; Burt v. Walker, 4 B. & Ald. 697; Stark. on Evid. Part II. 338.
 - (1) Hill v. Phillips, 5 Car. & P. 356.

(m) See ante, 625.

(n) See Cooke v. Tanswell, 8 Taunt. 450; Poole v. Warren, 8 Ad. & El. 582; 3 N. & P. 693, S. C.

(0) And by the rule of H. T. 4 Will. 4, (1834,) s. 20, it is ordered, that either party, after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country, in the form hereunto annexed, marked A., or the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required by summons to shew cause before a judge why he should not consent to such admission; or, in case of refusal, be subject to the costs of proof. And unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order that the costs of proving any document, specified in the notice, which shall be proved at the trial to the satisfaction of the judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause.

Provided, that if the judge shall think the application unreasonable he shall indorse the

summons accordingly.

Provided also, that the judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the judge shall order the same to be

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admiss in, or the judge shall have indorsed upon the statemons that he does not think it reasonable to require it.

A judge may make such order as he may think fit respecting the costs of the application and the costs of the production and inspection; and in the absence of a special order, the same

shall be costs in the cause.

Form of Notice referred to.

A. B. v. C. D.

In the K. B., C. P., or Exchequer.

Take notice that the { plaintiff defendant } in this cause proposes to adduce in evidence the seveI. In genebe proved, and how. Secondly, How Defendant became Party to Bill or Note. Effect of Defendant's admission.

*In general the signature of a party to a bill or note may be proved as ral what against him by his admission; and if he made such admission before the bill was due, and the holder received the bill on the faith of such representation, the party will be precluded afterwards from disputing the fact, or shewing that the hand-writing was a forgery (p)(1): and in an action against a person as acceptor, though the plaintiff fail in proving the defendant's hand-writing, and it appear to be a forgery, yet proof that the defendant has paid several other bills, accepted in like manner, will establish his liability (q). And an admission of a hand-writing, made by the defendant, pending a treaty for compromising the suit, is evidence against him(r). But not so if expressly made without prejudice, whether verbal or in writing(s). In an action against an indorser, proof that the defendant had written a letter, stating that he had received a bill corresponding with that upon which the action was

> ral documents hereunder specified, and that the same may be inspected by the { defendant } his attorney or agent, at —, on —, between the hours of —, and that the { defendant } will be required to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are

stated to have been served, sent, or delivered were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

G. H. attorney for { plaintiff defendant } To E. F. attorney & defendant. } or agent for { plaintiff. }
[Here describe the documents, the manner of doing which may be as follows:]-

Originals.

Description of Documents.	Date.
(inter alia) Letter defendant to plaintiff. Bill of exchange for 100l. at three months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H.	lst March, 1828. 1st May, 1829.

Conies

Copics.			
Description of Documents.	Date.	Original or Duplicate served, sent, or de- livered, when, how, and by whom.	
(inter alia) Letter plaintiff to defendant. Notice to produce papers	1st February, 1828. 1st March, 1828	Sent by general post, February, 1828. Served 2nd March, 1828, on defendant's attorney, by E. F. of ——.	

In Field v. Fleming, 5 Dowl. P. C. 450; 7 C. & P. 619, S. C. nom. Field v. Hemming, the plaintiff declared on a note dated the 10th of November, but in the notice to admit the hand-writing described the note as bearing date the 10th day of October. A verdict having been found for the plaintiff, the court refused to set it aside, as it did not appear the defendant had been misled.

- (p) Leach r. Buchanan, 4 Esp. Rep. 226, (Chit. j. 657); Cooper v. Le Blanc, 2 Stra. 1051, (Chit. j. 281); ante, 407, note (i); Hart v. King, 12 Mod. 809, (Chit. j. 212.)
- (q) Barber v. Gingell, 3 Esp. Rep. 60, (Ch. j. 618); ante, 31, note (g).
 - (r) Walridge v. Kennison, 1 Esp. Rep. 143. (s) Cory v. Bretton, 4 Car. & P. 462.
- (1) But notwithstanding an acknowledgment of the signature to the note, the maker may produce evidence of persons acquainted with his hand-writing, to state their opinion that the signature is not genuine, and also to prove the same by signatures known to be his. Such an acknowledgment is not conclusive, and may be shown to have been made by mistake. Hall v. Huse, 10 Mass. Rep. 39. The acknowledgment of the maker of his hand-writing on the note does away the necessity of proving it by the subscribing witness. Hall v. Phelps, 2 John. Rep. 451. If the subscribing witness deny the execution of the note, it may be proved aliunde. Ibid. Where the subscribing witness is out of the state, other evidence is admissible to prove the hand-writing of the maker, and this before proving the hand-writing of the subscribing witness. Horner p. Wallis, 11 Mass, Rep. 309.

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brought, and that after issue joined he had declared that he came to town to I. In genehasten the trial of a cause brought against him on an indorsement he had ral what made upon a bill, and that he had carried the cause down by proviso, was be proved, held sufficient(t). And in an action against defendant as acceptor, his giv- and how. ing a notice to produce papers relating to the bill described therein as "accepted by the said defendant," is prima facie evidence of defendant's acceptance(u). And an admission under a judge's order, that a bill was accepted by the defendant's partner for self and partner, coupled with production of the bill, is sufficient evidence in an action brought upon the bill against the defendant, the only plea being a traverse of the acceptance (x).

But an admission in general only operates against the party making it; and Admissions therefore proof that one of the indorsers had confessed his signature is not not Evidence admissible evidence in an action by an indorsee against the drawer of a against bill(y)(1); and we have seen that in an action against several drawers, in-third Par-

(t) Dale v. Lubbock, 1 Barn. K. B. 199.
(u) Holt v. Squire, Ryan & Moody, 282, (Chit. j. 1272).

(x) Bartlett v. Martin, 1 Jurist, 499.

(y) Hemmings v. Robinson, Barnes, 3d edit. 436, (Chit. j. 274); cited in Whitcomb v. Whiting, 2 Dougl. 652, (Chit. j. 409). In an action by the indorsee of a note against the maker, it was reserved as a point whether the acknowledgment of an indorser was sufficient evidence to prove his indorsement, and the court held not; Roscoe on Bills, 287.

In Western v. Wilmott, tried at Westminster Hall, 5th July, 1820, before Abbott, C. J. plaintiff declared against defendant as acceptor of a bill drawn by Berne, payable to his own order, indorsed by him to Smith, by him to Cross, and by him to the plaintiff. Plaintiff proved the indorsement by Berne and by Cross, and that

Smith, on being applied to after the defendant was shewn the bill and indorsements, admitted the indorsement of Smith as his hand-writing. It was also proved that the defendant, after the bill became due, was shewn the bill, and informed that plaintiff was the holder; whereupon he admitted it was a just debt, and that he would pay shortly. Chitty, for plaintiff, submitted, that such acknowledgment by Smith was sufficient in this action, and that defendant's admission was also equivalent to an account stated. But Abbott, C. J. said, that such admission by a third person could not affect the defendant; and that as there was no original debt, or privity between the parties, this was not an account stated; therefore plaintiff was nonsuited. But see Maddocks v. Hankey, 2 Esp. Rep. 647, (Chit. j. 598); post, 645, note (c).

(1) \(\text{An acknowledgment, however, made by the maker of a note, to one who had once held the note as endorsee, will enure to the benefit of the holder. McRoe v. Kennon, 1 Ala. Rep. (New Series), 295. So the declarations of the payce of a negotiable note, made while he retains it in his possession, are admissible in evidence, although he may have previously written thereon his endorsement to a third person, in whose name the action is brought. Whittier r. Voze, 16 Maine Rep. 403. But the declarations of the payee of a note, who is not at the time, the holder, and while it is actually held by another for value, are not admissible in evidence in a suit upon it against the maker, by an indorsee. Russell v. Doyle, 15 id. 112 }

The confessions of one partner made after the dissolution of the partnership, in relation to a demand against the partnership not barred by the statute of limitations, are competent, though not conclusive evidence against a copartner, the joint contract being first proved aliunde. Cady

v. Shepherd, 11 Pick. Rep. 406.

In an action on a note payable to A. B. or bearer, transferred and suit brought by the assignee. evidence of the declarations or admissions made by the payee, while the holder and owner of the note, in discharge of the drawer, is inadmissible. Whitaker v. Brown, 8 Wend. Rep. 490. The payee is a competent witness, and should be produced to prove the defence set up. Pinkerton v. Bailey, 8 Wend. 600. Baker v. Briggs, S Pick. Rep. 122.

A note was made by a failing debtor, on which the payee immediately made an attachment of the debtor's property. Part of the alleged consideration of the note was an acceptance made by the payee, of an order drawn on him by the debtor, in favor of another creditor. A subsequent attaching creditor being admitted, under the statute, to defend, it was held, that the plaintiff could not introduce evidence of his own declarations made on the day when the note was given, to show that the acceptance was made before the attachment. Carter v. Gregory, 8 Pick. Rep. 165.

In an action by the assignee of a note against the payee, who had assigned it warranting it to be due, the admissions of a person whose name appeared to the note, as maker, were held to be inadmissible in evidence to prove the execution of the note by him, and thereby defeat a recovery by the plaintiff, on the ground that the supposed maker himself might be called on as a witness. Warner et al. v. M'Gary, 4 Vermont Rep. 507.

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I. In gene-dorsers, or acceptors, a mere admission upon the pleadings by one, of his ral what signature will not exempt the plaintiff *from proving it against the other ral what signature, will not exempt the plaintiff *from proving it against the others. be proved, though an admission in fact would be otherwise (z). and how.

[*637] Effect of Part-payment.

A promise to pay the amount of the bill, or a part payment of it after it is due, is an admission of the acceptance(a) and of the other party's hand-The payment of money into court, generally, on the whole de-Promise or writing (b). claration, precludes the defendant from disputing his signature(c). But an offer to pay a part as a compromise is no evidence, because, as observed by Lord Mansfield, "men must be permitted to endeavour to buy their peace, without prejudice to them, if the offer do not succeed(d)." Though an offer of a specific sum by way of compromise is admissible in evidence, unless accompanied with a caution that the offer is confidential or without prejudice(e).

Thirdly, Proof of Title.

Thirdly. It will be incumbent on the plaintiff to prove his interest in the Plaintiff's bill or note, or in other words, how he became a party to it. Interest or the bearer of a bill or note, originally payable to bearer, has in general only to produce the instrument (f); though, under suspicious circumstances, the As Payee bearer of a note transferrable by delivery may be required to prove that he, or some person under whom he makes his title, took it bona fide, and gave a valuable consideration for it(g). But if in an action by the indorsee of a note, payable to A. or bearer, the indorsement by A. be unnecessarily stated, it must be proved(h). Where a bill is drawn with the payee's name in blank, and the plaintiff inserts his own name as payee, he must adduce evidence to shew he was intended as payee(i). Proof of a promissory note payable to A. B., generally, is prima facie evidence of a promise to A. B. the father, and not to A. B. the son, the names being the same; but A. B. the son, bringing the action, and being described as the younger in the declaration, and being in possession of the note, is entitled to recover upon it(k).

(z) Ante, 628, notes (z) and (a).

(a) Jones v. Morgan, 2 Campb. 474, (Chit. j. 807).

(b) Helmsley v. Loader, 2 Campb. 450, (Chit. j. 799); Bosanquet v. Anderson, 6 Esp. Rep. 43, (Chit. j. 726).

(c) Gutteridge v. Smith, 3 Hen. Bla. 374, (Chit. j. 534); Watkins v. Towers, 2 T. R. 275; Guillod v. Nock, 1 Esp. Rep. 347; Israel v. Benjamin, 3 Campb. 40, (Chit. j. 837); an-

te, 626, note (c).
(d) Bull. N. P. 236; Gunn r. Gulloch, Westminster Sittings after Trinity Term, 1755, 1 Esp. Dig. 175.

(e) Wallace v. Small, Mood. & M. 446. (f) Per Lord Mansfield, Dougl. 632; King

v. Milsom, 2 Campb. 5, (Chit. j. 764). (g) Per Lord Mansfield, in Grant v. Vaughan, 3 Burr. 1627, (Chit j. 635); ante, 253 to

(h) Wynam v. Bend, 1 Campb. 175, (Chit. j. 746); Rex r. Stevens, 5 East, 244; 1 Smith's Rep. 437, S. C.

Wynam v. Bend, 1 Campb. 175, (Chit. j. 746). Action against the defendant as maker of a promiseory note for 2001., Payable to

L. Toader or bearer. The declaration stated that L. Toader, to whom the sum of money mentioned in the note was payable, indorsed it to the plaintiff. No evidence of this indorsement being given, it was contended, that the plaintiff's case was imperfect, and that he must be called. The counsel on the opposite side answered, that the averment being unnecessary might be rejected, and that at any rate the plaintiff might recover under the count for money had and received, the note being for value received. Lord Ellenborough held, that as an indorsement was stated, though unnecessarily in the count on the note, it must be proved; and that the plaintiff could not recover under any of the money counts, as he was not an original party to the bill, and there was no evidence of any value being received by the defendant from him. A witness, however, was afterwards found, who proved the hand-writing of L. Tonder, and the plaintiff had a verdict.

(i) Crutchley v. Mann, 1 Marsh. 29; 5 Taunt. 529, (Chit. j. 908).

(k) Sweeting v. Fowler, 1 Stark. Rep. 106, (Chit. j. 946).

The declarations of one of several partners cannot be given in evidence to prove a partnership; they are testimony only against the party making them. M'Pherson v. Rathbone, 7 Wend. Rep.

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If a note be payable to a firm of A. B. and Co., and A. B. and C. D. sue I. In genethereon, they must prove that they were, at the time the note was given, the ral what Facts must

competent members of such firm (l)(1).

*In an action against the acceptor or indorser of a bill(m), or the indorser and how. of a note(n), the hand-writing of the drawer of the bill as such, and the maker of the note, are considered as admitted, and need not be proved, nor can Proof of it be contradicted by the defendant(o); and the circumstance of its having Plaintiff's been forged constitutes no defence, unless it appear that the bill was accepted Interest or Title. before the drawer had sight of the bill, in which case it is said that the draw- As Indorer's hand-writing must be proved(p). In an action against the drawer or indorser of a bill, accepted generally, if it be unnecessarily alleged that it was [*638] accepted, such acceptance need not be proved (q). But if the bill has been accepted payable at a place different to the address at the foot of the bill, and it be necessary to prove a presentment at the place so specified in the acceptance, then such acceptance must be proved in an action against the drawer or indorser(r), though it need not be alleged in the declaration(s).

be proved,

An indorsee of a bill or note, transferrable in the first instance only by indorsement, must, in an action against the acceptor or drawer, prove that the when and

how prov-

(1) Post, 644, note (c); Waters and others v. Paynter, Sittings at Westminster, 14th December, 1826, before Abbott, C. J. This was an action by the payees against maker, on a note payable to Messrs. Waters, Jones, and Co. bankers, Carmarthen. The promise in the declaration being stated to the plaintiffs under the name and description of Messrs. Waters, Jones, and Co, the only proof for the plaintiffs was the hand-writing of the defendant. Abbott, C. J. "In this case you must go further, and shew that Messrs. Waters, Jones, and Co. bankers, Carmarthen, are Robert Waters, John Waters, and David Jones, the plaintiffs in this action. The distinction ought to be understood ---where a bill or note is indorsed generally, the holders, whoever they may be, are as such entitled to recover: but where the promise is to pay a certain firm, it must be shewn that the plaintiffs are the persons who compose that firm." Chilton for plaintiff. The learned judge permitted the cause to stand over for a few hours until the necessary witness was ob-

(m) Wilkinson r. Lutwidge, 1 Stra. 648, (Chit. j. 263); Jenys v. Fowler, 2 Stra. 946, (Chit. j. 272); Price r. Neale, Burr. 1351; 1 Bla. Rep. 390, (Chit. j. 864, 365); per Dampier, J. in Bass. Clive, 4 Maule & S. 15, (Ch. j. 930).

(n) Free v. Hawkins, Holt, C. N. P. 550, (Chit. j. 1000). In an action against the payee of a promissory note, who was likewise the indorser, held, that his indorsement was an admission of the hand-writing of the maker. Action by indersee against the payee of a promis-

sory note, of which Sir Robert Salisbury was ed. the maker, and the defendant became the payee and indorser, as surety for Sir Robert Salisbury, to the plaintiffs. The only evidence of the making of the note by Sir Robert Salisbury was by proving the indorsement of the note by the defendant, which was objected to by Mr. Serjeant Lens. But Gibbs, C. J. ruled, from the analogy of a bill of exchange, where the acceptance is an admission of the hand-writing of the drawer, that the indorsement by the payer is an admission of the hand-writing of the maker.

(o) Sed vide Bul. N. P. 270, where it is said, that although an acceptance is prima facie an admission of the hand-writing of the drawer, in an action against the acceptor it is not conclusive so as to prevent him from prov-

ing the contrary.

(p) Free v. Hawkins, Holt, C. N. P. 550, (Chit. j. 1000); Penke's Evid. 4th edit. 248, sed quære; see per Parke, B. in Farr v. Ward, 2 M. & W. 844, 846. And in Schultz v. Astley, 7 Car. & P. 99, it was held, that where a party draws a bill in a name different from that which he generally used at the time, it is not necessary in an action against the acceptor to shew that such name was on the bill at the time it was accepted.

(q) Tanner v. Bean, 4 Bar. & Cres. 312: 6 Dow. & Ry. 338, (Chit. j. 1261); overruling Jones v. Morgan, 2 Campb. 474, (Chit. j. 807).

(r) Sedgwick v. Jager, 5 Car. & P. 199,

(Chit. j. 1582).

(s) Parks v. Edge, 1 C. & M. 429; S. C. 8 Tyrw. 364; 1 Dowl. P. C. 643.

It is sufficient to prove by a person who knows the fact, that the plaintiffs at the date of the note carried on business in partnership under the name or firm contained in the note as payees. łЬ.

⁽¹⁾ Where a note or bill is payable to a firm, strict proof is required that the firm consists of the plaintiffs on the record; a letter stating who composes the firm from one of the plaintiffs to the attorney, and the information of one other individual to the same effect, is not sufficient. M'-Gregor v. Cleaveland, 5 Wend. Rep. 475.

and how.

Thirdly, Proof of Plaintiff's Title. As Indorsee.

I. In gene- bill was indorsed by the person to whose order it was intended to be made rai what Payable (t) (1); and if there was a subscribing witness *to the indorsement he be proved, must be subpoenzed(u). And even in an action against the acceptor, the first indorsement of a bill must be proved, although it was payable to the drawer's own order, and indorsed by him, because the acceptance only admits the hand-writing of the party as drawer, and not as inderser(x). And it has even been holden, that the circumstance of the defendant having accepted the bill after it was indorsed, does not dispense with proof of such indorsement(y); and in an action by an indorsee against the drawer, the indorsement of the payee must be proved, although the bill, with the indorsement upon it, was shewn to the defendant after it was due, and he did not then object to the title of the holder(z)(2).

> (t) Smith v. Chester, 1 T. R. 654, (Chit. j. 439); Macferson v. Thoytes, Peake's Rep. 20, (Chit. j. 469)

> Smith v. Chester, 1 T. R. 654, (Chit. j. 439). Indorsee of a bill of exchange against the acceptor. It appeared at the trial before Buller, J. at the last Sittings at Westminster, and when the bill was accepted there were several indorsements upon it; but the plaintiffs not being able to prove the hand-writing of the first indorser, was nonsuited. Bower now moved to set aside this nonsuit, on the ground that as these indorsements were on the bill at the time of the acceptance, they must be taken to have been admitted by the acceptor, and he could not afterwards dispute them: and he cited in support of this a determination of Lord Mansfield's in the case of Pratt v. Howison, Sittings after T. T. 23 Geo. 3, at Guildhall; and another case, in Sayer, 223, observing, that there would be great hardship in the case of foreign bills of exchange, in many instances, on account of the difficulty and inconvenience of proving the hand-writing of the first indorser, who may be unknown to the holder. Per Ashhurst, J. "The law has been otherwise settled: and if it were not so, there would be no difference in this respect between bills payable to order and those payable to bearer, and it would open a door to great fraud." Per Buller, J. "This point was much considered in a late case before this court, when they were perfectly clear that an indorsee of a bill of exchange in an action against the acceptor, was obliged to prove the hand-writing of the first indorser. For when a bill is presented for acceptance, the acceptor only looks to the hand-writing of the drawer, which he is afterwards precluded from disputing; and it is on that account that an acceptor is liable, even although the bill be forged."

Per Grose, J. "This matter appears extremely clear; for the payment of a bill of exchange to the holder is no payment to the person in whose favour it is drawn, unless it is indorsed by him." Rule refused.

Macferson v. Thoytes, Peake's Rep. 20, (Chit. j. 469). Assumpsit on a bill of exchange, indorsee against acceptor. The bill was drawn by one Parry, payable to his own order, and the name of Parry was indorsed on it. The plaintiff proved the hand-writing of all the indorsers except the first. The defendant's counsel insisted that this should be proved. It was answered, that the acceptance was an admission of the hand-writing of the drawer, and that by comparing that hand-writing with the indorsement, they would be found to correspond. Per Lord Kenyon, "Comparison of hands is no evidence. If it were so, the situation of a jury, who could neither write nor read, would be a strange one; for it is impossible for such a jury to compare the hand-writing."
The plaintiff was therefore called. And see Skinn. 411; 1 Atk. 282

(u) Stone v. Metcalf, 1 Stark. Rep. 53, (Chit. j. 943); ante, 633, 634.

(x) See note (t), supra; and Bosanquet v. Anderson, 6 Esp. Rep. 43, (Chit. j. 726), post, 645, note (l). But after the indorsement is proved to have been made by the drawer, the acceptor is estopped from objecting to an irregularity in the indorsement; Schultz v. Astley, 2 Bing. N. C. 544; 2 Scott, 815, S. C.; ante, 214, note (o).

(y) See note (i), ante, 637; and Bosanquet v. Anderson, 6 Esp. Rep. 43, (Chit. j. 726); post, 645, note (1).

(z) Duncan v. Scott, 1 Campb. 101; 2 Campb. 183, in notes, (Chit. j. 742). When otherwise, Ryan & Mood. 403.

It is for a jury to determine, in such a case, whether the drawer had authority or not, taking into view the connection and relationship of the parties, and the probable motives of the indorser. The maker in this case was the brother-in-law of the defendant. Ib.

(2) Where a sealed bill is signed, and suit brought in the name of the assignor, he must prove the assignment under the plea of non est factum. McMurtry v. Campbell, Ohio Rep. Cond. 125.

⁽¹⁾ In an action against a party sought to be charged as the indorser of a promissory note, where it is proved that the signature of the indorser is not in the hand-writing of the party, but in that of the maker, it is competent to the plaintiff, for the purpose of showing authority in the maker, and acquiescence in the indorser, to prove that the defendant remained silent, although he received notice of protest, was sued, suffered a default in pleading, and took no measures to defend the suit, until after the maker absconded, and that the indorser had assumed the payment of other notes similarly situated Weed v. Carpenter, 10 Wend. Rep. 403.

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And though the drawee by the terms of his acceptance make it payable at I. In genea banker's, the latter must in an action for the money, as paid for his use, ral what Facts must prove the first indorser's hand-writing(a) So although the acceptance of a be proved, bill, drawn by procuration, admits the agent's hand-writing and his authority and how. to draw, yet it does not admit the indorsement by the same procuration; and Thirdly, in an action against the acceptor, the indorsement, as well as the authority to Proof of make it, must be proved(b). *And it should seem, that where the indorse-

> "17, Broad-street Buildings, London." And indorsed on the back,-" Per pro. Chas. Stachen and Co."

"A. Henry and Co." The first count of the declaration stated, that A. Henry, using the name, style, and firm of C. Stachen and Co drew the bill on the defendant, and that after his acceptance, he indorsed it to the plaintiffs. The second count stated, that Henry drew and indorsed the bill in his own name; and the third, that the bill was drawn and indorsed by certain persons using the name, style, and firm of Stachen and Co. who indorsed it, but neither of these counts noticed the procuration. The cause was tried before Mr. Justice Burrough at the Sittings at Guildhall after the last Hilary Term, when the plaintin's adduced evidence to prove that the body of the bill of exchange, as well as the indorsement, was of the hand-writing of Henry, who was previously a partner with Stachen and Co. but that at the time of drawing the bill there was no such firm as Stachen and Co.; that such a firm had existed, which was dissolved on the 1st of January, 1816; and after that time Henry carried on business on his own account. The hand-writing of the defendant as acceptor, and the due presentment of the bill were also proved, but no evidence was given of the hand-writing of the indorsement by Henry. On the production of the bill it appeared to have been drawn and indorsed by Henry, per procuration of Stachen and Co. The learned judge thought the plaintiffs ought to prove the procuration, and as they were not prepared with such proof, he accordingly directed a nonsuit. A rule nisi had been obtained, and on shewing cause, Lord Chief Justice Gibbs said, "I cannot say whether there has been any private communication between these parties; but can only look to the instrument itself. Stachen and Co. appear to have authorized Henry to draw the bill, pavable to their order. The defendant, by his acceptance, admits that such a firm as Stacher and Co. was in existence, and also the bill was drawn by Henry by their procuration. By accepting this bill purporting to be drawn by Henry, as the agent for Stachen and Co. the defendant renders himself answerable to them for its The defendant has by his acceptance admitted that Henry was authorized to draw the bill by procuration, but he has not admitted thereby that it might be indorsed in this manner; it was not proved that Henry was so empowered. The defendant might say that he had by his acceptance admitted the existence of the firm of Stachen and Co., and that the bill was drawn by Henry as their agent, but be does not thereby admit that the indorsement

(a) Forster v. Clements, 2 Campb. 217, (Chit. j. 765). Assumpsit for money paid. Plea, the general issue. This was brought by Messrs. Forster, Lubbocks, and Co. bankers in London to recover the sum of 100l., paid by them to the holder of a bill of exchange, accepted by the defendant, payable at their bankinghouse. The bill was drawn by one Hanley, payable to his own order, and when paid by the plaintiffs, had his indorsement upon it. Paley, of counsel for the plaintiffs, at first satisfied himself with proving the defendant's handwriting to the bill; that it was paid by the plaintiffs, and that the defendant had then no effects in their hands. Lord Ellenborough said he must go farther, and give evidence of the indorsement by Hanley, to whose order the bill was payable. Paley contended, that prima facie the hand-writing must be taken to be Hanley's, and that as it was the custom of bankers to pay a bill with the name of the payee written on the back of it, a request from the acceptor must be understood for them to do so. When this bill was presented to the plaintitis for payment, it appeared in a negotiable shape, and they were authorised to pay it without inquiring into the title of the holder. Per Lord Ellenborough, "If the acceptor of a bill of exchange makes it payable at a banker's, he requests the latter to pay it only to the payee or his own order, and not to any person who presents it. If the banker pays it without ascertaining the indersement to be genuine, it is at his own risk. The name of Hanney upon this bill may be forged, in which case the plaintiffs have paid it in their own wrong." Evidence was afterwards given of acknowledgment by the defendant that Hanley had indorsed the bill, and the plaintiffs had a verdict for the 1007, but without interest, to which Lord Ellenborough said they had shewn no right.

(b) Robinson v. Yarrow, 7 Taunt. 455; 1 Moore, 150, (Chit. j. 993). Held, that the acceptance of a bill of exchange admits mercly the drawing, but not the indorsement of the drawer Therefore, if a bill be drawn and indorsed by procuration, it was held in an action by the indorsees against the acceptor, that as the indersement by procuration was not proved, they were not entitled to recover. This was an action brought by the plaintiffs as indorsees against the defendant as acceptor of the following bill of exchange:-

"London, Jaly 6, 1916. "Two months after date, pay to our or-"der Thirty Pounds, for value received. " Per pro. CHAS. STACHEN and Co. "A. HENRY."

"To Mr. John S. Yarrow,

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Interest or Title.

As Indorsee. #640] and how. Thirdly, Proof of Plaintiff's Interest or Title.

Indorsements when and how proved.

I. In gene- ment only states the initial of the name of the principal, thus, " Per pro. H. Pickersgill, John Pickersgill," and the declaration avers that Hannah Facts must Pickersgill indorsed, not only her authority but her christian name must be proved(c); although it is supposed that in that case Lord Tenterden thought at nisi prius, "that as the defendant's acceptance admitted the authority to draw by procuration in that particular form, and that the indorsement being in the same form and hand-writing, it might be taken to have been made with the same authority;" yet it further appeared that other bills had been pre-As Indor- viously drawn, accepted, and indorsed in like manner, and the decision turned upon other particular circumstances, and must not be considered as a precedent for other cases. And in a subsequent case, where in an action by indorsee against *acceptor, the witness proved that neither the drawing nor indorsement was in the hand-writing of the person whose they purported to be, but that the defendant had acknowledged the acceptance to be his, [*641] and it was contended, that as the acceptance admitted the drawing to be correct, the jury might find for the plaintiff, if they thought upon inspection of the bill that the drawing and indorsement were of the same hand-writing, yet it was held by Tindal, C. J. that it was necessary that some proof should be given as to whose the hand-writing was, and for want of it the plaintiff was nonsuited (d). So it has been held, that in an action on a promissory note, in which the question is whether the defendant has indorsed it or not, the plaintiff cannot give in evidence a number of other notes, bearing the defendant's undoubted signature, with a view of having the jury compare the hand-writing of those signatures with the indorsement on the note in question; nor can the jury compare anything with the indorsement, except documents otherwise in evidence in the cause(e). It seems, however, that if the drawer and payee of a bill deliver it with his name indorsed on it to another, proof of such delivery, with the name indorsed, is sufficient, without proof of hand-writing (f); and the court will not, in an action by the indorsee, al-

> was on the same terms, and it was therefore necessary that such procuration should be prov-Rule discharged. As to authority of agent in general, see ante, 28 to 32, and 197

> (c) See per Bayley, J. in Jones v. Turnour, 4 Car. & P. 206, (Chit. j. 1488). The declaration in an action on a bill stated it to have been drawn by one Hannah P., accepted by the defendant, and indorsed by the said Hannah P. to the plaintiffs. The drawing and indorsement appeared to be in this form: -Per pro. H. P. -John P. A clerk of the plaintiff proved that the drawing and indorsement were of the handwriting of a Mr. John P., whom he understood to be the son of a Mrs. P., whom he had never seen, but with whose house the house of his employers had dealings, and that he had seen bills drawn and accepted in the same form as the bill in question, some of which bills had been paid. The plaintiffs, on this evidence, had a verdict, and a rule nisi for a new trial having been obtained, an affidavit, in consequence of an observation made by the Lord Chief Justice, was produced, stating the name of the party to be Hannah P., and that the bill was drawn by her authority. And the court on the whole evidence refused to make the rule

(d) Allport v. Meek, 4 Car. & P. 267, (Ch. 1489); and see Cooper v. Meyer, 1 Lloyd & Welsby's Comm. Cases, (Chit. j. 1480).

The case of Allport and another v. Meek was thus:---Assumpsit on a bill of exchange, drawn by one Williams on and accepted by the defendant, and indorsed by Williams to the plaintiffs. The witness, who was called to prove the hand-writing of Williams, said, that neither the drawing nor the indorsement were written by him, and that he did not know by whom they were written.

Wilde, Serjeant, for the plaintiffs, then proved that the defendant had acknowledged that the acceptance was his, and submitted to his lordship, that as the acceptance admitted the drawing to be correct, the jury might look at the indorsement to see whether it was of the same hand-writing, as theidrawing. The reason why a witness is not allowed to speak to hand-writing by comparison is, that it is the province of the jury, and it has been decided

that the jury may judge by comparison.

Tindal, C. J.—"I think you must call some witness to lay some evidence before the jury, on which they may decide."

Wilde, Serjeant, admitted that he could not carry the case any further, and the plaintiffs were nonsuited.

(e) Bromage v. Rice, 7 Car. & P. 548; see Doe v. Suckermore, 5 Ad. & El. 703; 2 N. & P. 16, S. C; ante, 633, note (o).

(f) Glover v. Thomson, Ryan & Moo. 403, (Chit. j. 1306).

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20° 78 و س ۱۰۰ ر ۱ low the acceptor of a bill who negotiates it with the drawer's name indorsed, I. In geneto plead that it was not indorsed by the drawer to the plaintiff (g).

Proof that the bill was indorsed by a person of the same name as the perbe proved, son intended, will prima facie suffice; but if there be any doubt whether and how. the transfer were made by the proper party, the witness who is to prove the Thirdly, indorsement should be prepared to prove the identity of the party, though Proof of in general such latter proof is not required, and it lies on the defendant to Plaintiff's Interest or disprove the identity (h). Where in an action by the indorsee against the Title. acceptor of a bill, of which E. S. was the payee, the plaintiff proved that a As Indors person calling himself E. S. came to C. having in his possession the bill in ee. question, and also a letter of introduction (proved to be genuine), which was Indorseexpressed to be given to a person introduced to the writer as E. S., and ments also another bill drawn by the writer of that letter, and that the bearer of when and these decumpants after requising ten days at C. (during which time he deity how provthese documents, after remaining ten days at C. (during which time he daily ed. visited the plaintiff), indorsed to him the bill in question, and received value for it, and also a letter of credit, it was held, that this was evidence of the identity of this person with E. S., the payee of the bill, &c. in the absence of any evidence in answer sufficient to justify a verdict for the plaintiff(i).

*So where the first indorsement was in full, directing the acceptor to pay [*642] the bill to a certain person, who indorsed the same to the plaintiff, the latter must, in an action against the drawer or acceptor, prove the indorsement of that person(k); and all the indorsements stated, though unnecessarily, in

the declaration, must be proved (l). But if the first indorsement was in blank, it will be unnecessary, even in an action against the drawer or acceptor, to prove any of the subsequent indorsements, although they were in full(m); and they may be struck out at the time of the trial, unless unnecessarily stated in the declaration (n). it has been held that the indorsement on a bill, not stated in the declaration, may be struck out even after the bill has been read in evinence, and after an objection has been made on account of the variance(o). And a small mistake in the declaration in the name of the indorser, as describing him as Phillip, when the bill and evidence prove him to be Phillips, will not be material(p).

(g) Gilmore v. Hague, 4 Dowl. P. C. 303, K. B.

(h) Mead v. Young, 4 T. R. 28, (Chit. j. 467); ante, 198, note (e).

(i) Bulkeley v. Butler, in error, 2 Bar. & Cres. 434; 3 Dowl. & Ry. 625, (Chit. j. 1193).

It is a question for the judge, and not for the jury, whether the evidence of identity is sufficient so as to let in the declarations of the party; Corfield v. Parsons, 1 C. & M. 730.

(k) Ante, 231, 232.

(1) Cooper v. Lindo, B R. Sittings, London, after M. T. 52 Geo. 3, Selw. 9th edit. 372, note (t); Bosanquet v. Anderson, 6 Esp. Rep. 43, (Chit. j. 726); post, 645, 646, in notes; Sidford v. Chambers, 1 Stark. Rep. 326, (Chit. j. 960); post, 645, in notes. And see ante, 571,

Cocks and others v. Borradaile and Co. MS. Action on a bill drawn by R. Borradaile on Messrs. W. C. and C. Borradaile and Co. (defendants), payable to G. Borradaile, or order. Bill indorsed by G. Borradaile; Sikes, Snaith, and Co.; Hodges and Co. First count stated all the indorsements. Second count, that plaintitls were immediate indorsees of the first indorser. Abbott, C. J. said, "all the indorsements must be proved, or struck out, although not stated in the declaration. I remember Mr. Justice Bayley so ruling, and striking them out himself on the trial, and this need not be done before the trial. In the course of the cause it appeared that plaintiffs were indemnified by Hodges and Co., the last indorsers; and Scarlett then offered evidence of what Hodges and Co. had said respecting the bill after action brought." Gurney and Pollock objected. Abbott, C. J. said, "that where the sheriff was indemnified, what the indemnifying party said was always received as evidence, and he thought the evidence was admissible in this case.'

(m) Walwyn v. St. Quintin, 1 B. & P. 658; 2 Esp. 514, (Chit. j. 578); Chaters v. Bell and others, 4 Esp. Rep. 210, (Chit. j. 636); Smith v. Chester, 1 T. R. 654, (Chit. j. 439); Bosanquet r. Anderson, 6 Esp. Rep. 43, (Chit. j. 726); post, 645, note (1).

(n) Supra, note (l), and 571, 572; 1 T.R. 654; 6 Esp. Rep. 43.

(o) Mayer v. Jadis, 1 Mood. & R. 247. (p) Forman v. Jacob, 1 Stark. Rep. 47. It

I. In general what Facts must be proved, and how.

Thirdly, Proof of Plaintiff's Interest or Title.

see.

Indorsements when and how proved. [*643]

If the bill or note be payable to the order of several persons not in partnership, the hand-writing of each must be proved (q); and though it is reported to have been held in one case, that an acceptance after an indorsement by one of the payees admits the regularity of the indorsement (r), that decision appears to be contrary to the former authorities; though, if a bill have several indorsements upon it at the time it is presented for acceptance, and the drawee, when he accepts, *expressly promises to pay the bill, it has been decided that the indorsements are admitted(s).

In an action against the drawer or acceptor of a bill payable to the order As Indor- of several persons in partnership, it is in general necessary to prove the partnership, and the hand-writing of one of them or of an agent in the name of the firm(t). But where a bill has been drawn and indorsed by one partner in the name of the firm, and the partnership is afterwards dissolved, the holder is not bound to prove that the bill was drawn and indorsed before the dissolution took place, because, in the absence of evidence to the contrary, the bill is presumed to have been drawn on the day on which it bears date; and although the indorsement bear no date, it may properly be left to the jury to determine the time at which the indorsement was made, and to infer, from the circumstance of the drawers being also the payees and indorsers of the bill, that the indorsement took place at or shortly after the date of the bill(u). And where to an action by the indorsee against the drawers of a bill, it was pleaded that the bill was drawn by a partner, but not for partnership purposes, and was indorsed to the plaintiff after it became due, to which the plaintiff replied, that it was not indorsed after it became due, but was indorsed to and taken and received by the plaintiff before it became due, it was held, that it was sufficient for the plaintiff to put in the bill,

> appeared that the name of the indorser was Phillip Phillips; and it was objected that this varied from an allegation of an indorsement by Phillip Phillip, the person being different. The bill itself was payable to Phillip Phillips, and the name was so indorsed on the bill. Per Lord Ellenborough, " whether the name on the bill be the party's false or true name is immaterial, if it be his name of trade, the only question is as to the identity of the person.'

(q) Carvick v. Vickery, Dougl. 653, (Chit.

j. 410).

(r) Jones and another v. Radford, K. B. Sittings after H. T. 46 Geo. 3, 1 Campb. 83, (but see Carvick v. Vickery, Dougl. 630, 653, Ch. j. 410); Hankey v. Wilson, Say. 223, (Chit. j. 337), contrà, held, that in an action upon a bill, drawn payable to the order of two persons not partners, indorsed by one in the name of both, and afterwards accepted by the defendant, that the regularity of the indorsement could not be disputed. Action by the indorsee against the acceptor of a bill of exchange, payable to two persons of the names of Hopkins and M'-Michell. The bill had been indorsed by Hopkins in the name of himself and M'Michell, and defendant had accepted it with the indorsement upon it. The defence was, that the payees were not partners, and that the bill ought therefore to have been indorsed by both. But Lord Ellenborough held, that the defendant having accepted the bill indorsed by one for himself and the other, could not now dispute the regularity of this indorsement; but see Carvick v. Vickery, Dougl. 85, (Chit. j. 410); Smith v.

Chester, 1 T. R. 654, (Chit. j. 439); ante, 638, note (t).

(s) Hankey v. Wilson, Say. Rep. 223, (Ch. j. 337). Upon a rule to show cause why a new trial should not be had in an action of assumpsit, it appeared that the action was brought by the plaintiffs, as indorsees of a bill of exchange; that the defendant had accepted the bill; that there was no actual proof, that the name of one of the indorsers of the bill was of his hand-writing; that the name of that indorser, and the names of all the other indorsers, were upon the bill at the time of its being accepted; that at the time of his accepting it, the defendant promised to pay the bill, and that upon this evidence, which was left by Ryder, C. J. to the jury, a verdict was found for the plaintiffs. The question was, whether upon this evidence the matter ought to have been left to the jury? It was holden that it ought. And by the court.—It is in general necessary to give actual proof that the name of every indorser is of his hand-writing; but it is not necessary to do this in every case. In the present case, it was a matter proper for the determination of a jury, whether the acceptance of the bill when all the indorsers' names were upon it, together with the promise to pay, did not amount to an admission that the name of every indorser is of his hand-writing, inasmuch as such an admission would supersede the necessity of actual proof, that the name of any indorser is of his hand-writing.

(t) Ante, 37 to 61

(u) Anderson v. Weston, 6 Bing. N. C. 296-

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Where a bill has been made payable to the order of a fictitious person, it be proved, has been decided, that proof that the party sued knew of that circumstance and how. at the time he became a party to the bill, or before he transferred the same, Thirdly, will dispense with proof of the hand-writing of the supposed inderser(y).

Where several persons sue as indorsers of a bill of exchange, if the bill Plaintiff's Interest or appear indorsed in blank, there is no necessity for their proving that they Title. were in partnership together, or that the bill was indorsed or delivered to As Indorsthem jointly(z). But when a bill of exchange is payable *or indorsed spe- ee. cially to a firm, it has often been ruled, that in an action by the payees or Indorseindorsees, strict evidence must be given that the firm consists of the persons ments who sue as plaintiffs on the record (a). And it has been held, that if a note when and he navable to a firm of A B and C Abe payable to a firm of A. B. and Co., and A. B. and C. D. sue thereon, proved. they must prove that they were, at the time the note was given, the component [*644] members of such firm (b). And where a bill of exchange was, by the direction of the payee, indersed in blank and delivered to A. B. and Co., who were bankers, on the account of the estate of an insolvent, which was vested in trustees for the benefit of his creditors, it was held that A. and B., two of the members of the firm, and also trustees, could not, conjointly with a third trustee who was not a member of the firm, maintain an action against the indorser, without some evidence of the transfer of the bill to them as trustees by the firm, by delivery or otherwise (c)(1). When it is incumbent

(x) Parkin v. Moon, 7 Car. & P. 468

(y) Ante, 157, 158.

(z) Ord v. Portal, 3 Campb. 239; Rordasnz v. Leach, 1 Stark. Rep. 446, (Chit. j. 977); Atwood v. Rattenbury, 6 Moore, 579, (Chit. j. 1131). Actions by the plaintilis as indorsees. against the defendant as acceptor of a bill of exchange, drawn by one Sted, payable to his own order, and indorsed by him in blank. The plaintiffs' case being closed without shewing that the plaintiffs were in partnership, or that the bill had been indorsed to them jointly, Garrow, for the defendant, insisted that they ought to be nonsuited. The declaration alleged, that the drawer of the bill indorsed and delivered the bill to the three plaintiffs, and there was no evidence whatsoever in support of this allegation. Per Lord Ellenborough, "There is no occasion for any such evidence. The indorsement in blank conveys a joint right of action to as many as agree in suing on the bill." The plaintiffs had a verdict.

Rordasnz v. Leach, 1 Stark. Rep. 446, (Ch. j. 977). The two plaintiffs sued as the indorsees of two bills of exchange. The bills had been indorsed in blank, and the only question was, whether it was incumbent on the plaintiffs to prove their joint title to sue on the bill by shewing that they were partners, or by proving a transfer to them jointly. Lord Ellenborough held that it was not. Verdict for the plain-

(Chit. j. 864).
(b) Waters v. Paynter, MS.; anle, 637, note (1).

(c) Machell v. Kinnear, 1 Stark. Rep. 499, (Chit. j. 981). This was an action by Machell. Boucher, and Birkbeck, as the indorsees of a bill of exchange, against the defendant as the indorser. The bill in question was dated on the 21st of August, 1815, and was drawn by Corbett on Goldie, for the payment of 400l. six months after date to his own order, indorsed by Corbett to Kinnear, the defendant, and indorsed by the latter in blank. The principal question was, whether under the circumstances such a right had been transferred to the plaintiffs as entitled them to sue upon the bill. It appeared that Machell and Boucher were two of the partners of which the firm of Langton and Co. consisted. Machell, Boucher, and Birkbeck, the three plaintitis, were the trustees of the estate of Holder, an insolvent for the benefit of the creditors; Birkbeck not being a member of the firm of Langton and Co. The defendant being indebted to the estate of Holder, transmitted the bill in question to his clerk in Liverpool, with directions to deliver it to Langton and Co. on the account of Holder's estate, and either to indorse it or give them a letter of guarantee to secure the payment. The clerk accordingly indorsed it in blank and delivered

it to Langton and Co. Garrow, A. G. for the

⁽a) Note, in Ord v. Portal, 3 Campb. 240,

^{(1) {} Where the payee of a note sued as "manager of the National Provincial Bank" &c. but did not sue as a public officer, and the defendant not having pleaded that the bank was established under 7 Geo. 4, c. 46, and that the plaintiff was not the public officer, held that the plaintiff was not obliged to show that he was, and that the defendant could not show that he was not such public officer. Robertson r. Sheward, I Scott New Rep. 419. \rangle

I. In gene- on the plaintiff to prove the names of the partners of a firm, the counsel for ral what such plaintiff may suggest to the witness called to prove the partnership the be proved, names of the component members of the firm (d). and how.

Admis-

*It has been decided, that the admission by an indorser of a promissory sions, &c. note of his hand-writing is sufficient evidence of the indorsement in an action [*645] against the maker, because such admission is in derogation of the party's own title to the note, and therefore admissible(c); but that doctrine seems over-ruled (f). The indorser himself may be called as a witness to prove his own hand-writing (g), and the consideration given by the plaintiff; and he may be called to prove his indorsement after another witness for the plaintiff has negatived it(h); though it has been doubted whether, after the plaintiff has failed in proving the indorsement by one witness, he can call any other person(i). And a promise to pay(k), or request to renew(l),

> defendant, objected that it was not competent to two of the firm of Langton and Co. to associate with themselves a third person who was a stranger, for the purpose of bringing an action on the bill, without shewing that the bill had been transferred by Langton and Co. to the plaintiffs, thus associated. Marryatt, for the plaintiffs, contended, that since the bill had been indorsed in blank, it was competent to any number of persons to associate together for the purpose of bringing an action. And he cited the case of Ord and others v. Portal, 3 Campb. 289, where it was held, that an indorsement in blank conveyed a joint right of action to as many as agreed to sue upon the bill; per Lord Ellenborough, "the bill having been indorsed, and delivered to Langton and Co. according to Kinnear's direction, Langton and Co. had authority to appropriate it. Since it was paid to them on account of Holder's estate, if they had received the amount it would have been money had and received by them on account of the estate, but the evidence, as it stands, proves the interest in the bill to be in Langton and Co. It would be sufficient to prove that Langton and Co. consented to appropriate the bill to the three plaintiffs as trustees. If Langton and Co. had indorsed it to the plaintiffs the right to sue would have been clear, or they might have transferred the right by a delivery of the bill, but without some evidence of this kind, the right to stue still remains in Langton and Co. Had it not been for the evidence of the particular transfer to Langton and Co. an indorsement in blank might have entitled the parties who bring the action to recover." Plaintiffs nonsuited.

> (d) Acerro v. Petroni, I Stark. Rep. 100. Assumpsit by the plaintiffs, bankers at Paris, upon an account stated by the defendant. witness called to prove the partnership of the plaintiffs could not recollect the names of the component members of the firm so as to repeat them without suggestion, but said he might possibly recognize them, if suggested to him. Lord Ellenborough, alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names, ruled, that there was no objection to asking the witness whether certain specified persons were members of the firm. The witness recollected the surnames but not the christian names, of those mentioned as members of the firm, and

their christian names being specified in the declaration in the count upon an account stated, and the terms of the acknowledgment being generally to Acerro and Co. the plaintiffs were nonsuited Sed quære as to the christian names, which are not in general material. See Hodenpyl r. De Vingerhoed and another, ante, 627, note (q); Boughton r. Frere, 3 Campb. 29; Walker r. Willoughby, 2 Marsh, 139.

(e) Maddocks v. Hankey, 2 Esp. Rep. 647, (Chit. j. 598). Assumpsit by the indorsee of a promissory note against the maker; the promissory note was drawn by the defendant payable to one Sellier, who indorsed to Rymer, by whom it was indorsed to the plaintiff. plaintiff proved the hand-writing of the defendant and Rymer, by persons acquainted with them, and the only doubt in the case was as to the hand-writing of Sellier. The evidence to establish that fact was a person who had gone to Sellier, he then being in prison, and asked him if that was his hand-writing -To whom he acknowledged that it was. Gibbs, for the defendant, objected to this evidence, insisting, that such an admission of a fact was not evidence against the defendant, as it might be material to ascertain the time when the indorsement had been made. Lord Kenyon said, that he thought it was admissible and sufficient evidence, as it went in derogation of the parties' own title to the note, but he offered to reserve the case. The plaintiff had a verdict. Roscoe, 287, but

see ante, 636, note (y).

(f) Western r. Wilmott, and Hemmings v.

Robertson, ante, 636, note (y).
(g) Richardson v. Allan, 2 Stark. Rep. 334; 2 Chit. Rep. 657, (Chit. j. 1022); Hobson v. Rich, Bart. on motion for new trial, K.B. A. D. 1826.

(h) Id. ibid.

(i) Id. ibid.

(k) Hankey. v. Wilson, Say. 223, (Chit. j.

337); ante, 643, note (s).

(1) Bosanquet v. Anderson, 6 Esp. Rep. 43, (Chit. j. 726); Sidford v. Chambers, 1 Stark. Rep. 326, (Chit. j. 960).

Bosanquet r. Anderson, 6 Esp. Rep. 43, (Chit. j. 726). In an action by the indorsee of a bill of exchange, where several indorsements have taken place, which are laid in the declaration, though necessary to be proved in general, yet if defendant applies for time to the ur

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made to an *indorsee after the bill was due, dispenses with the necessity I. In genefor proof of the indorsement, because it admits the title of the holder. after a partnership has been established in evidence, the admission of a part-be proved, ner, though not a party to the suit, is evidence as to joint contracts against and how. any other partner, as well after the determination of the partnership as during Thirdly, But although a bill of exchange has been shewn to the Proof of its continuance(m). drawer, with the name of the payee indorsed upon it, and he merely objects Plaintiff 'a to paying, that he had drawn it without consideration; in an action against Interest or Title. him by the indorsee, this does not dispense with regular proof of the indorse-The payment of money into court generally, on the whole decla- As Indorsration, amounts to an admission of the indorsement, and dispenses with the necessity of proving it(o), after proving the payment into court(p).

In an action against an inderser of a bill or note, the hand-writing of the when and drawer(q), and all prior indorsers(r) being admitted by the defendant's in- how prov-

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Indorse-

holder, and offers terms, it is an admission of the holder's title, and a waiver of proof of all the indorsements except the first. Assumpsit by the plaintiff as indorsee of a bill of exchange, drawn by Wilson in his own favour on the defendant who accepted it, and indorsed over by Wilson. The declaration stated several indorsements on the bill. The evidence for the plaintiff was only proof of the hand-writing of the first indorser, and that the defendant, when the bill became due, came to the plaintiffs, who were bankers, and then holders of the bill, and offered another bill in the place of it, he being then unable to take it up. It was contended for the defendant that it was necessary for the plaintiff to prove all the indorsements on the bill stated in the declaration, for that by the averments so made he had bound himself to prove them, though if he had not done so and declared only on the first indorsement, he might have recovered on that only. It was answered by the plaintiff's counsel that it was sufficient for the plaintiff to prove the hand-writing of the first indorser under the circumstances above stated; that of his offering terms to the plaintiff and thereby admitting the bill to be his; and that there was no necessity for proving the handwriting of all the indorsers though so laid in the declaration, as by such admission and offer he admitted the plaintiff's title to the bill, and thereby waived the necessity of such proof as would be otherwise necessary. Lord Ellenborough said, "that the acceptor by his acceptance admitted the hand-writing of his correspondent, the drawer, but if payable to the drawer's own order, his hand-writing as such indorser must in every case be proved, as that put the bill into circulation, and though he accepted the bill with many names on it, if they were laid in the declaration they should be proved; but he was of opinion that the offer here made to the acceptor to pay the bill to the plaintiffs, who then held the bill, with all the names on it, was a sufficient admission of the plaintiff's title, which was derived through the several indorsements, and of the defendant's liability, so as to supersede the necessity of proof of each person's hand-writing." dict for the plaintiff.

Sidford v. Chambers, 1 Stark. Rep. 326, (Chit j 500). This was an action by the in-

dorsees of a bill of exchange against the indorser. The bill was drawn by Fish on Hill and Co., payable four months after date to the order of Fish, and indorsed by Fish to the defendant, by the defendant to Sheckles, by Sheckles to Niblock and Co., and by the latter to the plaintills. All the indorsements were stated in the declaration. The plaintiffs proved all the indorsements except that of Sheckles, and in order to supersede the proof of this indorsement they gave in evidence a letter written by the defendant to the plaintiffs, offering to give them a substituted bill, to be approved of by any moderate person, but stating that he had not money to take it up with; adding that he hoped it was not in the hands of Niblock and Co. At the time this letter was written the bill was in the hands of the solicitor for the plaintiffs, and the indorsements were complete. The Attorney-General for the plaintiffs submitted that this evidence was sufficient without further proof, and cited the case of Bosanquet v. Anderson, 6 Esp. Rep. 43, to shew that an application by a defendant for time was an admission of liability. Lord Ellenborough, remarking, that the hope expressed by the defendant that the bill was not in the hands of Niblock and Co., who were indorsers subsequent to the Sheckles, shewed that he knew the channel through which the plaintiff's title had been derived, was of opinion that the evidence amounted to proof of their title through that channel Verdict for the plaintiffs.

(m) Wood v. Braddick, 1 Taunt. 104; Phil. Evid. 3d edit. 75, 76; see fully as to this, ante, 53, 54.

(n) Duncan v. Scott, 1 Campb. 101, (Chit. j. 742).

(o) Gutteridge v. Smith, 2 Hen. Bla. 374. (Chit. j. 534).

(p) Israel v. Benjamin, 3 Campb. 40, (Chit.

(q) Lambert v. Pack, 1 Salk. 127; 1 Lord Raym. 443; 12 Mod. 244; Holt, 117, (Chit. j. 211); Free v. Hawkins, Holt, C. N. P. 550, (Chit. j. 1000).

(r) Id. ibid.; Critchlow v. Parry, 2 Campb. 192, (Chit. j. 774); Chaters v. Bell, 4 Esp. R. 210, (Chit. j. 636).

Critchlow v. Parry, 2 Campb. 182, (Chit. j. 774). Action by an indorsee against the in-

and how. Thirdly, Proof of Plaintiff's Interest or Title.

see.

I. In gene- dorsement, they need not be proved, although the bill be forged and although ral what stated(s). But if a subsequent indorsement be stated in the declaration it be proved, must be proved (t).

Where A. made a promissory note payable to B. or order, and B. indorsed it and gave it to C. to get it discounted, and C. went away and shortly afterwards came back to B. with the money, and the executors of C.'s father, of whom C. was one, brought an action on the note as executors, it was held, that as the executors produced the note on the trial as executors, they might recover on it, although there was no evidence that C.'s father ever had possession of the note in his lifetime (u). In an action, however, at the suit of an executor against the acceptor of a bill, on a promise laid to the testator, the plaintiff must prove that the bill was accepted in the testa-[*647] tor's lifetime(v)(1); and *as we shall hereafter see, when a bill or note is attempted to be set off against the claim of the assignees of a bankrupt, the party must prove that the instrument came to his hands before the bankruptcy, though returned to him afterwards (w). But if the act of bankruptcy were secret, and the bill or note proposed to be set off were afterwards received by the party before the commission was issued, and without notice of the bankruptcy, he may set it of f(x).

> When the drawer of a bill payable to the order of a third person, and returned to and taken up by him, sues the acceptor, and states that he transferred it and that the same was returned to him, in order to shew that the right of action has become vested in him, he should be prepared to prove such return to him(y); though it is not necessary to prove that the acceptor had effects in hand, that fact being prima facie admitted by the accept-And it has been considered, that when a prior indorser, who has ance(z).

dorser of a bill of exchange. The declaration stated several indorsements prior to that of the defendant, which was immediately to the plaintiff. A question arose whether, upon proof of the defendant's hand-writing, it was necessary to prove the hand-writing of any of the prior indorsers. Lord Ellenborough at first doubted whether it was not necessary in this case, as well as in an action against the acceptor, to prove all the indorsements that were mentioned in the declaration, and particularly that of the original payee. Clark, for the plaintiff, contended, that the defendant's indorsement admitted all antecedent indorsements; that even if they were forged, he would be liable; that he was to be considered as the drawer of a new bill of exchange; and that his contract was very different from that of the acceptor, who only undertook to pay to the payee, or his order, and against whom, therefore, a title through the payee must be established. Lord Ellenbo-

rough was of this opinion, and the plaintiff had a verdict.

(s) Id. ibid.

(t) See ante, 641, 642.

(u) Godson v. Richards, 6 Car. & P. 198. (v) Anon. 12 Mod. 447; Sarell v. Wine, 3 East, 409.

(w) Dickson v. Evans, 6 T. R. 57, (Chit. j. 531); Moore v. Wright, 2 Marsh. 209; 6 Taunt. 517, (Chit. j. 959); Oughterlony c. Easterby, 4 Taunt. SSS, (Chit. j. S90); see post, tit. Bankruptcy. But see Bolland c. Nash, S Bar. & Cres. 105; 2 Man & Ry. 189, (Chit. j. 1381); and Collins r. Jones, 10 Bar. & Cres. 777, (Chit. j. 1493).

(x) 6 Geo 4, c. 16, s. 50.

(y) As to such action, see ante, 537, note (h); and Simmonds v. Parminter, 1 Wils. 195;

4 Bro. P. C. 604, (Chit. j. 321).
(2) Vere r. Lewis, 3 T. R. 182, 183; 2 Stark. Ev. 276.

maintain the replication. Buswell, adm'r. v. Rohy, 3 New Hamp. Rep. 467.

Per Richardson, C. J. "We are aware that, it has been long settled in England, that when an administrator declares upon a promise made to intestate, the declaration cannot be supported this state, and in Massachusetts, the practice has always been otherwise. S Mass. Rep. 134; Baxter v. Penniman." Ibid.

⁽¹⁾ In an action of assumpsit brought by an administrator, the defendant pleaded the statute of limitations, to which the plaintiff replied, that the defendant promised to the intestate to pay within six years; it was held, that evidence of a promise to the administrator was admissible to

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been obliged to pay a subsequent indorser, sues the acceptor, he should I. In geneprove such payment(a).

Facts must

In an action by an accommodation acceptor against the drawer for money and how. paid, or specially for not indemnifying the plaintiff, in addition to the proof As Accomof the drawing the bill and the absence of consideration, he should prove modation payment of the bill by himself, or execution or some damage against his per- Acceptor. son or property (b); and the production of the bill from the custody of the acceptor is not prima facie evidence of his having paid it, without proof that it was once in circulation after it had been accepted; nor is payment to be presumed from a receipt indorsed on the bill, unless such receipt is shewn to be in the hand-writing of a person entitled to demand payment(c)(1).

(a) Mendez v. Carreroon, 1 Ld. Raym. 742, (Chit. j. 215), sed quære. Action upon a bill of exchange. Upon the evidence at the trial before Holt, C. J. at Guildhall, November 28d, M. T. 12 Will. 3, the case was this:—A. drew a bill of exchange upon B. payable to C. at Paris; B. accepted the bill, C. indorsed it, payable to D., D. to E., E. to F., F. to G. G. demanded the bill to be paid by B. and upon nonpayment G. protested it within the time, &c. and then G. brought an action against D. and it was well brought, and he recovered; afterwards D brought an action against B., and though D. produced the bill and the protest, yet because he could not produce a receipt for the money paid by him to G. upon the protest as the custom is among merchants, as several merchants on their oaths affirmed, he was nonsuited. But Holt, C. J. seemed to be of opinion. that if he had proved payment by him to G. it had been well enough.

In an action on a bill of exchange (by drawer against acceptor), in order to rebut the presumption arising from the plaintiff's possession of the bill, that he was the helder; the defendant offered in evidence a draft of a declaration delivered in the year 1829, in an action on a bill of exchange of the same date and amount, and drawn and accepted by the same parties, in which action the plaintiff and another sued as assignees of a bankrupt: this was held insufficient to call upon the plaintiff to shew how he became repossessed of the bill in his individual capacity; Dabbs v. Humphreys, 4 Moore & S. 285; 10 Bing. 446, S. C.

(b) Taylor v. Higgins, 3 East, 169; Chitten v. Whiffin, 3 Wils. 13. Defendant is liable if the acceptor has incurred, though not actually paid costs; Bullock v. Lloyd, 2 Car. & P. 119.

(c) Pfiel r. Van Battenburg, 2 Campb. 489, (Chit. j. 797). Action for money lent. The plaintiff's case was, that he had accepted and paid several bills of exchange for the defendant's secommodation. The bills were produced by

the plaintiff, and proved to have been drawn by the defendant. They were likewise receipted in the usual form of bills paid, but it did not appear by whom the receipts were written. Richardson contended that the simple production of the bills by the acceptor was prime facie evidence of payment. They could not have got into his hands unless he had paid them, and the presumption that an instrument in the possession of the person liable upon it is satisfied, has been invariably acted upon. But the receipts indorsed on these bills put the matter beyond all doubt, as the defendant was guilty of forgery if the bills had not been paid, and the law would not presume that a man had committed a capital offence. Lord Ellenborough, "Shew that the bills were once in circulation after being accepted, and I will presume that they got back to the acceptor's hands by his having paid them. But when he merely produces them, how do I know that they were ever in the hands of the payee, or any indorsee, with his name upon them as acceptor? It is very possible, that when they were left for acceptance, he refused to deliver them back, and having detained them ever since, now produces them as evidence of a loan of money. Nor do I think the receipts carry the natter a bit faither, unless you shew them to be in the hand-writing of the defendant, or some other person authorised to receive payment of the bills. A man cannot be allowed to manufacture evidence for himself at the risk of being convicted of forgery; and it is possible, that though the bills are unsatisfied, these receipts may have been fraudulently indorsed without the plaintiff's privity. The fact of payment still bares in doubt, and you must do something more to turn the balance .. Prove the bills out of the plaintiff's possession accepted, and I will presume that they got back again by payment. If you do not, the plaintiff must be called." I owever, a witness afterwards swore that the defendant had acknowledged the debt, and the plaintiff had a verdict.

In an action on an account current, founded on a long course of commercial transactions between the parties, in which payments are charged for sums paid to take up drafts or bills accepted by the plaintiff, the possession of the draft by the acceptor is prima facie evidence of the pay-

⁽¹⁾ The rule that an acceptor of a bill is bound to show, not only the drawing and acceptance of the bill and its payment, but that it was put in circulation after acceptance, and that the drawer had no funds in his hands, applies only to cases where the acceptor declares upon a bill of exchange against the drawer. Bell r. Norwood, adm'r., 7 Louis. Rep. 95.

I. In gene- though it has *been held, that a general receipt on the back of a bill is prima ral what facie evidence of its having been paid by the acceptor, and will not of itself be evidence of a payment by the drawer, although produced by him(d); yet we have seen that such receipt is not conclusive evidence, and may, thereand how. fore, be contradicted or explained(e).

Consideration when and how proved. Onus Probandi.

We have seen, that in general it is presumed that a bill or note was given for adequate consideration, but that in some cases the plaintiff will be called upon to prove the consideration which he gave for the bill or note(f)(1). In an action by the indorsee of a bill of exchange, if it appear, on the part of the defendant, that the defendant or a prior party made it under dures, or was defrauded of it, or had only a part of its value, the plaintiff must be prepared to prove under what circumstances, and for what value, he became the holder(g). But in an action on a bill of exchange by a third indorsee against the acceptor, the defendant cannot put the plaintiff to prove consideration, by giving prima facie evidence to shew the want of it, merely as between the drawer and his indorsee, and each subsequent indorser and indorsee, but he must also shew the want of consideration as between himself and the drawer(h). And for this purpose it is not enough to prove that the [*649] drawer, on the day before the maturity of the bill, procured all the *indorsements to be made without consideration in order that the action might be brought by an indorsee, on the understanding that the money, when recovered, should be divided between one of the indorsees and the drawer(i). where in an action by the drawer against the acceptor of a bill, the defendant pleads that it was accepted without any consideration, and the plaintiff replies that it was accepted for a good consideration, the onus of proof lies

(d) Scholey v. Walsby, Peake's Rep. 24,

25, (Chit. j. 469); anie, 424, note (r).
(e) Anie, 423, 424; Scholey v. Walsby,
Peake's Rep. 24, 25; Graves v. Key, 3 B. & Ad. 313; Farrar v. Hutchinson, 1 Perry & Dav. 437.

(f) Ante, 68 to 70, &c.

(g) Duncan v. Scott, 1 Campb. 100, (Chit. j. 742); ante, 70, &c.; Paterson v. Hardacre, 4 Taunt. 114, (Chit. j. 836); ante, 72, &c. in notes; Rees v. Marquis of Headfort, 2 Campb. 574, (Chit. j. 823). This was an action against the defendant as acceptor of a bill of exchange, drawn by one Whitton, payable to his own or-der, indorsed by him to Chamberlain and Co. and by them to the plaintiff. The plaintiff made out a primi facie case; but Whitton, the drawer, having been called to prove the handwriting of the parties, it appeared from his cross-examination that he himself had never received any consideration for the bill, and had been tricked out of it by means of a gross fraud. Lord Ellenborough held, that on this ground the plaintiff was bound to prove what consideration he gave for it; and as he was not prepared to do so, his lordship directed a nonsuit. And see Thomas v. Newton, 2 Car. & P. 606, (Chit. j.

(A) Whitaker v. Edmunds, 1 Ad. & El. 638;

1 Mood & Rob. 366, S. C.; et per Patteson, J. in Heydon v. Thompson, 1 Ad. & El. 210; 3 Nev. & Man. 319, 324, S. C.

Whitaker v. Edmunds, 1 Mood. & Rob. 366. Per Patteson, J. "Since the decision of Heath v. Sansom, 2 Bar & Adol. 291, the consideration of the judges has been a good deal called to the subject; and the prevalent opinion amongst them is, that the courts have of late gone too far in restricting the negotiability of bills and notes. If, indeed, the defendant can shew that there has been something of fraud in the previous steps of the transfer of the instrument, that throws upon the plaintiff the necessity of shewing under what circumstances he became possessed of it. So far I accede to the case of Heath v. Sansom; for there were in that case circumstances raising a suspicion of fraud: but if I added, on that occasion, that even independently of these circumstances of suspicion, the holder would have been bound to shew the consideration which he gave for the bill, merely because there was an absence of consideration as between the previous parties to the bill, I am now decidedly of opinion that such doctrine was incorrect." And see per Tindal, C. J. in Lowe v. Chifney, 1 Scott, 95, 97; 1 Bing. N. C. 267, S. C.

(i) Whitaker v. Edmunds, 1 Ad. & El. 638.

ments charged in the account, and may be given in evidence in support of items in the general

^{(1) {} It is only upon evidence showing suspicious circumstances that the holder of a note payable to bearer will be held to show how he came by it. Jones v. Westcott, 2 Brev. Rep. 166; 2 Johns. Rep. 51. }

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on the defendant, to show the want of consideration (j). So, where to an I. In genaction by the drawer of a bill of exchange against acceptor, the defendant eral what pleaded that there was no consideration for the acceptance, concluding with be proved, a verification; and plaintiff replied that there was a consideration, to wit, the and how. sale and delivery of goods concluding to the country; it was held, that the Thirdly, plaintiff was not bound to prove the consideration alleged, and that it lay on Proof of the defendant to shew want of consideration; though, if the replication had Plaintiff's Interest or concluded with a verification, the consideration alleged would have been Title. part of the issue, and the plaintiff must have proved it(k). And in an accommideration by the indorsees against the indorser of a promissory note for 500l., ation when where the defendant pleaded as to 300l. that the note was indorsed by the and how defendant for the accommodation of the maker, and as a security to the proved. plaintiffs, who were the makers' bankers, for subsequent advances, and that Onus Proonly 2001. was subsequently advanced, and therefore as to 3001. there was no consideration; and the plaintiffs replied that they were holders of the note for value given to the maker to the full amount; it was held, that upon this issue it was not incumbent on the plaintiffs, in the first instance, to give any evidence of consideration, but that the defendant was bound to begin and to impeach the plaintiff's title, because the simple fact of the note having been indorsed for the accommodation of the maker raises no inference that the holder has not given value for it, but rather that he has given value, that being the object for which the note is given(1). It was also held, it having been proved that more than 500l. being due from the maker to the plaintiffs at the time the note was paid in to them, they entered the note as a bill discounted to his credit, but that 1981. only was actually paid to him, that that was equivalent to their having advanced the amount mentioned in the note, and was a giving of a valuable consideration within the meaning of the issue. And further, that if the note were given to them as a security for a previous debt, the plaintiffs might be properly stated to be the holders for a valuable consideration (m).

In order, therefore, in the case of an accommodation bill or note, to cast upon the holder the onus of proving consideration, the defendant must first make out a case of fraud or suspicion(n). Nor is the fact of a bill having been accepted in order to raise money for the acceptor, and of the payee having appropriated the money so paid to his own use, sufficient to call upon a subsequent indorsee to shew that he gave value for the bill(o). declaration by the indorsee against the acceptor of a bill of exchange, the defendant plead that the bill was *drawn for the accommodation of the de- [* 650] fendant and indorsed to the plaintiff's indorsee for the purpose of its being discounted for the defendant's use, that it was indorsed to the plaintiff in fraud of the defendant, and that plaintiff took the bill, by such indorsement, after it was due; and the plaintiff reply that the bill was indorsed to him before it became due, he not knowing the premises, without this that the plaintiff took it after it was due; it lies upon the defendant to begin, by proving that the bill was indorsed after it became due(p). And in an action by the

⁽i) Batley v Catterall, 1 Mood. & Rob. 379; Lacey v. Forrester, 2 C., M. & R. 59; S. C. 3 Dowl. P. C. 668; 1 Gale, 139.

⁽k) Lowe v. Burrows, 2 Ad. & El. 483; 4 Nev. & Man. 366, S. C.; Batley r. Catterall, 1 Mood. & Rob. 379, per Alderson, B.

That a general plea of no consideration is a bad plea, see cases ante, 603, note (s); but that a replication traversing generally the want of consideration is good, see ante, 619.

⁽¹⁾ Percival v. Frampton, 2 C., M. & R.

^{180; 3} Dowl. 748. S. C.; and see Mills v. Barber, 1 M. & W. 425, 431, 432; infra, note(n).

⁽m) Id. ibid.

⁽n) Mills v. Barber, 1 M. & W. 425; 5 Dowl. 77; 2 Gale, 5, S. C.; and see Percival r. Frampton, 2 C., M & R. 180, 183; supra, note (l).

⁽o) Jacob v. Hungate, 1 Mood. & Rob. 445. (p) Lewis r. Parker, 4 Ad. & El. 838; 6 Nev. & Man. 294; 2 Har. & W. 46, S. C.

Facts must be proved, and how. Thirdly, Proof of Plaintiff's Interest or Title.

Consideration when and bow proved.

Onus Pro-

bandi.

I. In gene- indorsee against the maker of the note, where the defendant pleaded that the note was given for a gambling debt, and indorsed to the plaintiff with notice thereof and without consideration, and the plaintiff replied that the note was indorsed to the plaintiff without notice of the illegality, and for a good and sufficient consideration, on which issue was joined; it was held, that on these pleadings the illegal making of the note was not so admitted as to render it necessary for the plaintiff to give any evidence of consideration, but that in order to compel him to do so, the defendant ought to have proved the illegality by evidence (q).

Formerly, in the Common Pleas, the defendant was not allowed to call on the plaintiff to prove the consideration which he had given for the bill, even where the bill had been lost or fraudulently obtained, unless he had given him reasonable notice, before the trial, that he would be required to bring forward such proof, so that the plaintiff might come to the trial prepared to establish the consideration (r)(1). But in the King's Bench the practice was otherwise(s). And since by the new rules of pleading, a defendant is now bound to plead the want of consideration specially, this notice is altogether unnecessary. The merely giving a notice, however, that the plaintiff would be required to prove what consideration he gave, was not sufficient to throw the burthen upon him; but some suspicion must first have been cast upon his title, by shewing that the bill was lost or obtained from the defendant or some previous holder by undue means, after which, and not till then, $\lceil *651 \rceil$ the plaintiff was required to prove how he became the holder(t). *And though at one time it was considered, that when the plaintiff had in due time received a notice from the defendant to prove the consideration, he ought to do so in opening his case to the jury; and that after his counsel had closed his case, he should not be permitted to go into evidence of consideration, in

> (q) Edmunds v. Groves, 2 M. & W. 642; 5 Dowl. 775, S. C. An admission of a fact on the record amounts merely to a waiver of requiring proof of that fact; but if the other party seeks to have any inference drawn by the jury from the fact so admitted, he must prove it like any other fact; id. ibid. per Alderson, B.

In an action against the drawer of a check on a banker, where the defendant pleads that the amount for which the check was drawn was illegally won at play, upon which issue is joined, the plaintiff is not bound to produce the check, nor can the defendant insist on its production as part of his case; Reed v. Gamble, 5

Nev. & Man. 433. (r) Paterson v. Hardacre, 4 Taunt. 114, (Chit. j. 826). Mansfield, C. J. Declared the decision of the court to be, "that wherever a defendant meant to avail himself, as a defence against an action brought upon a bill of exchange of the circumstance that the bill had been lost, or fraudulently obtained, and that the plaintiff had no right to the possession thereof, it was necessary that the defendant should distinctly give notice to the plaintiff, that he meant to insist at the trial that the plaintiff should prove the consideration upon which he received the bill; and no such notice having been given in

this case, the rule must be discharged."

(s) Heath v. Sansom, 2 B. & Ad. 291. So where a suspicion was cast upon the plaintiff's case by his own evidence he was bound to prove consideration though no notice had been given; Foulger v. Jadis, Sittings at Westminster after H. T. 1830, February 13th, M. S.; and see Green v. Dakin, 2 Stark. Rep. 347; and Mann r. Lent, I Mood. & Mal. 240, that defendant might go into evidence of want of consideration without having given notice.

(t) Reynolds v. Chettle, 2 Campb. 596, (Chit j. 828). The defendant had given the plaintiff notice to prove what consideration he gave for the bill, which it was submitted he was bound to prove accordingly. Lord Ellenborough, "The notice is insufficient to throw this burthen on the plaintiff; you must first cast some suspicion upon his title, by shewing that the bill was obtained from the defendant, or some previous holder, by force or by fraud." The plaintiff had a verdict. And see per Burrough, J. in Rawlings v. Hall, 1 Car & P.11; De la Chaumette v. Bank of England, 9 Bar. & Cres. 208; Coster v. Merest, 7 Moore, 87. See also per Parke, B. in Mills v. Barber, 1 M. & W. 425, 428, 429; ante, 649, note (*).

⁽¹⁾ It seems, that fraud in the consideration of a promissory note, as between the original parties, may be given in evidence under the general issue, without notice. Hills v. Bannister, 8 Cowen, 31.

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reply to the defendant's case(u); yet a different practice afterwards prevail- I. In geneed, and the course was for the plaintiff to begin by merely proving a prima ral what facie case, and then if the defendant succeeded in proving that he lost the be proved, bill, or received no value, the plaintiff was allowed, in answer to the defend- and how. ant's evidence, to go into full proof of the circumstances under which he held Thirdly, the bill(x). And the practice at the present day is, as we have just seen, Proof of not to require the plaintiff to prove consideration in any case until his title Plaintiff's Interest or has first been impeached. It should seem, however, that if the plaintiff in Title. the first instance attempts to prove the consideration, he must do so as far Consideras he can, and cannot afterwards adduce evidence of it in reply (y).

A notice served on defendant, requiring him to produce a check, though and how in his banker's hands, is sufficient, because the banker is considered to be proved.

merely the defendant's agent(z).

We have already stated when the want of consideration, or the illegality of it, will affect the plaintiff's right of action(a). In the case of a bank-note, unless there be a strong presumption of fraud or want of consideration, the plaintiff's interest in the security cannot be disturbed (b). And we have

(u) Per Lord Ellenborough, in Dellanney v. Mitchell, 1 Stark. Rep. 439, (Chit. j. 976). This was an action by the plaintiff, as the indorsee of a bill of exchange, against the defendant as acceptor. Scarlett, for the plaintiff, having adduced the usual documentary proofs, was inclined to rest his case there, intimating, that if in the course of the cause it should become necessary, he was prepared to prove the consideration given for the bill. The Attornev-General insisted, that since notice had been given, that one ground of defence was the want of consideration, it would not be competent to the plaintiff, after having closed his case, to go subsequently into such evidence. Lord Ellenborough held that after such notice he could not.

Humbert v. Ruding, K. B. Westminster, 18th July, 1817, MS. Action on a bill of exchange. The defendant had given notice to the plaintiff to prove the consideration of the bill, and Lord Ellenborough said, " I think as this is the case you must go into proof of the consideration in the first instance." Mr. Jervis, for the plaintiff. And see Spooner v. Gardiner, Ryan & Moody, 86, (Chit. j. 1211); see also per Abinger, C. B. in Simpson r. Clarke, 2 C., M. & R. 342, 346 to 348.

(x) Lord Tenterden, at Nisi Prius, declared this to be the correct course. And according to the note in Browne v. Murray, Ry. & Moo. 258, this practice of the K. B. prevailed also in the C. P., though it was otherwise ruled in Spooner v. Gardiner, Ry. & Moo. 86, (Chit. j. 1211); and see Stark. on Evid. part iii. p. 883, note (a); Phil. on Evid. 6th edit. vol. ii. p. 17. See also per Abinger, C. B. in Mills v. Barber, 1 M. & W. 431.

In Mason and another v. Robertson, Guildhall, March, 1830, K. B. which was an action by a third indorsee against acceptor, on a bill for 871. On the part of defendant it was proved that the bill was accepted for the accommodation of the drawer, and the first indorsee proved that he advanced to the drawer only 161., and handed it over to the second indorser, Norton, an attorney, for 151. only, and who indorsed it to the plaintiffs. It was contended for

the defendant that upon this evidence the plaintiff could only recover 15l. On behalf of plaintiffs, it was contended that it was incumbent on the defendant to go further, and to shew that plaintiffs gave no more than the 15t. But Lord Tenterden said, "That as the defendant had proved that the bill was accepted for the accommodation of the drawer, that evidence was sufficient to call on the plaintiffs to prove affirmatively how and for what value they became possessed of the bill." Plaintiffs then called Norton, who swore that he owed the plaintiffs much more than the amount of the bill; whereupon plaintiffs had a verdict for the whole sum. Chitty for defendant. MS.

(y) Browne v. Murray, Ry. & Mood. 254. (z) Partridge v. Coates, Ry. & Mood. 156,

(Chit. j. 1013). As to production by plaintiff of check declared upon, see Reed v. Gamble, 5 Nev. & Man. 433; ante, 650, note (q).

(a) Ante, 68 to 101.

(b) Solomon v. The Bank of England, 18 East, 135, (Chit. j. 811); ante, 256, note (d); King v. Milsom, 2 Campb. 5, (Chit. j. 764). Possession is prima facte evidence of property in negotiable instruments. Therefore, in trover for a bank-note, it is not a primû fucie case for the plaintiff to prove that the note belonged to him, and that the defendant afterwards converted it; and the defendant will not be called upon to shew his title to the note, without evidence from the other side that he got possession of it mala fide, or without consideration. ver for a 50l. bank of England note. plaintiff's case was, that he had lost the note from his pocket in the street, and that the defendant, into whose possession it soon afterwards came, was not the bona fide holder of it for a valuable consideration. Lord Ellenborough, "There is a distinction between negotiable instruments and common chattels; with respect to the former, possession is prima facie evidence of property. must presume that the defendant, when possessed of this note, was a bond fide holder for a valuable consideration. It lies upon you to impeach his title. You might have thrown so much suspicion upon his conduct in the transac-

Onus Probandi.

I. In gene-seen that the claim of the holder of a *negotiable instrument, who has given rai what value, cannot now be defeated without proof of mala fides(c)(1). Facts must

be proved. and how. Fourthly, Defendant's Breach of Contract.

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Presentnecessary or not.

Fourthly. In an action against the acceptor, upon a general acceptance to pay the bill according to its tenor, and in an action against the maker of a promissory note, it is not necessary to prove a presentment for payment, because such presentment, we have seen, is not essential to the action(d). So in the Court of King's Bench, where a bill is drawn payable generally as to As Accep- place, but has been accepted payable at a banker's or other particular place, tor or Ma- but not within the meaning of the 1 & 2 Geo. 4, c. 78, it is not necessary, in an action against the acceptor, to go into proof of a presentment at such place(e), nor is it necessary, though such presentment has been unnecessariment when ly averred (f). And though in the Court of Common Pleas, before the above act, a different doctrine was entertained by some of the judges, it is now no longer necessary in that court to be prepared to prove that fact(g). When a bill has been accepted payable specially in the express terms of this act, a note has in the body of it been made payable at a particular place, the contract is considered as qualified, and a presentment there must be averred and proved in an action against such acceptor or the maker of the note(h). In short, whenever a particular presentment is essential to the support of the action, it must be proved(i). We have already fully considered what is a sufficient presentment. In case of a conditional acceptance, it is necessary to allege and prove that the terms of the condition have been performed (k), or else an excuse for non-performance must be shewn(l).

As Drawer or Indorser.

In an action against the drawer or indorser of a bill, or the indorser of a note, as his contract is only to pay in case of the party primarily liable does not, the default of such party must be proved, or some evidence must be Thus in an action adduced to dispense with the necessity for such proof.

tion, as to have rendered it necessary for him to prove from whom he received the note, and what consideration he gave for it: but I think you have not done so. The suspicious circumstances, detailed by the witnesses, may be accounted for from the defendant's ignorance. It would greatly impair the credit, and impede the circulation of negotiable instruments, if persons holding them could, without strong evidence of fraud, be compelled by any prior holder to disclose the manner in which they received them." Plaintiff non-suited.

(c) Ante, 257; and see Uther v. Rich, 2 Perry & Dav. 579; ante, 604, note (z).
(d) Ante, 359 to 365.

(e) Ante, 364, note (t); Fayle v. Bird, 6 Bar. & Cres 531; 9 Dow. & Ry. 639; 2 Car. & P. 303, (Chit. j. 1329); De Bergareche v. Pillin, 3 Bing. 477; 11 Moore, 350, (Chit. j.

1292); ante, 364, note (b).
(f) Freeman v. Kennell, Guildhall, 25th May, 1826, cor. Abbott, C. J. Dickenson, attorney; ante, 364, note (a).

(g) Ante, 364, note (a).

(h) Ante, 152, 153, 364, 865. In Phillips v. Franklin, Gow's Rep. 196, which was before the 1 & 2 Geo. 4, c. 78, Holroyd, J. held, that although in an action against the acceptor of a bill of exchange accepted payable at a particular place, a presentment at such place was not necessary in order to entitle the plaintiff to recover the principal sum, yet that a presentment there must be proved to entitle him to in-

(i) As to the cases when a presentment is necessary, see ante, 364, 365.

(k) Swann v. Cox, 1 Marsh. 176; Langeton v. Corney, 4 Campb. 176, (Chit. j. 930); Anderson v. Hick, 3 Campb. 179, (Chit. j. 855); and see Wynne v. Raikes, 5 East, 514; 2 Smith, 98, (Chit. j. 700.)

(1) Leeson v. Pigott, Bayl. 5th edit. 401, (Chit. j. 446); Bowes v. Howe, 5 Taunt. 30, (Chit. j. 895.)

^{(1) {} Proof that the plaint iffs were trustees of a bank, and the check sued upon was one of a number obtained by a person against whom the bank had a large account, and paid over by him to one of the bank agents, on a corrupt understanding, that it was to be entered in the bank books for the purpose of creating a colorable balance of the account, and that after the books were inspected by the trustees, the check should be returned, and none of the parties saed upon it and that the check had been obtained from defendant in consideration of a counter check for a like amount given by the payee, and on an understanding that neither was to be presented for payment, was held not to sustain a plea that the check had been given and endorsed without consideration Rosanquet v. Corser, 5 Jurist, 369. }

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against the drawer or indorser of a bill, or *the indorser of a note, it is nec- 1. In geneessary to prove a presentment to the drawee for payment(m); or if the ac-ral what ceptance was to pay at a particular place, then as well the acceptance and be proved, a presentment there, or to the acceptor in person, or at his house, must be and how. So if the bill be drawn payable at a particular place, as in Fourthly, proved(n). London, and be accepted so payable, though not in the terms of the act(o); Defendor if the bill be accepted payable at a particular place, though not so as to $\frac{ant's}{Breach}$ of constitute a special acceptance (p), a presentment at the place specified must $\frac{ant's}{Contract}$ be proved in order to charge the drawer or indorser. But it is not necessary to prove that the presentment was made by the person named in the deer or Inclaration (q). Nor is it necessary in an action against the indorser of a bill dorser. to prove any presentment to, or demand upon, the drawer, because the indorser, by the act of indorsement, engages that the bill shall be paid, which contract being broken by the dishonour of the bill, the holder is entitled to sue without reference to the drawer's breach of contract(r).

(m) Pardo v. Fuller, 2 Com. Rep. 579, (Chit. j. 296); Heylin v. Adamson, 2 Burr. 676, (Chit. j. 849).

Pardo v. Fuller. This was an action on a promissory note against the indorser. At the trial before Chief Justice Willes, at Guildhall, it was doubted whether the plaintiff ought not to prove a demand upon the drawer before the action was brought. The matter of proof was left to the jury, whether a demand was made or not. On a motion, for a new trial, Judge Fortescue mentioned the case of Davis v. Muson, 1 Geo. 2, in the Court of Common Pless, wherein it was agreed by the court, that there ought to be a demand upon the drawer, for the indorser undertook conditionally only if the drawer did not pay. Indeed, if a note be forged, Chief Justice Holt held the indorser liable, though no demand, and indeed no demand can be, for when a note is forged there is no drawer. So on a note payable to a man or bearer, no demand need be from him to whom it is made payable. But a new trial was denied, for the evidence of the demand was left to the jury, who were proper judges of that fact, and knew best the course of dealing.

(n) Sedgwick v. Jager, 5 Čar. : P. 199, (Chit. j. 1582).

(o) Gibb v. Mather, 8 Bing. 214; ante, 152, 864, 575, 576.

(p) Parks v. Edge, 1 C. & M. 429, ante, **576**, note (o).

(q) Boehin r Campbell, Gow's Rep. 55; 8 Moore, 15; 1 Bing. 216, (Chit. j. 1045).

(r) Heylin v. Adamson, 2 Burr. 669, 675, (Chit. j. 349); Bromley v. Frasier, 1 Stra. 441. It was determined in the case of Heylin v. Adamson, 2 Burr. 669, (Chit. j 349), which examines and reconciles the authorities upon the subject, that to entitle the indorsee of an inland bill of exchange to bring an action against the indorser upon failure of payment by the drawee, it is not necessary to make any demand of, or inquiry after, the first drawer. This point had been laid down differently in different books, owing to the drawer of a bill of exchange being confounded with the maker of a promissory note; vide 1 Ld. Raym. 448; Rep. temp. Hardw. p. 822; 2 Burr. 677. The distinction subsisting between them is thus

clearly and satisfactorily laid down by Lord Mansfield, 2 Burr. 675, by whom the law upon the subject appears to have been settled: " As to foreign bills of exchange, the question was soleninly determined by this court, upon very satisfactory grounds, in the case of Bromley v. Frasier, I Stra. 441. That was an action upon the case upon a foreign bill of exchange, by the indorsee against the indorser, and on general demurrer, it was objected that they had not shewn a demand upon the drawer in whose default only it is that the indorser warrants." And because this was a point unsettled, and on which there are contradictory opinions in Salk. 131 and 133, the court took time to consider of it. And on the second argument they delivered their opinions, that the declaration was well enough; for the design of the law of merchants, in distinguishing these from all other contracts, by making them assignable, was for the convenience of commerce that they might pass from hand to hand in the way of trade, in the same manner as if they were specie. Now to require a demand upon the drawer, will be laying such a clog upon these bills as will deter every body from taking The drawer lives abroad, perhaps in the Indies, where the indorsee has no correspondent to whom he can send the bill for a demand, or if he could, yet the delay would be so great, that nobody would meddle with them. Suppose it was the case of several indorsements, must the last indorsee travel round the world before he can fix his action upon the man from whom he received the bill? In common experience, every body knows that the more indorsements a bill has, the greater credit it bears; whereas, if those demands are all necessary to be made, it must naturally diminish the value by how much the more difficult it renders the calling in the money. And as to the notion that has prevailed, that the indorser warrants only in default of the drawer, there is no colour for it, for every indorser is in the nature of a new drawer, and at Nisi Prius the indorsee is never put to prove the hand of the first drawer, where the action is against an indorser. The requiring a protest for non-acceptance is not because a protest amounts to a demand, for it is no more than giving a notice to the drawer to get his

I. In general what Facts must be proved, and how.

Fourthly, Defendant's Breach of Contract.

As Drawer or Indorser.

*When the action is for default of the drawee to accept, a due presentment and a refusal must also be proved(s); and when it is essential from the circumstance of the bill being payable at a banker's, that a presentment should be made there, such presentment must, in an action against the drawer or indorser of a bill, be proved to have been made in due time, and proof of a presentment by a notary in the evening, when no person was at the bankinghouse to give a proper answer, will not suffice t; though if it appear that upon such presentment in the evening, there was some person at the banker's, who, in pursuance of authority, gave an answer to the holder, such evidence would suffice(u).

Where a bill is payable so many days after sight, the plaintiff must prove a presentment for acceptance(x). But in other cases it is sufficient to prove a presentment for payment when the bill becomes due, and a refusal to It suffices to prove a presentment for acceptance and a refusal to accept at any time before the bill becomes due, for upon the dishonour the drawer becomes liable immediately (z); it also suffices to prove that the drawee refused to accept according to the form of the bill, and evidence is [*655] inadmissible, for the purpose of proving that the *mode of payment proposed would have been equivalent to a payment according to the terms of the bill(a); the plaintiff must prove that the refusal came from the drawee; it is

> effects out of the hands of the-drawee, who, by the others drawing, is supposed to have sufficient wherewith to satisfy the bill. Upon the whole, they declared themselves to be of opinion, that in the case of a foreign bill of exchange, a demand upon the drawer is not necessary to make a charge upon the indorser, but the indorsee has the liberty to resort to either for the money, consequently the plaintiff (they said) must have judgment. Every inconvenience here suggested holds to a great degree, and every other argument holds equally in the case of inland bills of exchange. We are therefore all of opinion, that to entitle the indorsee of an inland bill of exchange to bring an action against the indorser upon failure of payment of the drawee, it is not necessary to make any demand of, or inquiry ofter, the first drauer. The law is exactly the same, and fully settled upon the analogy of promissory notes to bills of exchange, which is very clear, when the point of resemb-lance is ence fixed. While a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange. When it is indorsed, the resemblance begins, for then it is an order by the indorser upon the maker of the note (his debtor by the note) to pay to the indorsee. This is the very definition of a bill of exchange. The indorser is the drawer, the maker of the note is the acceptor, and the indorsee is the person to whom it is made payable. The indorser only undertakes, in case the naker of the note does not pay. The indorsee is bound to apply to the maker of the note, he takes it upon that condition, and therefore must in all cases know who he is, and where he lives, and if after the note becomes payable, he is guilty of a neglect, and the maker becomes insolvent, he loses the money, and he cannot come upon the indorser at all. Therefore, before the indorser of a promissory note brings an action against the indorser, he must shew a demand or due diligence to get

the money from the maker of the note, just as the person to whom the bill of exchange is made payable must shew a demand or due diligence to get the money from the acceptor, before be brings an action against the drawer. determined by the whole Court of Common Pleas, upon great consideration, in Pasch. 4 Geo. 2, as cited by my Lord Chief Justice Lee, in the case of Collins v. Butler, 2 Stra. 1087, (Chit. j. 285). So that the rule is exactly the some upon promissory notes as it is upon bills of exchange, and the confusion has in part arisen from the maker of a promissory note being called the drawer, whereas by comparison to bills of exchange the indorser is the drawer. All the authorities, and particularly Lord Hardwicke, in the case of Hamerton v. Mackerell, Mich. 10 Geo. 2, according to my brother Denison's statement of what his lordship said, put promissory notes and inland bills of exchange just upon the same footing, and the statute expressly refers to inland bills of exchange: but the same law must be applied to the same reason to the substantial resemblance between promissory notes and bills of exchange, and not to the same sound which is equally used to describe the makers of both.

(8) Anie, 272, & c. (t) Ante, 287; Parker v. Gordon, 7 East, 385; 2 Smith, 258; 6 Esp. 41, (Chit. j. 727). Aliter, if drawee be not a banker, ante, 387; and Wilkins v. Jadis, 2 Bar. & Adol. 155; 2 Mood. & Mal. 41, (Chit. j 1537).

(u) Garnett v. Woodcock, 1 Stark. 475; 6 Mau. & S. 44, (Chit. j. 979, 981); ante, 387, note (m).

(x) Ante, 272.
(y) Bul. N. P. 269; Bright v. Purrier, 3 East, 483, (Chit. j. 371); Ballinghalls v. Gloucester, 3 East, 481; 4 Esp. 268, (Chit. j. 678).

(z) Id. ibid. (a) Boehm v. Garcias, 1 Campb. 425, (Chit. j. 756).

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not sufficient therefore to produce a witness who went to the drawee's resi- I. In genedence, and was there told by some one that the bill would not be honour-ral what ed(b).

To prove a presentment for payment, it has been held that the entry of a and how. clerk, deceased, in the book of a notary public, containing a minute of time Fourthly, and place of presenting the bill, is, upon proof of his hand-writing, admissi- Defendble in evidence(c).

Facts must be proved.

Breach of Contract

In an action against the drawer or indorser of a foreign bill (and even in an action on an inland bill, when a protest is averred (d), it is necessary to prove, besides the presentment and notice of dishonour, a protest for nonacceptance(e)(1), or non-payment(f), the requisites and points relating to which have already been considered. Under circumstances, however, there may be an excuse for not protesting (g), and which in such case should be proved. In the case of an inland bill, interest or damages may be recovered from a drawer or indorser without proof of a protest(h). A protest, apparently under the seal of a notary public, and made abroad, need only be produced, and proves itself without shewing by whom it was made(i). But a protest made in England must be proved by the notary who made it, and by the subscribing witness, if any (k)(2). The necessity of proving a pro-

(b) Check v. Roper, 5 Esp. 175, (Chit. j. 702); Stark. on Evid. p. iv. 257.

(c) Sutton v. Gregory, Peake's Rep. Add. 150, (Chit. j. 598); Peake's Evid. 18; Price v. Torrington, 1 Salk. 285; 2 Ld. Raym. 875; Hagedorn v. Reed, 3 Campb. 379; 1 M. & Sel. 567, S. C.; post, 658, note (m).

An entry of the dishonour of a bill of exchange made in the usual course of business, at the time of the dishonour, in the book of a notary, by his clerk, who presented the bill, may be given in evidence in an action on the bill upon proof of the death of the clerk who made the entry; Poole v. Dicas, 1 Bing. N. C. 649; 1 Scott, 600; 1 Hodges, 162, S. C.; 7 Car. & P. 79, S. C. The same principle was established in Doe d. Patteshall v. Turford, 8 Bar. & Adol. 89.

(d) Boulager v. Talleyrand, 2 Esp. Rep. 550, (Chit. j. 585); Selw. 9th edit. 875; sed quære, the averment might be rejected as surplusage.

(c) Ante, 331.

(f) Ante, 455. (g) Ante, 485, 486.

(h) Ante, 465, note (z); Windle v. Andrews, 2 Bar. & Ald. 696; 2 Stark. 425, (Chit. j. 1062).

(i) Anon. 12 Mod. 345, (Chit. j. 212); 2 Rol. Rep. 346; 10 Mod. 66; Peake's Law of Evid. 4th edit. 80, in notes.

(k) Chesmer v. Noyes, 4 Campb. 129, (Chit.

(1) A protest of an inland bill of exchange or promissory note is not necessary, nor is it evidence. Young v. Bryan, 7 Wheat. 146. The Union Bank v. Hyde, 6 Wheat. 572. Nicholas v. Webb, 8 Wheat. 326. In relation to protests of bills drawn in one State of the Union upon another State, see Townsley v. Sumrall, 2 Peters, 170, 180. Bills of this description partake of the character of foreign bills, and ought to be treated as such in the courts of the United States. Buckner v. Finley, Id. 586.

By an act of the legislature of Pennsylvania, 2d January, 1815, the official acts, protests, and attestations of notaries public certified according to law under their respective hands and seals of office may be received in evidence provided any party may contradict them by other evidence, any such certificate. Under this act, notice to the indorser of the non-payment of a promissory note, is held to be an official act, and the protest is prima facte evidence thereof. Brown v. Philadelphia Bank, 6 Serg. & Rawle, 484. Stewart v. Allison, Ibid. 324. The certificate of the notary under seal is prima facie evidence that such person is a notary public. Ibid. But the notary may be admitted to give evidence to explain or rebut the facts stated by him in the protest. Craig v. Shallcross. And may even be compelled to appear and give such evidence. Wright v. Almond, Sup. Court, Pennsylvania, March Term, 1925.

The protest of a notary, with a copy of the note declared on attached thereto, and his certiscute that he had given due notice, is sufficient evidence upon which to charge the indorser, under the plea of non assumpsit. Smith v. M'Manus, 7 Yerg. 477.

A protest made in another State which wants the seal prescribed by law in that State, will not be received in evidence as such in Louisiana. Tickner r. Roberts, 11 Curry's Louis. R.

(2) In South Carolina, the act of 1822 makes protests of notaries who are dead, or reside out of the district where the suit is brought, evidence as well of notice to the indorser as of a demand on the drawer. The protest should state both the demand and notice of non-payment, and is evidence of both. Dobson v. Laval, 4 M'Cord's Rep. 57,

be proved, and how.

I. In gen- test is superseded by proof of an admission by the defendant of his liability, eral what as by a part-payment or promise of payment (l).

*In an action against the drawer or indorser of a bill, or indorser of a note, Notice of it is in general necessary to prove that due notice of the dishonour was given Dishonour, to the defendant. The sufficiency as to time is a question of law, dependent essary and on facts(m). The requisites and time within which notice of non-accepthow prove ance (n) or non-payment (o) must be given, have already been considered. This, we have seen, cannot be left to inference and without positive proof, [*656] and therefore a witness swearing that he gave notice in two or three days after the dishonour, when three days would be too late, will not be sufficient proof(p).

We have already considered what notice of non-acceptance (q) and nonpayment(r) is sufficient; and we have seen, that a statement in a letter, giving notice that the holder did not, till within a few days, know where the party was to be found, is not to be taken as an admission that the notice was not given on the next day after the residence of the party had been ascer-

tained(s).

If by Let-ter or in Writing.

If the notice was given by letter, or in writing, it was formerly decided that evidence of the contents of such notice could not be given without first proving the service of a notice to the defendant to produce such letter or writing, and it is still always advisable to serve such notice to produce(t).

j. 929). This was an action on a foreign bill of exchange drawn at St. Croix upon a person at Bristol. In the course of the trial it became material to shew that the bill had been presented to him for payment. For this purpose the plaintiff's counsel offered as evidence a notarial protest under seal, stating the fact of the presentment in the usual form, and contended, that by the usage of merchants a protest under a notary's seal is evidence of the dishonour of foreign bills of exchange. Lord Ellenborough, "The protest may be sufficient to prove a presentment which took place in a foreign country; but I am quite clear that the presentment of a foreign bill in England must be proved in the same manner as if it were an inland bill or a promissory note." The plaintiff had a verdict upon other evidence.

Marin v. Palmer, 6 Car. & P. 466. Indorsee against acceptor of an English bill of exchange. To shew that the plaintiff had received the bill when it was overdue, a protest, which had been made of it by the plaintiff's immediate indorser, being in the hands of the plaintiff, was called for by the defendant at the trial on notice to produce. On its production it appeared to be attested by a subscribing witness: held, that the mere circumstance of the protest coming out of the hands of the plaintiff, as he did not claim title under it, was not sufficient to dispense with the necessity of calling the subscribing witness; but it being proved that on two occasions the paper had been produced by the plaintiff's attorney, to the defendant's attorney, as the protest applying to the bill in question, it was admitted in evidence without proof of the attestation.

(1) Bayl. 5th edit. 475; Gibbon v. Coggon, 2 Campb. 188, (Chit. j. 774); Taylor v. Jones. 2 Campb. 105, (Chit. j. 791); Stark. on Evid.

part iv. p. 266; post, 660, note (w).

(m) Per Lawrence, J. in Darbishire v. Parker, 6 East, 3; 2 Smith, 195, (Chit. j. 707); see Fry v. Hill, 7 Taunt. 897, (Chit. j. 992). Sed vide Lord Kenyon's opinion in Hilton v. Shepherd, 6 East, 14, note, (Chit. j. 710).

(n) Ante, 336

(o) Ante, 475 to 493.

- (p) Lawson v. Sherwood, 1 Stark. Rep. 314, (Chit. j. 959); ante, 480, note (p); Elford v. Teed, 1 Maule & S. 28, (Chit. j. 879).
 - (q) Ante, 381 to 335. (r) Ante, 466 to 475.

(s) Kerby v. England, 2 Car. & P. 300, (Chit. j. 1303); Firth v. Thrush, 8 Bar. & Cres. 397; 2 Man. & Ry. 359; Dans. & Ll.

151, (Chit. j. 1898); ante, 498

(t) Shaw v. Markham, Peake's Rep. 165, (Chit. j. 498); Langdon v. Hulls, 5 Esp. Rep. 156, (Chit. j. 697); Peake's Law of Evid. 4th edit. 115; Phil. Evid. 3d edit. 895.

Shaw v. Markham, Peake's Rep. 165, (Chit. 498). Assumpsit against the defendant as indorser of two promissory notes drawn by Thomas Thomas. A witness of the name of Osborne swore that when Thomas dishonoured the note he wrote three letters to the defendant to inform him of it, and sent one to his living at Chester, another to his living at Yorkshire, and a third to the book-seller's where he usually lodged when in London. No notice had been given to the defendant to produce these letters, nor any copy kept. Erskine, for the defendant, objected to the evidence, contending that no notice having been given to produce these letters, the plaintiff could not give parol evidence of their contents. Bower, for the plaintiff, answered, that the letters themselves were nothing more than a notice, and that it was an established rule that no notice need be given to produce a no٠.....

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But it is now settled, that secondary evidence "may be given of a written I. In genenotice of the dishonour of a bill, upon which the action is brought, without Facts must notice to produce such writing (u)(1). So a copy of a letter, containing nobe proved, tice of the dishonour of a bill, is admissible, without notice to produce the and how. original(2), and proof that duplicate notices of the dishonour of a bill were Notice of

tice. Lord Kenyon said this objection could not be got over, and no evidence of the contents of the letter could be received without a notice to produce. Call it a notice or by any other name, it was still a letter, and must be proved as any other written paper.

Langdon v. Hulls, 5 Esp. Rep. 156, (Chit. j. Assumpsit on a bill of exchange drawn by the defendant in his own favour on one Pugh for 50'., two months after date, accepted by Pugh, and indorsed by the defendant to the plaintiff. The plaintiff having proved the ac-ceptance and hand-writing of the defendant to the indorsement, then proved that the bill, when due, was presented for payment at Pugh's house, and that it was not then paid. To prove the notice to the defendant as the drawer, of the non-payment by the acceptor, the plaintiff proved, by the notary's clerk who presented the bill, that he had left word at the defendant's house that the bill had not been paid, the plaintiff also proved that his attorney, by his directions, had written a letter to the defendant, informing him of the non-payment of the bill by It becoming necessary to prove this notice so given by the plaintiff's attorney by letter to the defendant, the attorney was called. No notice had been given to produce this letter, but he having stated that he had written such a letter, was proceeding to state the notice of the non-payment as mentioned in the letter, of which letter he had a copy, when it was object-

ed that evidence of the contents of the letter when neccould not be given, as no notice had been given essary and to produce it. It was answered, that the letter how provitself was a notice, and that it had been so de-ed. cided that notice to produce a notice was not necessary, and the case of Jory v. Orchard, 2 Bos. & P. 39, was cited as in point. It was contended by the defendant, that notice of the non-payment of the bill had not been given in due time, and that the letter had not been written until several days after the time for regular notice had expired, and it therefore became important to ascertain the exact time when it was written. Lord Ellenborough said that notice of the dishonour of a bill of exchange, by letter, was certainly good evidence, and had been so decided, but that there were other circumstances besides the mere fact of notice, which were necessary to give effect to it, so as to entitle the plaintiff to recover. These were the date and the time when it was sent, which was material, for notice of the dishonour was not sufficient unless given in the time required in the case of bills To ascertain the date of the of exchange. post-mark might be material, he was therefore of opinion that the plaintiff could not give evidence of the contents of the letter, not having given notice to produce it, and that upon that evidence the plaintiff could not recover. The plaintiff then proved a subsequent admission by the defendant that he had notice, and had a verdict, (u) Kine v. Beaumont, 3 Brod. & B. 288;

(1) Ludenberger v. Beall, 6 Wheat. 104. Faubalt v. Ely, 2 Devereux's Rep. 67. Leavitt v. Simes, 8 New-Hampshire Rep. 14.

The memorandum of a deceased cashier of a bank, who frequently notified indorsers of nonpayment of notes in the name of the acting notary of the bank, that on a certain day he sent notice by mail to an indorser, was held to be competent, and prima facie sufficient to charge the indorser. Nichola v. Goldsmith, 7 Wend. Rep. 160.

A protest of a bill of exchange by a curissier (an officer of a tribunal of commerce in France, authorized by the commercial code of that country to make protests,) will not be received in evidence without proof of the code. Chamoine v. Fowler, 3 Wena. Rep. 173.

The commercial code of France being written law, must be proved by the production of a printed book, admitted to be conformable to the official edition of the code published by the government. Id.

R seems that the same faith and credit would not be given to the protest of an officer unknown to the law merchant, that is given to the acts of a notary public, although the acts of such officer are in strict conformity to the laws of the country in which he resides, and such laws are duly proved; evidence beyond the production of the bill and protest would be required to show the authenticity of the act. Id.

After a lapse of ten years, a written memorandum, made at the time of the transaction, respecting notice of protest of a note, may be read in evidence, as a link in the chain of testimony. Hart v. Wilson, 2 Wend. Rep. 513. And see Holiday v. Martinett, 20 John. Rep. 168. Welch v. Bennett, 15 Mass. R. 380.

The memoranda of a deceased notary, of the demand and notice of non-payment of a promissory note, are prima facie evidence of the fact. Butler v. Wright, 2 Wend. Rep. 369. Farmer's Bank of Maryland v. Duvall, 7 Gill & John. 78, S. P.

In Louisiana, the act of 1821 (1 Moreau's Digest, 93) provides that the notary keep a record of his protests, signed by himself and two witnesses; and the act of 1827 authorizes the notary's certificate from this record to be given as evidence of notice to the indorsers. M'Donough v, Thompson, 11 Curry, 566. }

(2) { The letter of the cashier of a bank (the holder of the note sued on), addressed to and

and how. Notice of

I. In gene- written, and that a letter was delivered to the defendant upon the dishonour ral what of a bill, together with proof of notice to produce the letter so delivered, as Facts must posterious so dishonour is evidence, an default of production that the be proved, containing notice of dishonour, is evidence, on default of production, that the defendant had notice (x); and proof of a letter from the defendant, in which he acknowledged the receipt of a letter from the holder, of a named date Dishonour, (being the proper time for giving notice), but without referring to its contents, when nec-would afford presumptive evidence of the receipt by the party of a regular essary and how prove notice(y). If a notice to produce be given, it should specify \*particularly the intended instrument(z). Where the witness who forwarded the letter [ \*659 ] cannot recollect the date or time when he did so, then a notice to produce such letter, bearing the proper date, appears to be particularly requisite(a).

If it should become necessary to prove notice to a party of the dishonour

7 Moore, 112, (Chit. j. 1143); Roberts v. Bradshaw, 1 Stark. Rep. 29, (Chit. j. 933). Both the courts having consulted together on the point. Ackland v. Pearce, 2 Campb. 601,

(Chit. j. 824); Phil. Evid. 3d edit. 395. Ackland v. Pearce, 2 Campb. 601, (Chit. j. 824). Action against drawer of a bill. The witness called to prove notice of the dishonour of the bill, said, that on the day it became due, he lest a written notice of its having been disbonoured at the defendant's house. Le Blanc, J. after argument, ruled, that the secondary evidence of the contents of this notice might be given without a notice to produce it, and compared it to a notice to quit. If the document be in the possession of the banker of the plaintiff, he is to be considered as the agent of the plaintiff, and notice to produce, served on plaintiff, is sufficient, without subprenaing the bank-Burton v. Payne, 2 Car. & P. 520, (Chit. j. 1316).

(x) Roberts v. Bradsbaw, 1 Stark. Rep. 28, (Chit. j. 983); Hetherington v. Kemp, 4 Campb.

194, (Chit. j. 932).

Roberts v. Bradshaw, 1 Stark. Rep. 28, (Ch. . 933). Action on a bill of exchange by the indorsee against the drawer. In order to prove notice of the dishonour, the counsel for the plaintiff called a clerk of the plaintiff's, who stated, that on the 2d of February, the day on which the bill had been dishonoured, his master gave him two papers to compare with each other, one of which the witness now produced, and purported to be a notice of the dishonour of the bill in question. Topping, for the defendant, objected, that this could not be read without proof of notice to produce that which had been so delivered; but Lord Ellenborough, C. J. was of opinion, that a letter acquainting a party with the dishonour of a bill was in the nature of a notice, and that it was unnecessary to prove a notice to produce such a letter. Upon further examination the witness stated, that upon the day after he had compared the two papers, he carried a letter from the plaintiff to

the defendant, but did not know the contents. Lord Ellenborough was of opinion that this was not sufficient evidence. The plaintiff then proved the service of a notice on the defendant, calling upon him to produce a letter from the plaintiff, giving him notice of the dishonour of the bill mentioned in the declaration. The Attorney-General contended that this was sufficient evidence to go to a jury, that the original had been sent, and that it lay upon the defendant to shew, by producing it, that the letter proved to have been delivered on the 3d of February was nothing more than an invitation to dinner, or something else equally unconnected with the dishonour of the bill in question. Topping, "No answer has been given to the objection; a notice is of no avail to warrant the reading of a copy, unless the party be proved to have been in possession of the original; on the contrary, the notice itself assumes the fact of possession." Lord Ellenborough, C. J. "I think, certainly, that there is a looseness in this evidence, and you may afterwards move the court upon it. Supposing, however, that the paper delivered had been a perfect blank, or contained matter wholly unconnected with the dishonour of the bill, you might have produced it, and shewn the fact to be so, since it is evident what letter was the object of the plaintiff's notice. This is the first time the identity of such a letter has been so minutely scrutinized, and the proof might, in many instances, be attended with great difficulty, as where letters, after being written, are placed upon the table, it might afterwards be exceedingly difficult to identify them with those afterwards put into the post-office " Verdict for the plaintiff. In the ensuing Term the court refused a rule nisi for a new trial.

(y) Hetherington v. Kemp, 4 Campb. 194, (Chit. j. 932).

(z) France v. Lucy, Ry. & Mood. 341; post, 606, note (n).

(a) See Langdon r. Hulls, 5 Esp. Rep. 156, (Chit. j. 697); ante, 656, in notes.

notifying the indorser of the note that it was held unpaid and that he was held liable for its payment, was found in the letter book of the bank, with this entry opposite; "Put into the post office at A." on the day of its maturity. The cashier was dead, and the defendant admitted that the entry was in his hand-writing. Held this evidence was not sufficient to authorize the jury to find that payment had been demanded of the maker. Farmer's Bank of Maryland v. Duvall, 7 Gill & John. 78. full i

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In general, on proof of notice of the dishonour of a bill or note having Notice by been given, it will suffice to shew, that a letter containing information of the Post bow fact, and properly directed, was in due time put in the proper post-office (f), or left at the defendant's house (g). In civil cases, the post-mark upon the letter seems to be evidence of the time and place when it was put into the post-office(h); and sometimes a reference to the post-mark on a letter misdated will establish the real time of sending notice of the dishonour. case, although the post-mark is not necessarily to be assumed to be genuine, and the best evidence of its authenticity would be the testimony of the very person who impressed the mark, yet it should seem that it may be proved by any post-master, or any person in the habit of receiving letters by that post(i). Proof of having forwarded a notice or other paper, properly directed, by the post, has generally been considered in mercantile transactions to be sufficient proof of notice to the party to whom it was directed, and this on a principle of general convenience; a question has, however, frequently arisen as to the requisite proof of the fact of sending by the post. It must be proved precisely, and not lest to inference, at what time and in what manner the letter was sent. Therefore, where the witness swore that it was given in two or three days, the plaintiff was nonsuited(j); and where the holder's clerk, who copied the letter containing the notice, said that the letter was put into the post on Tuesday morning, but he had no recollection whether it was done by himself or another clerk, this was held insufficient proof of notice (k). In one case (l), where it became necessary to prove that a licence to trade had been sent by the plaintiff to A. B., it was proved to be the \*invariable | \*659 ] course of the plaintiff's office, that a clerk who copies the licence sends it off by the post, and writes on the copy a memorandum of his having done so; a copy of the licence in question was produced from the plaintiff's letterbook(m), in the hand-writing of a deceased clerk, who had written a memorandum, stating that the original had been sent to A. B.; and a witness, acquainted with the plaintiff's mode of transacting business, swore that he had no doubt that the original had been sent according to the statement in the

(d) Afflalo v. Fourdrinier, Mood. & M. 835; 6 Bing. 306, (Chit. j. 1468).
(e) Bevans v. Waters, Mood. & M. 235.

(g) Stedman v. Gooch, 1 Esp. Rep. 5, (Ch. 508); Jones v. Marsh, 4 T. R. 465, (Chit.

(i) Abbey v. Lill, 5 Bing. 299.

(k) Hawkes v. Salter, 4 Bing. 715; 1 Moore & P. 750, (Chit. j. 1387).

(1) Hagedorn v. Reed, 3 Campb. 379; 1 Mau. & S. 567, S. C. And see Poole v. Dicas, 1 Bing. N. C. 649; and Doe d. Patteshall v. Turford, 3 B. & Ad. 890; ante, 655, note (c),

(m) See Sturge v. Buchanan, 2 Perry & Dav. 573.

<sup>(</sup>b) Kine v. Beaumont, 3 Brod. & Bing, 288; 7 Moore, 112, (Chit. j. 1148); Nauze v. Palmer, Mood. & M. 81.

<sup>(</sup>c) Id. ibid.; Afflalo v. Fourdrinier, Mood. & M. 835; S. P. 6 Bing. 306, (Chit. j. 1468).

<sup>(</sup>f) Saunderson v. Judge, 2 Hen. Bla. 509; Scott v. Lifford, 9 East, 847; 1 Campb. 246, (Chit. j. 747, 749); ante, 656, note (p).

<sup>(</sup>h) Archangel v. Thompson, 2 Campb. 623.

<sup>(</sup>j) Per Lord Ellenborough, in Lawson v. Sherwood, 1 Stark. Rep. 814, (Chit. j. 959); ante, 480, note (p).

and how. Notice of ed.

I. In gone- memorandum; this evidence was held to be sufficient. In another case reral what lating to a bill(n), where the question was whether the defendant had received be proved, due notice of the dishonour of a bill of exchange, it was proved, that on the day after the bill became due, the plaintiff wrote a letter addressed to the defendant, stating that it had been dishonoured; and which letter was put Dishonour, down on a table, where, according to the usage of the counting-house, letters, when nec-essary and for post were always deposited, and that a porter carried them from thence how prove to the post-office; but the porter was not called, and there was no evidence as to what had become of the letter after it was put down upon the table; and a notice to produce the letter had been served upon the defendant; and it was contended for the plaintiff, that this was good prima facie evidence that the letter had been sent by the post; but Lord Ellenborough held, that some evidence ought to be given that the letter had been taken from the table in the counting-house and put into the post-office; if the porter had been called, and if he had said, that although he had no recollection of this particular letter, he invariably carried to the post-office all letters found upon the table, this might have been sufficient; but it was not sufficient to give such general evidence of the course of business in the plaintiff's counting-house(1). In general all the persons through whose hands the letter containing the notice, and the last of whom put the same in the post-office, must be called as witnesses; and the evidence of the practice of a particular private countinghouse, leaving the fact of putting the letter into the post-office to conjecture, will not suffice (o)(2).

> (n) Hetherington v. Kemp, 4 Campb. 193, (Chit. j. 939); see ante, 657, note (y); Phil. on Evid. 3d edit. 390.

> (o) Toosey v. Williams, Mood. & M. 123. Where the practice of the defendant's counting-house was, that the clerk, after copying a letter into the letter-book, returned it to the defendant to seal, and that he or another clerk carried all letters to the post office, but there

was no particular place of deposit in the office for such letters, and neither of the clerks had any recollection of the particular letter offered in evidence, though they swore that they uniformly carried all letters given them to carry; held, that the entry in the clerk's writing in the letter-book of a letter to the plaintiff could not be read as proof of such letter having been sent to the plaintiff. Lord Tenterden, C. J. "I

(1) Although the protest of a notary public is not evidence in the case of promissory notes and inland bills of exchange, yet the books of a notary public proved to have been regularly kept, are admissible in evidence after his death, to prove a demand of payment, and notice of non-payment, of a promissory note. Nicholas v. Webb, 8 Wheat, 326. The register of a deceased notary is not evidence of demand and notice on a promissory note, where the entries were made by his clerk, who is still alive; though he be gone out of the jurisdiction of the court, and on diligent inquiry, cannot be found. Wilbur v. Selden, 6 Cowen, 162.

The protest of a deceased notary and a register of protests kept by him in which the notes and

memoranda in his hand-writing, proved by a witness, stated that the notary had made diligent search and inquiries after the maker of a note in the city of New York, (where the note was dated), in order to demand payment of him, and that he could not be found, &c. and that notice of non-payment was put in the post-office: Held, that this was sufficient evidence of due diligence as to the demand of payment of the maker of the note, but not of notice to the indorser, as the note or memorandum of the notary did not state where the indorser resided nor to what place the notice to him was directed: But it seems that if the notary had stated that the indorser after diligent search and inquiry could not be found, that would have been sufficient to entitle the plaintiff to recover against the indorser. Holliday v. Martinet, 20 Johns. 168.

The learned reader will find the subject of notice of the dishonor of bills of exchange and promissory notes, ably and fully discussed in the following cases. Brent's Ex'rs. v. Bank of the Metropolis, 1 Peters, 89. Bank of Columbia v. Lawrence, Id. 578. Fullerton v. Bank of the United States, Id. 604, 616. Bank of Washington v. Triplett, Id. 25. Williams v. Bank of the United States, 2 Peters, 96. Bank of the United States v. Corcoran, Id. 221. Bank of the United States v. Carneal, Id. 543. Bank of the United States v. Smith, 11 Wheat 171. Mills v. Bank of the United States, Id. 431. United States v. Barker, 12 Wheat. 559. Mead v. Engs, 5 Cowen, 308.

(2) { As to what admissions and acts of the defendant are proper to go to the jury as evidence that he has received due notice of dishonour. See Brush r. Hayes, 1 Irish Law Rep. 327, Ledlie v. Lockhart, Id S9; Bronnell r. Bonney, 21 Leg. Obs. 239; 6 Jurist, 6. S. C.; Tebbetts r. Dowd, 28 Wend. 829. }

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It suffices, we have seen, to prove that a verbal notice of the dishonour I. In genewas left on the proper day, and within reasonable hours, or even to shew ral what that an attempt to leave such notice was made, but that there was no person be proved, at the proper place to receive the the same notice (p).

and how.

The plaintiff, however, may prove facts to excuse his neglect to make a verbal Nodue presentment or a protest in the case of a foreign bill, or to give notice tice. of the non-acceptance or non-payment, as that the defendant \*when drawer, Excuse of had no effects in the hands of the drawee, from the time it was drawn until it Notice. became due(q); and proof that the drawer made the bill payable at his own [ \*660] house, affords presumptive evidence that it was drawn for his accommoda-A bank- Notice of tion, and prima facie dispenses with proof of a regular notice (r). er's ledger, produced by one of the clerks to prove how it was kept with when exthe customer, is receivable in evidence, to shew that a customer had no funds in the banker's hands; for, per Best, C. J., the inconvenience of call- cused. ing all the clerks of the house who made the different entries would be seriously felt, and without the book it would be impossible to prove that the party had no money in the house; to prove the negative, therefore, the book to which all the clerks usually referred was sufficient, although it might not be admissible to prove the affirmative(s).

Proof of

So proof of a payment of part, or a promise to pay after full notice of the Promise or laches of the holder, we have seen, dispenses with the necessity for proof in Part payan action against the drawer of a due presentment, protest, and notice, and has been considered as admitting all these facts, as well the right of the holder to sue(t); and the like evidence suffices in an action against an indors-But it has been considered, that admitting a drawer of a bill may, by circumstances, impliedly waive his right of defence founded on the laches of the holder, yet it must be proved that an indorser has expressly waived it(x). In these cases it is to be left to the jury to say whether, under the

have great reluctance in refusing this evidence, but am bound to do it. The practice here differs from that in most counting-houses. If the duty of the clerk had been to see the letters he bad copied carried to the post-office, it might have done; but here there is something else to be done afterwards, and that by the defendant. There is not enough shown to to render the letter admissible." Verdict for the plaintiff. See Hagedorn v. Reed, 3 Campb. 379; 1 M. & Sel. 567, S. C.; Hetherington v. Kemp, 4 Campb. 193, (Chit. j.

(p) Ante, 471, 472.

(q) Ante, 436, 437; and generally, 433 to 455.

(r) Sharp v. Builey, 9 Bar. & Cress. 44; 4 Man. & Ry. 4, (Chit. j. 1416); anle, 437.

(s) Furness v. Cope, 5 Bing. 114.

(t) Anie, 499 to 507, where the cases establishing and qualifying this rule are collected; and see Greenway v. Hindley, 4 Campb. 52, (Chit j. 914); Lundie v. Robertson, 7 East, 281, (Chit. j. 724); Potter v. Rayworth, 13 East, 417, (Chit. j. 826); Stark. on Evid. part v. 272. An agreement between the drawer and first indorser, stating the bill to be then overdue and dishonoured, and stipulating for payment by weekly instalments, admits notice of the dishonour; Gunson v. Metz, 1 Bar. &

Cres. 193; 2 Dow. & Ry. 334, (Chit. j. 1168).

(u) Taylor v. Jones, 2 Campb. 105.

(x) Taylor v. Jones, 2 Campb. 105, (Chit. j. 771). Action against the defendant as indorser of a promissory note, due May 5th, 1805. The plaintiff proved the defendant's indorsement, and also that in the year 1807, the defendant being requested to pay the note, he promised that he would, but prayed for further time. There was no evidence of the presentment of the note to the maker, or of any notice of its non-payment being given to the defendant; nor did it appear that when the defendant so promised to pay, he knew whether any application for payment had been made to the maker. Gazelee, for the defendant, contended, that the subsequent promise did not dispense with proof of the presentment and no-tice, unless made with full knowledge of the laches of the holder. In the cases nitherto decided upon this subject something appeared that might be considered a waiver of any irregularity with regard to the bill or note, which could not be inferred from a mere promise to pay, made at a time when the party, without being aware of it, was discharged from his liability. But Bayley, J. held, that where a party to a bill or note, knowing it to be due, and knowing that he was entitled to have it presented when

be proved,

I. In gene- circumstances, the defendant had notice at the time of his promise or apral what plication, that there had been no due presentment, or that the holder had otherwise been guilty of negligence (y). So proof that the drawer of a bill knew two days after it was due that it was unpaid and in the hands of a particular indorsee, and objected to pay it on the ground of fraud in obtaining it, and did not then set up any defence on the ground of laches of the holder, was considered as sufficient evidence to go to the jury that he had received regular notice of the dishonour(z).

\*661] II. Evidence for Defendant

### \*II. Evidence for Defendant in general.

WITH respect to the evidence on the part of the defendant, it must necin general. essarily depend on the circumstances of each case.

Forgery(a).

Where a party defends an action on a bill of exchange on the ground that his acceptance has been forged, it is not admissible evidence that the party who negotiated such bill had been guilty of other forgeries (b). But in an action by the indorsee of a bill against the acceptor, where the defence was that the bill was a forgery, and the defendant had represented it to be so to certain bankers who were applied to to discount it for a prior holder, a letter written by the bankers stating what the defendant had said, and minutely entering into the circumstances, was held to be properly received in evidence, preliminary to the observation which was made upon it by the holder(c). We have seen, that in an action against the defendant as acceptor of a bill, the indorsement on which has been forged, and under which the plaintiff claims, the defendant is at liberty to prove that the indorsement was not made by the person entitled to make it(d).

Defect in Stamp(e).

If the defendant would wish to establish that the stamp is insufficient, he should be prepared to produce and point to the particular provision of a printed copy of the Stamp Act on which he relies; and if the objection be, that a bill, purporting to have been made abroad, was made in England, and therefore required a stamp, it will not suffice merely to prove that the drawer was in England at the time the bill bears date, but the fact must be established by more positive evidence(f). And where a bill or note improperly stamped is produced in evidence, the practice in general is, that if such bill or note has been put in and read, an objection as to the want of a pro-

due to the acceptor or maker, and to receive notice of its dishonour, promises to pay it, this is presumptive evidence of the presentment and notice, and he is bound by the promise so made. Verdict for plaintiff.

(x) Borradaile v. Lowe, 4 Taunt. 93, (Ch. j. 835); ante, 547, note (g).

(y) Hopley v. Dufresne, 15 East, 275, (Ch. j. 856); Holford v. Wilson, 1 Taunt. 15, (Chit.

(2) Wilkins v. Jadis, 1 Mood. & Rob. 41; 2 Bar. & Adol. 188, (Chit. j. 1537).
(a) See ante, 260 to 262, 426 to 432.

have there seen that although in general a banker who pays a forged check or acceptance of his customer must bear the loss, yet that it is other-wise where the customer has been guilty of neglect. The same principle was recognized in a

very late case, where it was held that a holder of bank stock might, by negligence, disable himself from recovering against the Bank of England stock which had been transferred from his account under a forged power of attorney; Coles v. Bank of England, T. T. 1840, Q. B. 4 Jurist,

(b) Viney v. Barss, 1 Esp. 298; Balcetti v. Serani, Peake's Rep. 142; ante, 631, note(d); Griffits v. Payne, M. T. 1839, Q. B. 3 Per. & Dav. 107.

(c) Miers v. Bowler, 2 Jurist, 95, Q. B.

(d) See cases, ante, 261, note(p).

(e) See generally as to stamps on bills and notes, ante, 102 to 125.

(f) Abraham r. Dubois, 4 Campb. 269, (Chit. j. 946).

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per stamp cannot afterwards be taken. But where an instrument which is II. Evidefective for want of a stainp requires extrinsic evidence to shew the defect, dence for Defendant as in the case of a post-dated check, the instrument may be read, and the in general. ground of objection afterwards proved as part of the defendant's case(g).

If the defendant relies on the insufficiency or illegality of the considera-Insuffition, he must be prepared with evidence to prove the circumstances under ciency or Illegality which the bill was drawn or negotiated(1).

As between the original parties to the hill or note, the want of conside- ration or ration alone will be a sufficient defence(i); but as against a third party the  $\binom{Contract}{(h)}$ . defendant must, as we have already seen, go further, and \*impeach the plain- [\*662] tiff's title, before the latter can even be called upon to prove the circumstances under which he became the holder of the instrument (j)(2).

in Consid-

When, however, the defendant has proved an illegality in the concoction Illegality of the bill or note, or in the previous transfer of it, then the plaintiff must, eration(k). in reply, prove himself a bona fide holder for value; for though a party who takes a bill or note bona fide, and without notice of the original illegality in the consideration, is entitled to recover thereon, yet the onus of proving that he so took it lies upon him(l). But we have seen that the plaintiff by replying, to a plea of gaming, that he took the bill or note without notice of the illegality, and for a valuable consideration, does not admit the illegal making of the instrument so as to call upon him in the first instance to prove that he took it for value, and without notice(m). And where the defendant pleaded that a promissory note on which the plaintiff declared was made by the defendant in December, 1833, in pursuance of an agreement thereby to secure to J. A. money lost to him at play in July 1833, it was held, that this plea was not supported by evidence that in July, 1833, the defendant gave J. A. a bill of exchange, payable six months after date, for 871., lost at play, which bill J. A. indorsed to V. K., and that in December, 1833, the defendant substituted for this bill of exchange a promissory note for 100l., bearing date September, 1833, and payable to the order of V. K. six months after date, being the note on which the plaintiff sued(n). And if in an action by the indorsee of a bill of exchange against the acceptor the defendant plead, first, that the bill was accepted for a debt from which he was discharged under the Insolvent Debtors' Act, of which the plaintiff at the time of the indorsement had notice(o), and secondly, that the bill was accepted to induce the drawer not to oppose the discharge of the defendant under that act(p), of which at the time of the indersement the plaintiff also had notice,

(h) As to the consideration, see ante, 69 to 101, and 648 to 652.

(i) In an action by the payee against the maker of a promissory note, on an issue whether consideration was given by the plaintiff, the letters of the plaintiff to a third person, shewing that he was pressed for money, are evidence for the defendant to prove that the note was made for the plaintiff's accommodation; Homan v. Thompson, 6 Car. & P. 717, per Parke, B.;

(j) See antc, 648.

(k) See ante, 81 to 97; 5 & 6 Will. 4, c 41. (1) See Wyatt r. Campbell, 1 Mood. & M.

80, (Chit. j. 1352); 5 & 6 Will. 4, c. 41.

(m) Edmunds v. Groves, 2 M. & W. 642; ante, 650, note (q).

(n) Boulter v. Coghlan, 1 Bing. N. C. 640; 1 Scott, 588; 1 Hodges, 145, S. C.

(o) See post, Part II. Ch. VIII.

(p) See anle, 85, note (g); and post, Part H. Ch. VIII.

(2) See post, 824, (66).

<sup>(</sup>g) Field v. Woods, 7 Ad. Ellis, 114; 2 see the other points in this case, unte, 70, Nev. & P. 117, S. C. When check must be note (m). stamped, ante, 106, 118.

<sup>(1)</sup> In debt on promissory note, defendant pleads generally that it was without consideration; on which plaintiff takes issue; the note is in itself evidence of consideration. McMahon r. Crockett, i Minor's Alabania Rep. 362.

II. Evidence for Defendant in general.

and the plaintiff in his replication deny the notice stated in each of the pleas, the onus of proving that the plaintiff had notice is on the defendant (q).

tion.

As between the original parties to the bill, we have seen(r), that a failure Failure of consideration may be shewn as a defence. In an action against the acceptor of a bill given for the price of a horse warranted sound, the breach of warranty, if the horse were returned forthwith, will afford a complete de-But it has been held, that if the consideration has only partially failed, and the exact amount to be deducted is unliquidated, the defendant cannot go into evidence in reduction of damages, but is driven to his cross action(t); and a party who has given his promissory note as the stipulated price of a picture, cannot give the inadequacy of the consideration in evidence with a view to reduce the damages, though he may give it in evidence as a circumstance indicatory of fraud, in order to defeat the contract altogether (u). And we have seen, that if a note be payable on demand, parol [ \*663 ] evidence \*cannot be given of an agreement to wait for payment till after the death of the testator (v).

Statements of prior Holder, when Evidence for Defendant.

In an action at the suit of an indorsee against the maker of a promissory note, where the defence was usury in its creation, it was held, that letters from the payee to the maker, stating the consideration as between them, if shewn to have been cotemporaneous with the making of the note, and whilst in the hands of the payee, were admissible evidence to prove the usury, without calling the payee himself (w); and statements, when part of the illegal transaction itself, and made at the same time by the very parties to it, may perhaps be admissible in evidence against a subsequent holder as part of the res gesta(x). But in a subsequent case, evidence of what a prior

(q) Warner v. Haines, 6 Car. & P. 666.

(r) Ante, 69, 70, 79.

(s) Lewis r. Cosgrave, 2 Taunt 2, (Chit. j. 771). The horse must be returned; Archer v. Bamfield, 3 Stark. Rep. 175, (Chit. j. 1162).

(t) See the cases, ante, 76 to 79.

(u) Soloman r. Turner, 1 Stark. Rep. 51; ante, 79.

(v) Woodbridge v Spooner, 3 B. & Ald. 233;

1 Chit. Rep. 661, (Chit. j 1073).

(w) Kent r. Lowen, 1 Campb. 177, 180 (d), (Chit. j. 746); S. P. in Walsh v. Stockdale, coram Abbott, J. sittings at Guildhall, after T. T. 1818; Pocock v. Billings, 2 Bing. 269; Ry.
& Mood 127, (Chit. j. 1225); see Coster v. Merest, 7 Moore, 87.

Kent r. Lowen, 1 Campb. 177, 180 (d). Assumpsit against the defendant as maker of a promissory note for 1531. 15s. dated 9th August, 1806, at ninety days after date, payable to Messrs. Coates and Co., indorsed by them to J. Watson, and indorsed by him to the plaintiff. The making of the note, and the several indorsements being proved, the Attorney-General opened, as a defence to the action, that the note had been given under an usurious agreement between the defendant and Coates and Co. To prove this, he offered in evidence certain letters from Coates and Co. to the defendant, wherein they proposed to accommodate him with their acceptance at three months, upon receiving his note for the same sum at ninety days, together with two-and-a-half per cent. commission. Parke objected to the admissibility of this evidence.

He allowed, that in an action against the acceptor of a bill, the drawer or indorser may be called to prove that there was usury in its original concoction, but there the evidence was giren upon oath, and an opportunity was afforded to cross-examine the witnesses. Here these letters of Coates and Co. were not upon oath, and might be collusively written, with a view to defeat the fair claim of the plaintiff. Lord Ellenborough ruled, that it was first necessary to prove by the post-mark, or otherwise, that the letters were contemporaneous with the making of the note, and that after that they would be evidence of an act done by Coates and Co. who were the payees of the note, and through whom the plaintiff made title. Whether the act was proved by an oral declaration, or by other evidence, his lordship said made no difference. The postmark being examined, did show the letters to have been written just before the date of the note, and they were read in evidence accordingly; and Lord Ellenborough told the jury, that if they believed that the note was made on the terms held out in the letters, they must find for the defendant, who had a verdict accordingly; and on a motion for a new trial, it was contended that the letters of the payee had been improperly admitted, but the court being of opinion that they were legal evidence to prove the usury as against the indorser; the verdict for the defendant was confirmed. But see post, 664, note (c).

(x) See observations of Lord Tenterden and Parke, J. in Beauchamp v. Parry, 1 Bar. & 11

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holder had said against the validity of a bill whilst he was the holder, was re- II. Evijected, because such holder was living, and ought to have been called as a dence for witness(y); and it is now settled, that in general the letters of an indorser in general. (and at all events those written after he has parted with the bill) are not ad-Statements missible in evidence to impeach the indorsee's title(z), he being an indorsee of prior \*before the bill became due; because such subsequent indorsee or holder Holder. does not sue as the trustee of the preceding one, nor stand on his title, but when Evidence for on that acquired by the bon i fide taking of the bill(a). And where in an Defendant. action by the indorsee against the maker of a note payable with interest on [\*664] demand, the plaintiff proved that he gave value for it, and the defendant tendered evidence of declarations made by the payee when the note was in his possession, that he the payee gave no value for it; it was held, that this evi-

Adol. 91, (Chit. j. 1501); see post, 664, note missible on two grounds, first, as declarations

(y) Per Gazelec, J. in Hedger v. Horton, 3 Car. & P. 179, (Chit. j. 1363); and sec Costar v. Symons, 1 Car. & P. 148, (Chit. j. 1204); Barough v. White, 4 Bar. & Cres. 325; 6 Dow. & Ry. 379, (Chit. j. 1261); and Spargo v. Brown, 9 Bar. & Cres. 935; Healey r. Jacobs, 2 Car. & P 616, (Chit. j. 1334); Beauchamp r. Parry, 1 Bar. & Adol 8), (Chit. j. 1591); Phillips v. Cole, 2 Perry & Dav. 288, next

Whitehouse v. Hickman, 2 Law J. 59, Ch. Ca. Nov. 24, 1823. On a motion after the coming in of the answer for an injunction to restrain the defendant (the holder of a promissory note) from proceeding at law against the plaintiff (the maker of the note), the plaintiff will not be allowed to read affidavits in order to prove circumstances of conduct, and acts of a third party (the original payee of the note) which are necessary to found the equity of the plaintiff, and as to which the defendant in his answer neither admitting nor denving them, says that he can give no information.

(z) Clipsam v. O'Brien, 1 Esp. Rep. 10, (Chit. j. 508).

Phillips v. Cole, 2 Perry & Day 288. sumpsit on a promissory note, indersee against maker. Plea, that there was no consideration for the defendant's making and indorsing the note, that it was indorsed in blank and delivered to one Williams to get discounted for the defendant, that Williams did not get the same discounted, and thereupon defendant requested him to return the note; but contrary to good faith Williams fraudulently, and without the knowledge or consent of the defendant, procured one Alves to indorse and deliver the note to the plaintiff, and who received the same without giving consideration, well knowing the fraudulent and colorable transfer and indersement. The defendant proposed proving the above facts by production of two letters written by Alves whilst he was holder of the note, Alves not appearing when called on his subprena. The admission of the letters was objected to by plaintiff and refused by the learned judge (Littledale, J.), and a verdict passed for the plaintiff. The court refused a rule for a new

trial on the ground of improper rejection of evi-Lord Denman delivered the judgment of the court, " It was argued that the letters were ad-

made not only against the interest but in acknowledgment of the fraud of the party making them; and secondly, as made by one under whom the plaintiff being a subsequent holder claimed. With regard to the first of these it is clear that declarations of third persons alive in the absence of any community of interest are not to be received to affect the title or interest of other persons merely because they are against the interests of those who made them. The general rule of law, that the living witness is to be examined on oath is not subject to any exception so wide; and we are of opinion that the circumstance of fraud being acknowledged introduces no difference in principle. That acknowledgment would certainly make the evidence, if receivable, more weighty, but only upon the ground that it is more strongly against the interest of the party than any merely pecuniary consideration could make it-the ground of its admission would be the same in either case; and the same objection applies in boththe want of community of interest. The second ground, if it could have been established in fact, would have made the letters admissible; but when they were tendered no evidence had been offered which either directly or indirectly connected the plaintiff with Alves; he had a title of his own as indorsee and might have an indefeasibly good title, though Alres had none at all; nothing like want of consideration, or the having taken the note overdue, was shewn: under these circumstances we hardly want an authority for holding that the plaintiff's title is not to be affected by the declarations of Alves, who might have been called; but Barough v White, 4 Bar. & Cres. 325, and Beauchamp e. Parry, 1 B. & Ad. 89, infra, are among others in point. It was stated, that the letters themselves would have disclosed fraud and brought the plaintiff into privity with the writer; but whatever is a preliminary necessary to the admissibility of evidence must be proved aliunde, before such evidence is admitted. The letters were therefore rightly rejected, and the rule for a new trial must be discharged."

(a) Shaw r. Broom, 4 Dowl. & Ry. 731, (Chit. j. 1220); Smith v. De Witts, Ry. & Moo. C. N. P. 212; 6 Dowl. & Ry. 120, 8. C., but not S. P., (Chit. j. 1244, 1253); Phillips r. Cole, 2 Porry & Day. 288; ante, 663, note (z).

II. Evidence for Defendant in general. of prior Holder, when Evidence for

dence was inadmissible, as the plaintiff could not be identified with the payee, and the note could not be treated as overdue at the time of the indorsement(b)(1). And in a recent case it was decided, that in an action by the Statements indorsee against the maker of a promissory note, the declarations of the payee (not uttered at the time of making the note) are not evidence to prove that the consideration for the note was money lost at play, unless it be previously shewn that the indorsee is identified in interest with the payee, as by **Defendant.** having taken the note after it was due, or without any consideration (c)(2). [\* 665] A fortiori statement of third persons are \*inadmissible(d). And where in an action by the holder against the indorsees of a bill of exchange, who indorsed it for the accommodation of the drawer, the latter proved that he had applied to the plaintiff's stepfather to get the bill discounted, and that he did so, and gave him, the drawer, 321. minus the amount of the bill, although the discount at 5l. per cent. was 1l. 19s. only, it was held, that a conversation between the drawer and the party who discounted the bill was not admissible in evidence on the part of the defendants, it not being shewn that such party was the plaintiff 's agent(e). But if it be shewn that the plaintiff is suing for the benefit of a third person, what that person has said will be admissible in evidence (f). And in an action by the indorsee of a bill against the acceptor, the declaration of the drawer is admissible in evidence to shew that the bill was obtained by fraud, if it be shewn that plaintiff was in any way privy to the fraud(g). However, a declaration by a holder under

> (b) Barough v. White, 4 Bar. & Cres. 325; 6 Dowl. & Ry. 379, (Chit. j. 1261).

(c) Beauchamp v. Parry, 1 Bar. & Adol. 89, (Chit. j. 1501). Per Lord Tenterden, C. J. "The rule for a new trial must be made absolute. It occurred to me at the trial, that the declarations made by Wade were admissible in evidence as part of the res gesta. On further consideration, I think they were not evidence to affect Beauchamp. He does not stand on the title of the person who made the declarations. Wade is not identified with the plaintiff in point of interest. His declarations are no more than assertions, not upon oath, of a particular fact, which was capable of proof by testimony upon oath. Wade might have been called. If the indorsement had been made to the plaintiff after the note had become due, the case would have been different." Bayley, J. "The indorsee of a bill or note cannot be affected by the declaration of the payee, unless it be shewn that he is identified in interest with him, as if he took it without consideration, or after it was due. There was no such proof in this case." Per Parke, J. "The plaintiff does not claim by the title of the indorser of the note. He has a title of his own as indorsee. He ought not therefore to be affected by the declaration of J. 30, Ch. Ca. Nov. 21, 1826. Even if evi-

the indorser. If the declarations were part of the illegal transaction itself, as in Kent v. Lowen, 1 Campb. 177, where the evidence given was the declaration of one of the parties, made at the time of the contract, the case might be different. There the evidence admitted was proof of the contract. The rule for a new trial must be made absolute. Rule absolute. See Phillips v. Cole, 2 Perry & Dav. 288; ante, 663, note (z).

(d) Healy v. Jacobs, 2 Car. & P. 616, (Chit. j. 1334). The payee was absent when the statements were made.

(e) Basset v. Dodgin, 3 Moore & S. 417;

10 Bing. 40, S. C.
(f) Welstead v. Levy, 1 Mood. & Rob. 138, (Chit. j. 1567); post, 675, note (e). See post, 824, (67).

(g) Peckham v. Potter, 1 Car. & P. 232. In a suit instituted against A. and B. to have bills of exchange, which have been negotiated from A. to B., delivered up, on the ground that it was a fraud in A. to negotiate them, and that B was a party to the fraud; the admissions of A., while the bills were in his possession, that he was not entitled to negotiate them, was admissible in evidence; Lee v. Harrison, 5 Law

{ But where the note was over-duc at the time it was indorsed, in an action by the indorsee against the maker, the latter, to show payment, was permitted to prove the declarations of the

payee, made before the indorsement. Hatch v. Dennis, 1 Fairf. 244. \( (2) The admissions of the payee of a note while owner thereof, cannot be given in evidence in an action against the maker of a subsequent indorser. Bristol v. Dann, 12 Wend. Rep. 142.

<sup>(1)</sup> In action by the indersee against the maker of a promissory note, which was sold by the payee at a rate of interest exceeding seven per cent. per annum, evidence of the declarations of the payee, who is dead, that the note was an accommodation note lent to him by the maker, thus rendering the negotiation which gave vitality to the note usurious, is not admissible. Kent v. Walton, 7 Wend. Rep. 256.

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whose indorsement the plaintiff claims, that after the bill was due the amount II. Eviwas settled between himself and the acceptor, is not evidence for the latter, dence for for the helder may be called by And where Animals and bill to P. and Defendant for the holder may be called h). And where A. indorsed a bill to B. as a in general. security for a running account, and after the bill became due, B. indorsed it Statements to C., an entry or declaration by B., as to the state of the accounts, is not of prior evidence for A., unless at least it was cotemporary with the indorsement to Holder, But where a bill of exchange has been given by the acceptor for the when Evidence for accommodation of the drawer, and whilst it was in the hands of the latter, Defendant. he made a declaration that it was an accommodation bill, and that the acceptor had received no value; and long after the bill was due, the drawer indorsed the bill to the plaintiff, all accounts between the drawer and acceptor being then closed, it was held, the declaration of the drawer was admissible to affect the plaintiff's title, on the ground that what would be a good defence against the drawer, would be equally a good defence against the indorser in this case (j).

Though we have seen that it is incumbent on the plaintiff in general to Evidence prove a due presentment and notice of the dishonour in support of his action to prove against the drawer or indorser of a bill, yet in doubtful cases it may be necessary for the defendant to be prepared with evidence to negative the plaintiff's prim? facie proof; and we have seen, that where the holder of a bill upon its being dishonoured received part payment, and for the residue ano ther bill, drawn and accepted by persons not parties to the original bill, and such holder afterwards \*sued the indorser upon such original bill, it suffices [ \*666 ] for him to prove the presentment and dishonour of the substituted bill, and it is incumbent on the defendant to prove that a loss has been sustained in consequence of the want of notice of non-payment of such substituted bill (k).

In order to let in secondary evidence of any particular instrument the usual Secondary notice must be given to the other party to produce it, and it should specify Evidence And a notice to produce all letters, papers, and  $^{(l)}$ . the instrument intended. documents, touching or concerning the bill of exchange mentioned in the declaration, and debt sought to be recovered, is too general(m). Where in an action on a promissory note the defendant wished to give in evidence a composition deed executed by his mother and the plaintiff, and also by various of the defendant's creditors, but not by the defendant himself, and the deed was in the hands of a trustee, who was willing to produce it, but the plaintiff's counsel objected, it was held, that the trustee ought not to produce it, but that the defendant might give in evidence an extract which had been furnished by the trustee, and which he, the trustee, proved to be a correct extract(n). If the defendant rely upon the illegality of consideration(o), or

dence is read without any objection being taken at the time, its admissibility may be objected to in the course of the argument; id. ibid. Under what circumstances B. shall be held to have been privy to the fraud committed by A.; id. ibid.

(h) Duckham v. Wallis, 5 Esp. Rep. 251, (Chit. j. 716).

(i) Collenridge v. Farquharson, 1 Stark. Rep. 359.

(j) Benson r. Marshal, cited in 4 Dowl. & Ry. 732.

(k) Ante, 441, 442; Bishop v. Rowe, 3 M. & Sel. 862, (Chit. j. 921). See Hickling r.

Hardy, 7 Taunt. 312; 1 Moore, 61, (Chit. j. 983); 7 Taunt. 312; Bridges v. Berry, 3 Taunt. 130, (Chit. j. 804).

(1) See ante, 656, to 658.

(m) France v. Lucy, Ry. & Moo. C. N. P. 341; ante, 658, note (z). See form of notice, post, appendix.

As to the sufficiency of a notice to produce, in point of time, see Phil. Ev. 666, ed. 1838; Sturge v. Buchanan, 2 Perry & Dav. 573. See post, 824, (68).

(n) Cocks v. Nash, 9 Car. & P. 154.

(o) See per curiam in Reed v. Gamble, 5 Nev. & Man. 433; ante, 650, note (q).

II. Evidence for Defendant in general. on payment(p) of the instrument declared upon, no notice to produce is necessary in order to let in such defence.

Proof of Time given to Ăc-

If the defence be, that the plaintiff gave time to the acceptor, it may be answered by evidence in reply that the defendant assented to the indulgence, or afterwards with full notice promised to pay, and a written paper authorisceptor,&c. ing the holder to use any means to obtain payment will be admissible for this purpose, though unstamped (q).

Payment by another Party to Bill.

Where A. drew a bill on B., and indorsed it to a bank at which he, A., had an account, and B. accepted the bill, but not paying it it was returned noted to the bank, who entered it on the debit side of A.'s account, "B.'s return, 1001. 6s.," and the state of A.'s account at the time of the entry, and up to the commencement of the action against B., was against A. to the amount of about 400l.; and it was proved that the bank had on former occasions allowed A. to overdraw his account to the amount of 500l. or 600l. but there was not any agreement that they should do so; it was held, in an action by the bank, that these facts did not prove a plea that the bank had received from A. 100l. 6d. in satisfaction of the bill(r).

To an action on a promissory note, payable to the plaintiff or order on de-

Substituted Bill or Note.

mand, with interest at 5l. per cent., the defendant pleaded specially to the effect that the plaintiff having agreed with him for the purchase of one of several shares in a business in which he was engaged with others, an agreement in writing was entered into between \*them that the amount should be 3,8671. 3s. 9d., in part payment of which the plaintiff would take yearly the defendant's share of the profits of the concern. The agreement, as set out in a plea, contained a memorandum that a note of hand had been given for the amount, bearing interest at 5l. per cent.; and there was a clause, that so long as the defendant should perform the conditions of the agreement, the plaintiff would not call upon him, at any future period, suddenly for the bal-The note referred to in the agreement contained in the ance of the note. body a stipulation which vitiated it, (viz. that the plaintiff's amount of profit The plea averred (inter should be applied yearly to the liquidation of it). alia) that the note sued on was substituted, with the plaintiff's consent, for that mentioned in the agreement, and was subject to its conditions: and further, that the defendant performed his part of the agreement, yet the plaintiff, notwithstanding, required him to pay the balance of the note suddenly, and before a reasonable time had elapsed. The plaintiff replied that the defendant, of his own wrong neglected and refused to pay the note, and that he did not call on him for payment suddenly and before a reasonable time had elapsed: it was held at his prius, that notwithstanding the limited nature of the replication, the question of reasonable time required proof of the whole circumstances of the case, and that the defendant might prove by parol evidence that the plaintiff assented to the substitution of the note sued on

for that mentioned in the agreement s). If the defendant in pleading pay-

<sup>(</sup>p) Shearm v. Burnard, 2 Perry & Dav. 565.

<sup>(</sup>q) Ante, 415, 416; Hill v. Johnson, 3 Car. & P. 456, (Chit. j. 1417); but see 3 Taunt. 307, and 580.

<sup>(</sup>r) Ryder r. Willett, 7 Car. & P. 608. When debiting in account operates as payment; Belcher and others assignees of Maberly v.

Lloyd, 10 Bing. 310; 3 Moore & S. 822, S. C. (s) Baylis v. Ringer, 7 Car. & P. 691, cor. Tindal, C. J. It was also held, that the plaintiff was entitled to a verdict for the interest due upon the note, though the jury should think that he was not entitled to the principal suni, on the ground of his having called for payment before a reasonable time had elapsed.

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ment of a substituted note unnecessarily aver the giving of the original note, II. Evino evidence as to such original note need be adduced, and the averment dence for may be altogether rejected as surplusage 1).

in general.

If the defendant be sued for goods sold, or work and labour, on account Bill given of which he has accepted or delivered a bill or note to the plaintiff, and for same which the plaintiff does not proceed upon at the trial, the defendant should give the plaintiff notice to produce the same, and prove the service of such notice, and the delivery of the bill to the plaintiff, which evidence will then compel the plaintiff to produce the same, or let the defendant into parol evidence; and if it was drawn or indorsed by the defendant, will further compel the plaintiff to prove that the same was duly presented to the acceptor or maker, and that due notice was given to the defendant of the dishonour, so as to enable the plaintiff to sue for the consideration (n).

Where the declaration in an action on a bill or note contains also the com- Right to mon money counts, and the affirmative of the issue as to the bill or note lies begin. upon the defendant, he will be entitled at the trial to begin, notwithstanding the plea of non-assumpsit to the money counts, unless the plaintiff intend to give distinct evidence upon the latter counts(1). Thus if in an action on a bill of exchange with a count upon an account stated, the defendant plead payment to the count on the bill, and non-assumpsit to the account stated, he is entitled to begin, unless the plaintiff's counsel have some evidence to give upon the account stated (v). And where in an action by the indersee against the acceptor the defendant pleaded that the bill was an accommodation \*bill, and that a blank acceptance had been filled up and applied in discharge of this and other bills, and the plaintiff replied that the defendant "broke his promise without such cause as in that plea alleged," it was held, that on these pleadings the defendant was entitled to begin (w). To where the only plea to an action by indersee against acceptor was, that the bill had been altered after acceptance, it was held, that the defendant's counsel had the right to begin, and that upon his calling for the bill the plaintiff's counsel ought to produce it without notice (x).

It has been held, that if the defendant's counsel open mere facts, but call Right to no witnesses, the plaintiff's counsel will still be entitled to the general re-But in a subsequent case(z), Lord Tenterden, C. J. stated the practice to be against such right, and held, that where the counsel for the defendant opens facts to the jury, and calls no witnesses to prove them, it is in the discretion of the judge to allow the plaintiff's counsel to reply. in a recent case, where the defendant, who had begun and had closed his case, and the plaintiff's counsel had after that, in his address to the jury, read a letter which he caused one of the defendant's witnesses to prove, but neither gave it in evidence or adduced any evidence at all, the judge would not allow the defendant's counsel to reply, but suggested that the plaintiff's counsel having proved the letter, and read it to the jury, ought in good faith to put it in, so as to give the defendant's counsel the reply(a). Where in

- (t) Shearm r. Burnard, 2 Perry & Dav. 565.
- (w) Ante, 175 to 177, 433, note (r). (v) Smart v. Rayner, 6 Car. & P. 721, cor.
- Parke, B.; and see Homan v. Thompson, id. 717; and Mills v. Oddy, id. 728.
  - (w) Faith v. M'Intyre, 7 Car. & P. 44. (x) Barker v. Malcom, 7 Car. & P. 101.
- (y) Rex v. Bignold, 4 Dowl. & Ry. 70. See Fairlie v. Denton, 8 Car. & P. 103, as to the right to reply on case cited in support of objection.
  - (z) Crerar v. Sodo, 1 Mood. & Mal. 85. (a) Faith v. M'Intyre, 7 Car. & P. 44, cor.
- Parke, B.

II. Evi-Defendant

an action on a bill or note the plaintiff's counsel makes out a prima facie case, and the defendant's counsel proves the bill or note to have been foundin general. ed on an illegal consideration, and after the plaintiff has called a witness in reply to disprove the illegality, a witness be called to contradict the plaintiff's witness in reply, the defendant's counsel is entitled to observe on the plaintiff's evidence in reply, and on the contradiction; and the plaintiff's counsel then has a general reply(b).

## III. COMPETENCY OF WITNESSES.

III. Com-

WE have already considered when it is necessary to subpana a subscribpetency of Witnesses. ing witness(c). It may here be proper to examine the cases respecting the admissibility of witnesses in an action on a bill or note, not the whole law respecting the competency of witnesses in general, but only that which more particularly relates to bills and notes. A reputed wife is a competent witness for or against the supposed husband, in matters relating to bills and notes, if in fact they be not married (d). But it has been doubted whether the wife of the drawer of a bill is compellable to prove for the defendant that the drawer altered it after it had been accepted, and thereby rendered it void, as such evidence tended to criminate her husband(e). The proper time to object to the incompetency of a witness on the ground of interest is [ \*669 ] on his being \*called on the voir dire, and evidence cannot afterwards be adduced to shew his incompetency. Where, therefore, in an action by the indorsee against the indorser of a bill of exchange, a witness called and sworn on behalf of the plaintiff as James Dewdney was afterwards recognized as George Dewdney, the plaintiff, upon which the counsel for the defendant proposed to call evidence to shew that he was the real plaintiff, it was held

Party to

The general rule is, that it is no objection to the competency of a witness Bill or Note that he is also a party to the same bill or note, unless he be directly interestadmissible. ed in the event of the suit, and be called in support of such interest, or unless the verdict to obtain which his testimony is offered, would be admissible evidence in his favour in another suit(g)(1).

(Chit. j. 1367). (c) Ante, 633, 634. (d) Hill v. Johnson, 3 Car. & P. 456, (Chit.

that such evidence was properly rejected (f).

j. 1417); Batthews v. Galindo, 6 Law J. 738, C. P. 6th May, 1828; 3 Car. & P. 238, S. C. (e) Henman v. Dickinson, 5 Bing, 183; 2

M. & P. 289, (Chit. j. 1416). Semble, that she was not a witness, Rex v. Cliviger, 2 T. R. 263; Rex v. Barbee, Chelmsford Assizes, overruling Rex v. All-Saints, Worcester, 1 Phil. Evid. 82.

(f) George Dewdney v. Palmer, 4 M. & W. 664; 7 Dowl. 177, S. C. Per curium,

(b) Meagoe v. Simmons, 3 Car. & P. 75, "The regular way, although in some instances may have been improperly departed from, was to make the objection on the voir dire, when other evidence might have been called, if necessary, to prove the incompetency, and then, if the incompetency were established, an opportunity would be afforded to the plaintiff of proving his case by other evidence.

(g) Bent v. Baker, 3 T. R. 27; Jordaine v. Lashbrook, 7 T. R. 601, (Chit. j. 606); Smith v. Prager, 7 T. R. 62; Jones v. Brooks, 4 Taunt. 164, (Chit. j. 868); Bayl. 5th edit. 535; see Stark. on Evid. part iv. 298.

(1) In an action upon a promissory note against one of several makers, another of the makers is a competent witness for the defendant, being released by the latter from all claim to con-

tribution. Ames v. Washington, 3 New Hamp. Rep. 115.

In an action on the guaranty of a promissory note, not negotiable, to which the defence was, that the maker of such note had been taken on execution for the same debt and discharged out of custody; it was held, that the maker was an incompetent witness for defendant. Terrell v. Smith, 3 Conn. Rep. 426.

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And now by the 3 & 4 Will. 4, c. 42, s. 26, in order to render the re- III. Comjection of witnesses on the ground of interest less frequent, it is enacted, petency of "That if any witness shall be objected to as incompetent on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness solely on shall nevertheless be examined, but in that case a verdict or judgment in that account of action in favour of the party on whose behalf he shall have been examined to be adshall not be admissible in evidence for him or any one claiming under him, missible. nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him or any one claiming under him." And by the 27th section of the same act it is enacted, Directions "That the name of every witness objected to as incompetent on the ground the pame that such verdict or judgment would be admissible in evidence for or against of the Withim, shall at the trial be indersed on the record or document on which the ness on the trial shall be had, together with the name of the party on whose behalf he Record. had been examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined in any subsequent proceeding in which the verdict or judgment shall be offered in evidence.'

Independently of this statute, if the verdict will not necessarily affect his own interest, he is a competent witness, and though his testimony, by deCompetenfeating the present action on the bill or note, may probably deter the holder cy and from proceeding in another action against the witness, yet that only affords Credibilimatter of observation to the jury as to the credit to be given to his testimony(h). Therefore, though it was formerly held, that no party should be permitted to give testimony to invalidate an instrument he had signed(i), a contrary rule now prevails k(2). Consequently, in an action at the suit of

- (h) Id. ibit. As to interest in the result of the action in general rendering a witness incompetent, see the observations on the propriety

  (i) Walton v. Shelley, 1 T. R. 300.

  (k) Bent v. Baker, 3 T. R. 36; Jordaine v. Lashbrocke, 7 T. R. 601, (Chit j. 606); Bayof the rule by Best, C. J. in Hovill v. Stephen-ley on Bills, 5th edit. 532. son, 5 Bing. 496.

In Connecticut, it is now well settled, that a party to a negotiable instrument, who is divested of his interest, is a competent witness to prove it usurious and with in its creation. Townsend v. Bush, I Conn. Rep. 260. But he is a good witness to prove any facts subsequent to the due execution of the note, which destroys the title of the holder. Baker r. Arnold, 1 Cnines' Rep. 258; Woodhull r. Holmes, 10 John Rep. 231. Warren r. Merry, 3 Mass. Rep. 37. Barker r. Prentiss, 6 Mass. Rep. 430. Parker r. Hanson, 7 Mass. Rep. 470. Webb r. Danforth, 1 Day's Rep. 301. Man r. Swann, 14 John. Rep. 270. Hulby r. Brown, 16 Johns. Rep. 70. Myers r. Palmer, 18 John. Rep. 167. The indorser of a negotiable note is not a competent with ness, in an action between the indorace and maker, to prove usury in the transfer of the note by kim. Manning r. Wheatland, 10 Mass. Rep. 502. And in Pennsylvania, it has been decided. that an indorser cannot in a like action be a witness, that there was no original consideration for

<sup>(1)</sup> Some difference exists in the different States as to a person who has been a party to a negotiable instrument, being permitted to testify that it was originally void. In South Carolina the Court recently expressed a doubt as to the law. See Haig r. Newton, 1 Const. Ct. Rep. 423. In New Hampshire he is held not to be a competent witness. Houghton r. Page, 1 N. H. Rep. 60. So in United States Courts. U. S. Bank r. Dunn, 6 Pet. R. 57, and in Massachusetts and New York it has been decided that a party to a negotiable instrument cannot be admitted as a witness to prove the note originally void. Churchill v. Suter, 4 Mass. Rep. 156. Warren r. Merry, 3 Mass. Rep. 27. Parker v. Lovejoy, 3 Mass. Rep. 565. Widgery r. Monroe, 1 Mass. Rep. 349. Jones r. Coolridge, 7 Mass. R. 199. Winter v. Saidler, 3 John. Cas. 185. Wilkie v. Roosevelt, 3 John. Cas. 206. Coleman r. Wire, 2 John. Rep. 165. Skilding r. Warren, 15 John Rep. 270. See Powell v. Waters, 3 Cowen, 669. Murray v. Judah, 6 Cowen, 484. But the assignor of a check or note, if he be discharged from his debts under the insolvent act subsequent to the transfer is a competent witness for the holder. Id under the insolvent act, subsequent to the transfer, is a competent witness for the holder. Id.

[ \*670 ]

III. Com- an indorsee against the acceptor, the drawer, or indorser, is a competent petency of witness for the defendant to prove \*that the bill was originally void, as that it Witnesses. was made in London, though dated at Hamburgh, and consequently invalid for want of an English stamp(l)(1). And Lord Mansfield admitted the maker of a note to prove, in an action against an indorser, that the date had been altered(m); and though in an old reporter it is stated to have been decided, that a person supposed to be the drawer of a bill cannot, without a release, be called to prove that he did not draw(n), that decision could not now be supported(2).

So if the witness has an interest inclining him as much to one of the par-Equality of Interest. ties as the other, so as upon the whole to make him indifferent in point of substantial interest in whose favour the verdict may be given, he will be com-Thus in an action on a note by petent to give evidence for either party(o). the indorsec against the indorser, the maker is a competent witness for the plaintiff, on the ground of equal interest both ways (p). And on the same principle, a party employed by the plaintiff to get a bill discounted, who, in-

> (1) Jordaine v. Lashbrook, 7 T. R. 601, (Chit. j. 606); and Smith v. Prager, 7 T. R. 62; Cooper v. Davis, I Esp. Ca. 463, (Chit. j. 549).

> (m) Levy v. Essex, M. T. 1775, 2 Esp. Rep. 708. The plaintiff declared as an indoree of a promissory note, drawn by Foster Charlton, payable to the defendant, dated the 13th of June, 1775; the defendant insisted that the date of the note had been altered from the 3d to the 13th; and to prove it, called Foster

Charlton. Lord Mansfield admitted him, as at all events he was liable to pay the note. (n) Anon. 12 Mod. 345, (Chit. j. 212); Dupays v. Shepherd, Holt, 297; Trials per Pais, 502. In 2 Stark. on Evid. part iv. 398, it seems to have been considered, that this rule is confined only to criminal cases, but the law is not so-

(o) Phil. Evid. 3d edit. 54 to 57. (p) Venning v. Shuttleworth, Bayley on Bills, 422.

Still v. Lynch, 2 Dall. Rep. 194. See also Allen v. Holkins, 1 Day's Rep. 17. Bearing v. Reeder, 1 H. & Munf. Rep. 175. 2 Binney, 154. 2 Desaus. Cha. Rep. 224.

But this rule is confined to negotiable instruments. Pleasants v. Pemberton, 2 Dall. 196. 1 Yeates, 202. Baring v. Shippen, 2 Bing. 165, 168. M'Ferran v. Powers, 1 Serg. & Rawle, 102. And they must be such as are actually negotiated in the usual course of business. Blagg v. Phoenix Ins. Co., Cir. Co. U. S. Whart. Dig. 270. Baird v. Cochran, 4 Serg. & Rawle, 399; Hepburn v. Cassel, 6 Serg. & Rawle, 113. Bank of Montgomery v. Walker, 9 Serg. & Rawle,

The indorser is not a competent witness in Pennsylvania in a suit against the maker of a promissory note, to prove that the note was originally drawn for the indorser's accommodation, and thereby enable the maker to set up a discharge by the holder's giving time to the indorser.

For, though a party to negotiable paper may be received to prove subsequent facts to discharge it, yet he is not competent to show that the instrument was not in truth what it purported on its face to be. Bank of Montgomery v. Walker, 9 Serg. & Rawle, 236.

A party to a negotiable instrument may teatify to facts which do not prove it to have been originally void; as payment, &c. Wendell v. George, 1 R. M. Charl. 51.

For further cases as to the competency of parties to a bill or note see, as to drawers and makers, Jackson v. Packer, 13 Conn. 342; Griffing v. Harris, 9 Port. 225; Adams v. Moore, Id. 406; Rice r. Gove, 22 Pick. 158; as to Indorsers; Harrisburg Bank r. Ferster, 8 Watts, 804; Everson v. Heath, 2 Harr. 245; Todd v. Hardy, 9 Port. 346; as to payers; Clapp v. Hanson, 15 Maine Rep. 345; Davidson v. Dove, 1 Alab. Rep. N. S. 133. }

(1) The first indorser of a negotiable promissory note is a competent witness without a re-lease, in a suit by the holder against a subsequent indorser, to prove that the defendant indorsed the note merely for the accommodation of the maker, and that the maker negotiated it fraudalently. Hall v. Hale. 8 Conn. Rep. 336.

A party to a negotiable instrument shall not be permitted by his own testimony to invalidate it.

Bank of United States v. Dunn, 6 Peters' Rep. 51.

The maker of a promissory note, against whom a judgment has been recovered, is a competent witness at common law in a suit by the same plaintiff, the lender, against the indorser, to

prove usury. Kechley v. Cheer, 4 M'Cord's Rep 397.

In an action against one of several makers of a promissory note, another of the makers is a competent witness for the defendant, being released by the latter from all claim to contribution. to prove the consideration of the note to have been an illegal contract for the sale of the office of deputy sheriff. Carleton v. Whitcher, 5 New Hamp. Rep. 196.

(2) See post, 825, (70).

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stead of doing so, deposits it with the defendant as a security for a debt due III. Comfrom himself to the defendant, is a competent witness for the plaintiff in an potency of Witnesses. action of trover for the recovery of the bill(q). So one joint maker of a promissory note is a witness to prove the signature of the other who has been separately sued(r). But if the interest of the witness on the one side be direct, and on the other contingent only, the former will prevail. in an action against one of two makers of a joint and several promissory note, the other is not a competent witness to prove the illegality of the consideration; nor will it make any difference that the witness before action brought paid his share of the principal, if interest be also due upon the note at the time of such payment; inasmuch as the witness, in case of a verdict against the defendant, will be liable to contribution in respect of that interest(s).

Where one partner drew a bill in the partnership firm, and gave it in payment to a separate creditor, in discharge of his own debt, the Court of King's Bench held, that in an action by such creditor against the acceptor, either of the partners might be called on the part of the defendant to prove that the partner who drew the bill had no authority to draw it in the name of the firm, and that the bankruptcy of the partners would not vary the question as to the competency of the witness; in this case the partner who drew the bill would have been liable to the plaintiff for the amount of his debt, if the plaintiff had failed in the action; and if the plaintiff had succeeded, he would have been liable to the defendant, the acceptor; and with respect to the other partner, though he would have been liable to the defendant, if the plaintiff recovered, he wou'd have had his remedy over against the joint partner(t). And though in another case the court held that a \*witness who might have a [ \*671] remedy by action, whether the plaintiff or defendant had a verdict, was nevertheless interested, because under the particular circumstances he would have a greater difficulty in the one case than in the other to enforce that remedy(u), it has been observed that this appears to be the only case which has been decided on such a ground, and that from the leading cases on this subject which rest on the broad ground of interest, such a circumstance may now more properly be considered as having a strong influence on the witness, but not as forming any solid objection to his competency (x)(1).

But, before the late act, if the verdict would necessarily benefit or affect Liability to the witness, as if he were liable to the costs of the action, then without a release, which would annul his interest in the event, he was not a competent Therefore, a person who had received a bill to get it discountwitness (y). ed for the drawer, and delivered it to the plaintiff in payment of a debt of his own, was not competent to prove the fact in an action against the drawer, for he would have been liable to the costs if the plaintiff had succeeded(z);

(u) Buckland v. Tankard, 5 T. R. 579, (Ch. (q) Fancourt v. Bull, 1 Bing. N. C. 681; 1 Scott, 645, S. C.

(r) York v. Blott, 5 Maule & S. 71, (Chit. j. 957); Stra. 35.

(s) Slegg v. Phillips, 4 Ad. & Ellis, 852; 6 Nev. & Man. 860; 2 Har & W. 51, S. C.

(1) Ridley v. Taylor, 13 East, 175, (Chit, j. 812); ante, 48, note (s); and see York r. Blott, 5 Maule & S. 71, (Chit. j. 957); Phil. Evid. 8d edit. 55.

j. 523).

(x) Phil. Evid. 3d edit. 56, 57.

(y) Jones v. Brooke, 4 Taunt. 464, (Chit. j. 868); Hardwick v. Blanchard, Gow's Rep. 118, (Chit. j. 1061); Phil. Evid. 3d edit. 49, 56; Hall v. Cecil, 6 Bing. 181.

(z) Harman v Lasbrey, Holt, C. N. P. 390, (Chit. j 976); Lurbalestier v. Clark, 1 B. & Adol. 899.

<sup>(1) {</sup> If the witness can neither gain nor lose by the event of the suit, and the verdict in the case cannot be given in evidence either for or against him, he is competent to testify. All other objections go to his credibility. Wendell v. George, 1 R. M. Charl. 51. }

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In case of

III. Com- and in an action against the acceptor of a bill, accepted by him for the acpetency of commodation of the drawer, the latter was not, without a release, a compe-Witnesses, tent witness to prove that the holder obtained the bill on usurious considera-Liability to tion, because he did not stand indifferently liable to the holder and the acceptor; for the holder could recover against him only the contents of the bill, but the acceptor would have been entitled in a special action for not indem-Accommodation Bill. nifying him to recover, as well the amount of the bill as the interest and costs of the action against himself, and therefore the drawer had a direct interest in defeating such action (a). So where in an action by the indorsee against the drawer of a bill it appeared by the plaintiff's case that he had received it from the acceptor in discharge of a debt due from him, and it was stated for the defendant, that the bill was accepted in discharge of part of a debt due from the acceptor to the drawer, and that it was indorsed and delivered to the acceptor in order that he might get it discounted, and that he delivered it to the plaintiff upon condition that if he procured cash for it he might retain out of it the amount of the debt due to him from the acceptor, but that he never \*did get cash for the bill; it was held that the acceptor could not be examined to prove these facts, for although he was disinterested as to the amount sought to be recovered on the bill, he was interested as to the costs, against which he would have to indemnify the defendant if the plaintiff obtained a verdict(b). This rule, however, did not apply unless the drawer was under an express or implied engagement to indemnify the acceptor against the costs of the action as well as the principal debt(c). Neither did it extend to the case of a bon't fide drawing where the drawer has overdrawn and the drawee has accepted under ignorance that he had previously been over-drawn(c). And an indorser, who, as agent, had received money from the acceptor to pay the bill, was a competent witness for the acceptor in an action against him by a subsequent indorsee, to prove payment of the

> 868); Hardwick v. Blanchard, Gow's Rep. 113, (Chit. j. 1061); Maundrell v. Kennett, I Campb. 408, (Chit. j. 755); Bottomley v. Wilson, 3 Stark. Rep. 148, (Chit. j. 1151); Edmonds v. Lowe, 8 Bar. & Cres. 407; 2 Man. & Ry. 427; Dans. & Ll. 88, (Chit. j 1400); Larbalestier v. Clark, 1 Bar. & Adol. 899; and see Phil. Evid. 3d edit. 56; Stark. on Evid. part iv. 299.

> Jones v. Brooke, 4 Taunt. 464, (Ch. j. 868). Per Mansfield, C. J. "This action is brought against Brooke as acceptor of a bill of exchange; at the trial, the defence made was, that this bill was given by the drawer to the indorser on usurious consideration, the latter having taken usurious interest on discounting the bill; and that the bill was accepted for the accommodation of the drawer. An objection was taken to the witness, who was the wife of the drawer; and the objection was overruled, on the ground that it is now the practice to receive persons whose names are on bills of exchange, as witnesses to impeach such bills. And so it is; but here the question is, inasmuch as this was an action against the acceptor, whether she should be received as against the acceptor, the drawer, as it was contended, being interested to defeat the action; the doubt was this: the drawer has an interest to protect the acceptor; for if the holder succeeds against the acceptor, the acceptor will have a right against the drawer, to make the drawer pay, not only the money, but also all damages he, the acceptor, might have sus-

(a) Jones v. Brooke, 4 Taunt. 464, (Chit. j. tained by being sued for it; for the drawer of an accommodation-bill is bound to indemnify the acceptor against the consequences of an acceptance made for the accommodation of the drawer; we are therefore of opinion that the drawer cannot be a witness, and consequently the rule must be made absolute for entering a verdict for the plaintiff." And see Hardwick v. Blanchard, Gow's Rep. 113.

(b) Edmonds v. Lowe, S Bar. & Cres 407; 2 Man. & Ry. 427; Dane. & Ll. 88, (Chit. j. 1400).

(ε) Bagnall v. Andrews, 7 Bing. 217; 4 M. & P. 839, (Chit. j. 1514). W. drew a bill on the defendant, to whom he had been sending goods for sale, and defendant accepted the bill, neither party knowing the state of the account between them; it turned out that W. was at the time indebted to the defendant. W. lurking from his creditors at large after an act of bankruptcy, indorsed the bill upon importanity to plaintiff, one of his creditors, with whom he was on friendly terms, and then became a bankrupt. Plaintiff having sued defendant on the bill, it was held, that W. was an admissible witness in the cause, and the jury having found for the de-

2 East, 458, (Chit. j. 652); and Shuttleworth r. Stephens, 1 Campb. 407, (Chit. j. 755), are overruled. Birt v. Kershaw, however, is cited by Patteson, J. in Reay v. Packwood, 7 Ad. &

fendant, the court refused to disturb the verdict

Semble, that the prior cases of Birt v. Kershaw.

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bill; for, otherwise, the rule would have excluded every witness who had III. Compaid money as agent(d). And if an accommodation acceptor released the witnesses. drawer, the latter was rendered competent(e); and the drawer of a bill who In case of had become bankrupt was a good witness in an action against an acceptor, Accommowho accepted the bill for the accommodation of such drawer, on being re-dation Bill. leased by such acceptor, although the latter had formally released the assignees of the cstate (f). And where the drawer or indorser of an accommodation bill, or a person who had guaranteed the payment of a bill had been discharged by his bankruptcy and certificate from any further liability to pay the amount of the bill, he was a competent witness, because he was also thereby relieved from liability to costs(g).

Since the 3 & 4 Will. 4, c. 42, the drawer of an accommodation bill is rendered a competent witness for the defendant, in an action by the indorsee against the acceptor, by an indorsement of the witness's name on the postea under the twenty-seventh section of that statute; because he could only be made liable to the costs of the action by means of the verdict and judgment, which, in consequence of the witness's name being indorsed, are prevented from being used against him(h). But the joint maker of a promissory note, signed by the defendant as surety only, is not a competent witness for the defendant in an action by the payee, nor can he be rendered so by an indorsement on the postea; for he is liable to indemnify the defendant, not only against the damages and costs to be recovered by the-plaintiff, but also against the defendant's own costs(i).

\*Where A. and B. dissolved partnership, and an action was brought by Co-dethe accommodation acceptor of a bill, drawn after the dissolution, in the fendant name of the firm, and A. pleaded his subsequent bankruptcy and certificate, when a and a nolle prosequi was entered as to him, it was held, that A. was a comforthe petent witness for B. to prove that the bill was drawn for A.'s accommoda-other. tion alone; and that consequently B. was merely surety for A., and there- [ \*673] fore discharged from liability (k). And where two persons were sued as acceptors of a bill, and one of them pleaded his bankruptcy and certificate, and thereupon the plaintiff entered a nolle prosequi as to him, and he released his interest in the surplus effects, it was held, that he was a competent witness for the other defendant(1). So if instead of entering a nolle prosequi, the plaintiff take issue on the plea of bankruptcy and a verdict be found on such plea for the defendant, the latter may immediately after be examined as a witness for the other defendant (m)(1). On the other hand, in an action brought to charge A. with others as a partner in a trading company, a person, who by other evidence than his own, appeared to be one of the partners,

post, 674, note (z).

(e) Hardwick v. Blanchard, Gow's Rep. 113, (Chit. j. 1061). Where a witness is rendered competent by a release it is not necessary to produce the release, though the interest of the witness appear upon the record; Lunnis v. Row, sitting in Banc after T. T. 1839, Q. B 3 Jurist, 604, overruling Goodhay v. Hendry, 1 Mood. & M. 319.

(f) Cartwright v. Williams, 2 Stark. Rep. 840, (Chit. j 1028).

(g) Brend v. Bacon, 5 Taunt. 183; Ashton

(d) Reay r. Packwood, 7 Ad. & El. 917; v. Longes, Mood. & M. 127, (Chit. j. 1871); per Lord Tenterden, 6 Geo. 4, c. 16, s. 52.

(h) Faith v. M'Intyre, 7 Car. & P. 44, cor. Parke, B overruling Burgess v. Cuttill, 6 Car. & P. 282; 1 Mood. & Rob. 315, S. C.

(i) Stanley r. Johson, 2 Mood. & Rob. 103; and see Green r. Warburton, ib. 105, S. P.

(k) Moody v. King, 2 Bar. & Cres. 559; 4 Dowl. & Ry. 30, (Chit. j. 1200).

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(1) Afflalo v. Fourdrinier, 6 Bing. 306; 8 Moore & P. 743, (Chit. j. 1460).

(m) Bate r. Russell, Mood. & M. 332

<sup>(1)</sup> In a suit against three joint and several obligors of a promissory note, but who sever in their trial, after one of them has a verdict in his favour he is a competent witness to testify on behalf of his co-defendants Row v. Richardson, 4 Miller's Louis. Rep. 551.

III. Com- was holden to be competent to prove the liability of A. as a partner(n). If petency of a witness has given a note jointly with others for a sum to indemnify the de-Witnesses. Sendant in the action, and his name has been erased from the note by the fendant in the action, and his name has been erased from the note by the consent of all parties, his competency is restored, and he may be examined for the defendant(o).

In an action against the acceptor of a bill, the drawer is a competent wit-Drawer, when com-ness for the plaintiff to prove not only his own indorsement(p), but also the petent. hand-writing of the acceptor(q)(1), or for the defendant to prove that the plaintiff discounted the bill upon an usurious consideration (r)(2), or that it [ \*674 ] has been paid(s)(3). And the circumstance of the witness \*being then in

> (n) Hall r. Curzon and others, 9 Bar. & man, 5 Esp. Rep. 119. Cres. 646.

(o) Sewell v. Stubbs, 1 Car. & P. 73.

(p) Willsheir r. Cox, Guildhall, 25th Muy, 1826. Coram Abbott, C. J. thought it was nrged by Chitty that the drawer's evidence was proving a title beneficial in the result to himself; Hobson v. Rich, ante, 645, note (g).

(q) Dickenson v. Prentice, 4 Esp. Rep. 32, (Chit. j. 693); Barber v. Gingel, 3 Esp. Rep.

62, (Chit. j. 618).

Dickenson v. Prentice, 4 Esp. Rep. 32, (Chit. 693). This was an action against the defundant as acceptor of a bill, the defence intended to be set up was, that the acceptance was a forgery; to prove defendants hand-writing, the plaintiff called the drawer, it was objected that having drawn the bill, the forgery of the acceptance could only be imputable to him, and that as he might be committed for a capital offence if the forgery was established, he had such an interest as ought to disqualify him But Lord Kenyon said, this was matter of observation as to his credit; but no objection to his admissibility. He was admitted, and the plaintiff had a verdict.

So where in an action by the indorsee against the acceptor of a bill, it appeared that the defendant had taken the benefit of the insolvent debtors' act, and had set down the drawer as a creditor in his schedule, it was held, that the drawer was, notwithstanding this, a competent witness for the plaintiff in this action; Cropley v. Corner, 4 Car. & P. 21, (Chit. j. 1449).

(r) Rich v. Topping, Peake's Rep. 224; 1 Esp. Rep. 176, (Chit. j. 528); Brown v. Acker-

Rich v. Topping, Peake's Rep. 224, (Chit. 528). The drawer himself had indorsed the bill to the plaintiff for an usurious consideration, he had a release from the acceptor, which Lord Kenyon thought was necessary. The learned reporter, however, in a note on the case, considered that the witness stood indifferent, and ought to have been received even without a release; and in Brown v. Ackerman, 5 Esp. Rep. 119, the drawer (under precisely similar circumstances) was admitted without a release, at least it is not stated that he had any.

(a) Humphrey r. Moxon, Peake's Rep. 52, (Chit. j. 481); Charrington v. Milner, Peake's Rep. 6, (Chit. j. 463); Adams v. Lingard, Peake, 117, (Chit. j. 495). Sed vide Phetheon v. Whitmore, Peake, 40, (Chit. j. 469).

Humphrey v. Moxon, Peake's Rep. 52, (Ch. 481). Assumpsit on a bill of exchange, indorsee against acceptor. The defendant's counsel offered to call the drawer to prove that the bill was paid by him, and relied on the case of Gardner and Carter, determined some time Erskine objected to this witness. This case differs from that of Gardner and Carter, there the payee was the plaintiff; this action is brought by the indorsee: Lord Kenyon, "It makes no difference. The courts have laid down a rule that a man shall not destroy his own security: this man does not come to destroy his own security, but to shew that it has been satisfied." He was therefore received, but it appearing that notice had been given to him the day after the bill became due, of its having been dishonoured by the acceptor, he was again ob-

(1) It has been held in Massachusetts, that in an action by an indorsee against the drawer, the indorser is not a competent witness to prove the hand-writing of the drawer without a release, or its equivalent, a discharge from liability on the indorsement. Barnes v. Ball, 1 Mass. Rep. 78. Rice v. Stearns, 3 Mass. Rep. 225. { Reid v. Geoghegan, 1 Miles, 204. }

(2) In the case of the Bank of the United States v. Dunn, 6 Peters, 51, this court decided that a subsequent indorser, was not competent to prove facts which would tend to discharge the

prior indorser from the responsibility of his indorsement. By the same rule, the drawer of the note is equally incompetent to prove facts which tend to discharge the indorser. Bank of the Metropohis v. Jones, 8 Peters' Rep. 12.

(3) { In an action by the indorsee of a promissory note, against the indorser, the drawer is not a competent witness for the defendant, to prove that when the note was made the indorsec had stipulated not to hold the indorser responsible, and that the note was for the accommodation of the indorsee, unless there be proof aliunde that the indorsee was an original party to the note. Harley v. Emerick, 1 Miles, 36.

In an action on a note by the payee against the surety, the principal is a competent witness; and his testimony is admissible to prove facts happening after its execution, to discharge the surety. Freeman's Bank v. Rollins, I Shepley, 202. } Hr.

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prison under a charge of having forged the bill will not affect his competency III. Comto give such evidence(t).

petency of Witnesses.

In an action by the indorsee against the drawer of a bill, a prior indorser is Indorser. a competent witness for the plaintiff, to prove that he the witness indorsed the bill(u)(1), or that the defendant promised to pay the bill after it became due(x), and a prior indorser of a note is a competent witness for the maker to prove it paid(y). So, in an action by indorsee against acceptor, issue being joined on a plea of payment, a prior indorsee is a competent witness for the defendant, though he acknowledges on the voir dire that he received the money from the defendant to pay the plaintiff the bill(z). action by the second indorsee against the first indorser, the second indorser was held a competent witness to prove that he, on receiving notice of dishonour from the plaintiff, gave notice thereof to the defendant(a).

In an action against the drawer of a bill, in order to excuse the neglect to Acceptor. give him due notice of the dishonour, the acceptor is a competent witness to prove that he had not received any value for his acceptance, for though by supporting the action against the drawer he may perhaps relieve himself from an action at the suit of the holder, yet he at the same time gives an action

jected to on account of interest. Lord Kenyon inclined to think this last objection a good one, because being liable to puy the bill himself on account of due notice having been given, by proving it paid, now he destroyed the bill, and would eventually discharge himself. His lordship, however, doubting whether the notice was given early enough, did not reject, but admitted his testimony subject to the opinion of the court, if the plaintiff chose to move for a new trial.

The bill was for 73l, and the witness proving payment of 301. only, the plaintiff had a verdict for the balance.

(1) Burber v. Gingell, 3 Esp. Rep. 62, (Chit. j. 618).

Barber v. Gingell, 3 Esp. Rep. 62. The drawer was called to prove that he had paid the bill. Being at that time a prisoner on a charge of having forged the bill, and brought up by habeas corpus, he was objected to as incompetent, but Lord Kenyon overruled the objection. See Dickenson v. Prentice, ante, 673,note (q).

(u) Richardson v. Allan, 2 Stark. Rep. 334, (Chit. j. 1022); Hobson v. Rich, Bart, ante, 615, note (g).

(x) Stevens r. Lynch, 2 Campb. 332; 12

East, 38, (Chit. j. 782).

(y) Charrington v. Milner, Peake's Rep. 6, (Chit j. 463); Humphrey r. Moxon, Peake's Rep. 42, (Chit. j. 481); supra, note (s). Charrington v. Milner, Peake's Rep. 6; the note had been indersed by Monk to the plaintiff, and the defendant was allowed by Lord Kenyon to call Monk to prove that he had paid the note to the plaintiffs.

(z) Reay v. Packwood, 7 Adol. & El. 917,

ante, 672, note (d).

(a) At Guildhall, 3d March, 1822, cor. Abbott, C. J. Vincent, attorney.

The payee of a note, in a suit between the assignee and the maker, is a competent witness to prove upon what terms the assignment was made, if called by the maker; their interests being adverse. Stone v. Vance, 6 Ham. 248.

(2) In an action by the holder of a bill of exchange against an indorser, a subsequent indorser is not a competent witness to charge the defendant, without a release from the plaintiff. Talbot v. Clark, 8 Pick. 51.

In an action by an indorsee against the maker of a promissory note, the payse is a competent witness to prove the time of the indorsement. Spring v. Lovett, 11 Pick. Rep. 417.

An indorser not shown to have been made liable by notice of the dishonour of a note, and not

called to prove the genuineness of the note, is a competent witness, in an action by the indorsee against the maker, to show that the note is not usurious. Barretto v. Snowden, 5 Wend. Rep. 181. And per Savage, C. H. J. "Perhaps it might be doubted whether the witness ought to be excluded, oven if his liability as inderser had been shown; for, by fixing the debt upon the defendant, he does not discharge himself; if he is liable, the plaintiff may prosecute him as well as the defendant, and prefer to take execution against him; or the maker may be insolvent; so that his interest would be contingent. Ib.

<sup>(1) {</sup> Or the hand writing of the drawer, in a suit by the holder or indorsee against the drawer. Reid v. Geoghegan, 1 Miles, 204. But in such a suit the indorser is not a competent with ness for the defendant, to prove that the plaintiff constituted him (the indorser) his agent to receive payment of the note from the defendant and that he did receive such payment. Elias v. Teill, Idem, 272.

III. Com- against himself at the suit of the drawer, in which the evidence he has given petency of of the want of consideration would not avail him, but must be proved by an-Witnesses. other person(b).

When Par-

The drawer will not, however, be allowed, in support of a defence to an ty not a Witness to action at the suit of an indorsee against the acceptor, to set up a title to the prove Title bill in himself, by proving that he had delivered the bill to the plaintiff without consideration, and as his agent only, to enable him to obtain payment, for his situation would be better or worse according to the event of a verdict; nor will a release from the defendant render him a competent witness for such purpose (c)(1).

Admissions. 1 \*6751

\*We have already seen how far the admissions or declarations of other parties to the bill or note are admissible in evidence (d). In general, evidence of what a third person said when he was holder of a bill, is not admissible against the plaintiff; but it is otherwise if it appear that the plaintiff is merely an agent for, or a tool of, the third party (e). As regards the identity of the party making the admission or declaration, it has been held, that where a person, on being sent by the defendant, an indorser of a bill of exchange, to the plaintiff, the indorsee, to inquire as to the solvency of B., a prior indorser, went to the plaintiff's residence, and on the street door being opened, a person in a dressing gown, whom he had never seen before or since, asked him what his business was, the evidence of identity was not sufficient to let in proof of the conversation; and that whether the evidence of identity was sufficient or not, was a question for the judge, and not for the jury (f).

When witness comgive evi-dence against his Interest.

It is declared by the 46 Geo. 3, c. 37, "that a witness cannot by law pellable to refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or

> (b) Staples r. Okines, 1 Esp. Rep. 332, (Chit. j. 544); Legge v. Thorp, 2 Campb. 310, (Chit. j. 783); Peake's Evid. 4th edit. 170. (c) Buckland r. Tunkard, 5 T. R. 578; 1

> Esp. Rep. 85, (Chit. j. 523); Bul. N. P. 288. Set quere, for if the plaintiff recovered, he would still be but a trustee for the witness; Stark. on Evid. part iv. 301, note (s).

> Buckland c. Tankard, 5 T. R. 578, (Chit. j. 523). This was an action by an indorsee against the acceptor of a bill. The bill was drawn by Gregson, payable to his own order, and indersed by him in blank, and the defendant called Gregson to prove that he had indorsed and delivered it to the plaintiff, that he

might get it paid, and not give him any interest in it, and that he had no consideration for it, and was still entitled to it. The witness had a release from the acceptor. Lord Kenyon thought him interested, and rejected him. And on a rule nisi for a new trial, the court held, that his situation would be better or worse according to the event of the verdict, and that therefore he was properly rejected. Rule discharged.

(d) Ante, 664, 665.

(e) Welstead v. Levy, 2 Mond. & M. 188, (Chit. j. 1567); ante, 665, note (f).

(f) Corfield r. Parsons, 1 Crom. & Mee.

The payee of a note who has indersed it with a saving of his own liability, is a competent witness to prove an alteration in the note since its execution. Parker r. Hanson, 7 Mass. Rep. 470. So a drawer is a competent witness to prove that at the time of drawing the bill he communicated certain conditions and restrictions as to his right to draw the bill. Storer v. Logan, 9 Mass. Rep. 55. An indorser is a competent witness in an action by an indorsee against the maker to Prove that the note was, after the indorsement, fraudulently put into circulation. Woodball v. Holmes, 10 John. Rep. 231. See also Owen v. Mann, 1 Day's Rep. 833, n. (1).

<sup>(1)</sup> In an action by an indorsee against an indorser, the maker, a certificated bankrapt, under a commission issued since the making of the note, and released by the indorser, is a competent witness to prove that he has paid the note to the plaintiff. Warren v. Marry, 3 Mass. Rep. 27. And in an action by the indorsee against the drawer, the indorser, (who was the payee) is a competent witness to prove that the indorsement was made in trust for himself without any recourse to himself. Barker v. Prentiss, 6 Mass. Rep. 430.

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forfeiture of any nature whatsoever, by reason only or on the sole ground III. Comthat the answering of such question may establish, or tend to establish that petency of he owes a debt, or is otherwise subject to a civil suit, either at the instance WhenWitof his Majesty or any other person. But it has been held, that a witness commay object to answer a question which he thinks will tend to his crimina-pellable to tion, though the answer would not lead to an immediate conclusion of give Eviguilt(g).

In an action on a bill of exchange, if a person called to prove the conagainst his
leration say that the bill was accounted for my sideration say that the bill was accepted for value received, but refuse to say of what that value consisted, on the ground that it might render him liable to a qui tam action, he cannot be compelled to answer; but if he persist in refusing, it will stand upon the evidence \*that there was no consideration, [ \*676] and unless the plaintiff prove that he gave value, he will fail(h). A witness is not excused from answering a question on the ground that the conduct inquired into would subject him to a penalty (as under the Stock-jobbing Act) if the time limited for proceeding for such penalty is past(i). And a witness may be asked questions tending to disgrace him, but not to subject him to punishment(k); and if he answers in part he must state the whole of the facts connected with the part so answered (l), and the objection to answering a question must proceed from the witness himself, or from the judge, and

Where in an action against the acceptor of a bill of exchange, the plaintiff was nonsuited in consequence of the absence of a witness subpænaed by him to prove the defendant's hand-writing, the court granted a new trial on payment of costs(n).

(g) Cates v. Hardacre, 3 Taunt. 424, (Ch. 931); Phil. on Evid. 3d edit. 222; 1 Chit. j. 931); Phil. on Evid. od edid. 222, Crim. Law, 2d edit. 620; Stark. on Evid. part ii. 135; Lloyd v. Passingham, 16 Ves. 59.

not from the counsel(m).

Cates v Hardacre, 3 Taunt. 424, (Chit. j. 831). This was an action by an indersee against the drawer of a bill drawn payable to the drawer's order, upon Strutton, and by him accepted, and afterwards dishonoured; it was stated in the declaration to have been indersed by the defendant to the plaintiff. The case was tried before Heath, J. at Westminster, at the sittings after H. T. 1811; the plaintiff proved his case. The defence intended to be set up was usury. The first witness called on the part of the defendant was one Taylor, and the bill having been put into his hands, he was asked by Shepherd, Serjeant, for the defendant, " whether that bill had ever been in his possession before;" upon which, Best, Serjeaut, interfered, hy asking the witness whether he had not been indicted for usury in this transaction, and upon his answering in the attirmative, Best cautioned him against answering questions which might tend to criminate him; the witness said, that he thought his answer to the question proposed would have a tendency to convict him of the offence of usury; the learned judge told him that if he thought so, he was not bound to answer the question; the witness availed himself of this direction, and the counsel for the defendant being thus prevented from pursuing his inquiry, a verdict passed for the plaintiff. Shepherd, Serjeant, moved for a new trial, contending that the judge's direction was wrong; that

it was not sufficient that a witness thought that his answers would tend to criminate him; but that it ought clearly to appear that they would have that effect. Mansfield, C. J. " Your questions go to connect the witness with the bill, and they may be links in a chain." Rule refused.

(h) Dandridge v. Corden, 3 Car. & P. 11, (Chit. j. 1351). Assumpsit on a bill of exchange. On the part of the plaintiff a stock-broker was called to prove the discounting of the bill. He was asked by Gurney, for the defendant, whether the bill was accepted for a valuable consideration? He answered that it was accepted for value received, but declined saying what the consideration was, as he might make himself liable to a qui tam action.

Gurney Submitted that the witness having answered in part was bound to continue his evidence, (i) fra, note (l),) and having said that the bill was accepted for value received, he was bound to explain of what that value consisted.

Lord Tenterden, C. J. "I cannot make him answer if he does not think proper. The effect of it will be, that if he does not state what the consideration was, it will stand as if there was no consideration at all."

(i) Roberts v. Allatt, Mood. & M. 192.

(k) Cundell v. Pratt, Mood. & M. 108. (1) East v. Chapman, Mood. & M. 47; 2 Car. & P. 570, S C.

(m) Thomas v. Newton, Mood. & M. 48, in notes; and 2 Car. & P. 606, (Chit. j. 1334).
(n) Shillito v. Theed, 4 M. & P. 575; S. C. 6 Bing. 753; S. Law J. 298, C. P., T. T. 1980.

# \*CHAPTER VI.

## OF THE SUM RECOVERABLE IN AN ACTION ON A BILL, &c.

| I. THE PRINCIPAL MONEY Holder's Right to recover full Am In case of Bill or Note payable by | 677  <br>ount ib.  <br>In- | Costs of Action IV. Re-exchange Nature of | 684<br>ib.<br>ib. |
|---------------------------------------------------------------------------------------------|----------------------------|-------------------------------------------|-------------------|
| stalments                                                                                   | 678                        | Who ljable to pay it                      | 635               |
| II. Interest                                                                                | 679                        | To what Amount                            | 656               |
| When recoverable                                                                            | ib.                        | V. Damages                                | 687               |
| When not recoverable                                                                        | 680                        | Upon Dishonour and Protest of             | f Fereign         |
| When it begins to run                                                                       | 681                        | Bill                                      | ib.               |
| When it stops                                                                               | 682                        | VI. PROVISION, &c.                        | ib.               |
| At what Rate                                                                                | 683                        | Meaning of                                | ü.                |
| III. Expences, &c.                                                                          | ib.                        | Amount of                                 | 688               |
| Noting and Protesting .                                                                     | ib.                        | •                                         |                   |

THE amount of the DAMAGES which the plaintiff is entitled to recover necessarily depends on the liability of the parties to the instrument, the nature of which liability has already been considered in that part of the work which treats of the drawing, acceptance, transfer, and dishonour of bills(a), and from whence it may be collected that, in general, the sum for which the bill is payable may be recovered, and in certain cases interest, and such expences as may have been occasioned by the dishonour of it.

# 1. THE PRINCIPAL MONEY.

I. The Principal Money.

Holder's Right to Amount.

WITH respect to the principal money, or that sum which is payable on the face of the bill or note, many instances occur in which, although the plainrecover full tiff may not have given full value for the bill, &c. he may, nevertheless, recover the whole sum, holding the overplus beyond his own demand as trustee for some other party to the bill, &c. entitled to receive such overplus. Thus if a bill be drawn in the regular course of business, as for money really due from the drawee to the drawer, in such case, in order to avoid several actions, an indorsee, though he hath not given the full value of the bill, may recover the whole sum payable, and be the holder of the overplus as a trustee for the indorser(b); and if the holder receive part-payment of the first indorser, he may, nevertheless, recover the whole against the drawer and acceptor, though if the acceptor pay a part, then only the residue can be recovered against the drawer(c). This rule, permitting the holder of a bill, &c. to recover more than is due to himself, only applies where there is some

(c) Walwyn v. St. Quintin, 1 Bos. & Pul.

658, (Chit. j. 578); Johnson v. Kennion, 2 Wils. 262, (Chit. j. 871); and see the same rule in proof in bankruptcy, Ex parte De Tastet, 1 Rose, 10.

<sup>(</sup>a) See ante, Part I. Ch. V. to X. (b) Wiffen v. Roberts, 1 Esp. Rep. 261, (Chit. j. 536); Jones v. Hibbert, 2 Stark. Rep. 304, (Chit. j. 1009).

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other person entitled to receive from the defendant the \*overplus of what is I. The due to the plaintiff, and if there be no such person, the plaintiff will be per- Principal mitted only to recover what is due to himself(d). But in case of bankrupt- $\frac{Money}{}$ . cy, though the holder may prove the whole amount under a commission Right to against a remote party, and receive a dividend until his debt is satisfied, he recover fall cannot prove for more than the sum actually due on the balance of account Amount. against his immediate indorser(e).

If there is a variance between the sum stated in words in the body of a bill or note, and the sum specified in figures in the margin, the former is to be taken as the sum for which the bill or note was drawn; and being an ambiguity apparent on the face of the instrument is incapable of explanation by parol; therefore, where a bill of exchange was expressed in figures to be drawn for 2451., in words for 2001., value received, with a stamp applicable to the higher amount, it was held, that evidence to shew that the words "and forty-five" had been omitted by mistake, was not admissible, and that the sum of 2001. only could be recovered (f).

We have, in the preceding chapter, seen that a partial failure of consideration, where the amount to be deducted is unliquidated, cannot be given in evidence to reduce the damages, though the total failure is an answer to A party to whom a bill or note is delivered to get discounted, but who pays it away in discharge of a debt of his own, is liable to the party by whom the bill or note was delivered to the same amount as if he had discounted it (h).

When a bill or note is payable by instalments, and it contains a clause, In case of that on failure of payment of any one instalment the whole shall become due, Bill or the holder is entitled to recover the whole amount of the sum for which it note payawas given; but where the instrument does not contain such a clause, it is stalments. doubtful on the authorities whether the holder can legally take a verdict for more than the instalment due. According to the case of Beckwith v. Nott(i), and several other cases cited by Lord Loughborough, in giving the opinion of the court in the case of Rudder v. Price(k), the plaintiff is entitled to the whole sum for which the note was given; but according to other cases, and particularly that of Ashford v. Hand (l), the plaintiff is only entitled to the instalment due at the time of commencing the action(1). When at the time of the trial nearly all the instalments are due, the jury will fre-

(d) Pierson v. Dunlop, Cowp. 571, (Chit. j. 892); Steel v. Bradfield, 4 Taunt. 227, (Chit. j. 855); Jones v. Hibbert, 2 Stark. Rep. 304,

(Chit. j. 1009). (e) Ex parte Bloxham, 6 Ves. 449, 600, (Ch. j. 626, 643, 685); acc. 5 Ves. 448; Cullen, 97, n. 85; Ex parte Leers, 6 Ves. 644, (Chit. j. 646); contrà, post.

(f) Saunderson v. Piper, 5 Bing. N. C. 425; see ante, 149, 150, 159, 160.

(g) Ante, 662; and see ante, 76 to 79. (h) Ougton v. West, 2 Stark. 321; see ante, 72.

(i) Beckwith v. Nott, Cro. Jac. 505; Jenk. 833, S. C.

(k) Rudder v. Price, 1 Hen. Bla. 551, (Ch. j. 476.)

(1) Ashford v. Hand, Andr. 370, (Chit. j. 288); Robinson v. Bland, 2 Burr. 1085, (Ch. j. 355).

And interest is payable only according to the law of the place where the note is drawn and is to be paid, though sucd elsewhere. Foden v. Sharp, 4 John. Rep. 193. Slacum v. Pomery, 6 Cranch, 221.

<sup>(1)</sup> It has been held in Massachusetts, that the instalments only which are due at the commencement of the action can be recovered. Tucker v. Randall, 2 Mass. Rep. 283. And upon a note payable in a certain number of years with interest, in the mean time, annually, judgment can be recovered upon default of payment of the interest, for the interest only. Hastings v. Wiswall, 8 Mass. Rep. 455. Greenleaf v. Kellogg, 3 Mass. Rep. 568. Cooley v. Rose, 8 Mass. Rep. 221. And the interest so recoverable is simple interest only upon the principal sum, although several years interest be in arrear. Hastings v. Wiswell, S Mass. Rep. 455.

l. The Principal Money.

quently, for the sake of avoiding another action, give the whole sum in damages. If the plaintiff take a verdict for more than he is entitled to recover, the court will either make him correct the verdict, and pay the costs occasioned by his misconduct, or grant a new trial(m).

Where a promissory note purports to be payable on demand, but is in truth given to secure the repayment of money by instalments, the payee having [ \*679 ] already brought an action on the note, and taken a cognovit \*for the instalments then due, cannot maintain a second action on the note for default in payment of the subsequent instalments (n).

II. Interest(o).

#### II. INTEREST.

When recoverable.

WITH respect to the recovery of interest, the general rule is, that the law does not imply a contract on the part of the debtor to pay interest on the sum he owed, nor, before the 3 & 4 Will. 4, c. 42, was the same recoverable, although the payment of the principal debt might have frequently been demanded(p). But by the 28th section of that statute it is enacted, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law." And in the case of a bill or note, independently of this act, interest is usually recoverable from the time it becomes due(1); and a bill or note payable on a day certain carries interest from that day, unless the non-payment at the appointed time was occasioned by the negligence of the holder(q); and in trover for a bill, the jury may, if they think fit, include the amount of interest in the damages, and this although there was no mention of interest in the declaration, and no special damage laid(r). But country bankers' notes payable on demand do not in general carry interest(s). When interest is made payable by the bill, &c. itself, there is no doubt of its being recoverable as a debt, in other cases it is

(m) Bacon v. Searles, 1 Hen. Bla. 88, (Ch. De Bernales v. Fuller, 2 Campb. 426; Walker j 449); Pierson v. Dunlop, Cowp 571, (Ch. j. 392); acc. Johnson v. Kennion, 2 Wils. 262, (Chit. j. 371), semb contrà

(n) Siddall v. Rawcliffe, 1 Mood. & Rob.

268; 1 C. & M. 487, S. C

268; 1 C. & M. 487, S. C.

(a) As to the recovery of interest in general, see Chitty's Ex. Dig. tit. "Interest;" Tidd, 9th edit. 871 to 875; Arnott v. Redfern, 8 Bing. 353; 2 Car. & P. 88, S. C.; Frubling v. Schroeder, 2 Scott, 143; 2 Bing. N. C. 77, S. C. How far payment of interest evidence of principal due, Manley v. Peel, 5 Esp. Rep. 121; ante, 424, note (x).

(p) Havilland v. Bowerbank, 1 Campb. 50;

v. Constable, 1 Bos. & Pul. 307; Chitty, jan. on Contracts, 195.

(q) Laing v. Stone, 2 Man. & Ry. 561, (Chit. j. 1404); Lithgow v. Lyon, Coop. Ch. Ca. 29. Diligence to obtain payment seems in all cases necessary, when interest is not expressly reserved; Bann v. Dalzell, Mood. & M. 228; S Car. & P. 876, S. C. (r) Paine v. Pritchard, 2 Car. & P. 558.

(Chit. j. 1325). And see the 29th section of 3 & 4 Will. 4, c. 42, which empowers juried to give damages in the nature of interest in actions of trover, &c.

(s) Parker v. Hutchinson, 8 Ves. 183.

<sup>(1)</sup> Where a note was in these words, "Due T. N. on demand, 300 dollars," &cc. Held, that interest would commence from the time of demand only. Cannon v Boggs, 1 M'Cord, 370; Yanghan r. Goode, 1 Minor's Alabama Rep. 417.

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recovered only as damages for breach of contract(t); and in such other cases II. Interthe jury are not bound to give it: if they should be of opinion that the delay est. of payment has been occasioned by the default of the holder, they may re- When Refuse; but otherwise they are bound to find a verdict for interest(u); and in coverable. one case the jury refused to give it where a promissory note had been overdue thirty years, and the court, on motion, would not increase the verdict by giving it(x). In case of bankruptcy, \*although there be a surplus, bills do [ \*680 ] not carry interest unless the previous dealings between the parties afford evidence of a contract to pay interest(y). In some cases interest is not allowed after a tender; and where the maker of a promissory note paid money into the hands of an agent to retire it, and the agent tendered the money to the holder on condition of having it delivered up, and the note being mislaid, that condition was not complied with, and the agent afterwards became bankrupt with the money in his hands; it was held, that though the maker was still responsible for the amount of the note, he was relieved from payment of interest(z). The acceptor of a bill and the maker of a note are liable to pay interest; so are the drawer and indorsers(a), without protest(b); and when goods are sold, to be paid for by a bill of exchange, and the purchaser neglects to give the bill, the vendor is entitled to interest as damages from the time when the bill, if given, would have become due(c); and the interest may in that case be recovered under the common count for goods sold(d); and this doctrine applies to any case where there is a contract to pay by a To entitle a party to interest on a bill or note he should declare on it, and produce the bill or note itself (f)(1).

But interest is not recoverable on a debt for goods sold, even on limited When not credit(g), or on a balance struck on an account for goods sold(h), or for recovera-

(t) Cameron v. Smith, 2 Bar. & Ald. 305, (Chit. j. 1047); 5 Taunt. 626; In re Burgess, 2 Moore, 745; 8 Taunt. 660, (Chit. j. 1042). So in equity, Ex parte Williams, 1 Rose, 399; Ex parte Cocks, id. 317; Lowndes v. Collens, 17 Ves. 27; Lithgow v. Lyon, I Coop. Ch. Ca. 29. When interest recoverable on note payable on demand with interest, though plaintiff precluded from recovering principal by reason of special agreement, Baylis v. Ringer, 7 Car. & P. 691; ante, 667, note (s).
(u) Per Bayley, J. in Cameron v. Smith, 2

Bar. & Ald. 808, (Chit. j. 1047).

(2) Du Belloix v. Lord Waterpark, 1 Dow. & Ry. 16, (Chit. j. 1128); Bann v. Dalzell, Mood. & M. 228; 3 Car. & P. 376, S. C; Arnott v. Redfern, 3 Bing. 353, 359; 2 Car. & P. 89, S. C.; Calton v. Bragg, 15 East, 223; Higgins v. Sarjent, 2 Bar. & Cres. 348; 3 Dow. & Ry. 616, S. C.; Page v. Newman, 9 Bar. & Cres. 378; 4 Man. & Ry. 305, (Chit. j. 1428); and see assigned reasons 9 Bar. & Cres. 380; 8 Bing 360.

(y) Ex parte Williams, 1 Rose, 399; and Ex parte Cocks, id. 817; Lowndes v. Collens, 17 Ves. 27; Lithgow r. Lyon, 1 Coop. Ch. Ca. 29. Interest accruing before the act of bankruptcy cannot be added to the principal sum due on a bill so as to make a good petitioning creditor's debt, unless it be expressly made payable on the face of the bill; Ex parte Greenway, Buck, 412, (Chit. j. 647); In re Burgess, 8 Taunt. 660; 2 Moore, 745, (Chit. j. 1042); Cameron v. Smith, 2 B. & Ald. 305, (Chit. j. 1047); but may be proved, 6 Geo. 4, c. 16, s. 57. See post, Ch. VIII. s. iii. Bankruptcy.

(z) Dent v. Dunn, 2 Campb. 296, (Chit. j. 877.)

(a) Cameron v. Smith, 2 B. & Ald. 305,

(Chit. j. 1047); 5 Taunt. 240. (b) Windle r. Andrews, 2 B. & Ald. 696, (Chit. j. 1062); ante, 465, note (z).

(c) Middleton v. Gill, 4 Taunt. 298, 299; Lowndes v. Collens, 17 Ves. 27; Porter v. Palsgrave, 2 Campb. 472, (Chit. j. 806); Boyce r. Warburton, 2 Campb. 480, 482, n. (Chit. j. 807).

(d) Marshall v. Poole, 13 East, 98; but see Slack v. Lowell, 3 Taunt. 157, (Chit. j. 805).

(e) Furlonge v. Rucker, 4 Taunt. 250.
(f) Fryer v. Brown, Ry. & Moo. 145, (Ch.

j. 1227).

(g) Gordon v. Swan, 12 East, 419; 2 Campb. 429, S. C.; 18 East, 99; 15 East, 225; but see Mountford v. Willes, 2 Bos. & Pul. 337; Blaney v. Hendrick, 3 Wils 205; 2 Bla. Rep. 761, S. C.; Trelawny v. Thomas, 1 Hen. Bla. 305; De Haviland v. Bowerbank, 1 Campb.

<sup>(1) {</sup> It is error to calculate interest on the amount of a bill from maturity, together with the damages up to the time of the rendition of the judgment. Interest can only run on the amount for which the bill was drawn. Rowland v. Hoover, 2 How. Rep. 769. }

II. Inter-

work and labour(i), or for money had and received, though fraudulently(k); or lent(l), unless there was a course of dealing allowing it(m), or unless it can be proved that the defendant made use of the money, and did not merely withhold it, or unless payment shall have been demanded according to the 3 & 4 Will. 4, c. 42, s. 28(n); nor is it claimable on money paid for de-[ \*681 ] fendant(o), nor on a sum insured(p), nor \*in an action on a judgment(q), English or foreign, or Scotch decree (r), unless due diligence to obtain payment has been used(s). And it has been held, that bail in error are not liable for interest due on a promissory note(t). The circumstance of money having been covenanted to be paid on a day or days certain, does not imply that interest shall be paid in case regular payment be not made(u). But interest is recoverable in debt on an award upon a sum awarded to be paid on a day certain, from the time of a subsequent demand(x).

In all cases interest is allowed if there be an express contract for the pay-And an agreement between the parties that it should be paid may be inferred from the course of dealing between them; as if it has frequently been charged and paid without objection in former and similar ac-The invariable custom or usage of any particular trade to charge interest may also establish a contract to that effect(z). And even compound interest is allowed if consistent with the course of dealing between the parties(a)(1). But it seems that a debtor is not bound or affected by the custom of his banker to charge interest upon interest by making rests in their accounts, unless it be proved he was aware of such their practice (b)(2). Generally speaking, interest is treated as an accessory to the principal debt, and where the right to the principal is barred, the accessory falls with it;

(i) Trelawny v. Thomas, 1 Hen. Bla. 305; Blaney v. Hendrick, 3 Wils. 205; 2 Bla. Rep. 761, S. C.; De Haviland v. Bowerbank, 1 Campb. 51. In some cases damages in the nature of interest is recoverable for work and labour, 9 Price, 134.

(k) Depeke v. Munn and another, 3 Car. & P. 112.

(1) Calton v. Bragg, 15 East, 223.

(m) Id. ibid.; Ex parte Williams, 1 Rose, 399; Denton v. Rodie, 3 Campb. 496, (Chit. j. 902); Gwyn v. Godby, 4 Taunt. 846. Interest is not in general recoverable against an auctioneer on deposit; Lee v. Munn, 8 Taunt. 45; 1 Moore, 485, S. C.; although he has made interest; Harrington v. Hoggart, 10 Bar.

(n) Thompson v. Morgan, 8 Campb. 102, (Chit. j. 847); Walker v. Constable, 1 Bos. & Pul. 806; De Haviland v. Bowerbank, 1 Campb. 50; Crockford v. Winter, id. 129; De Bernales v. Fuller, 2 Campb. 426; Lee v. Munn, 8 Taunt. 45; 1 Moore, 485, S. C.; and see Harrington v. Hoggart, 10 Bar. & Cres. 577, supra, note (m).

(o) Carr v. Edwards, 3 Stark. Rep. 132. (p) Kingston r. M'Intosh, 1 Campb. 518; 8 Dow. & Ry. 613.

(q) Hilhouse and others v. Davis, 1 Maule & S. 178; and see other cases in Chit. jun. on Contracts, 195 to 197.

(r) Arnott v. Redfern, 8 Bing. 858; 2 Car. & P. 88, S. C.

(s) Bann v. Dalzell, Mood. & M. 228; 3 Car. & P. 876, S. C.

(t) Anon. 6 Price, 338.

(u) Foster v. Weston, 6 Bing. 714; Page v. Newman, 9 Bar. & Cress. 878; 4 Man. & Ry. 305, (Chit. j. 1428); Gordon r. Swan, 12 East, 419; 2 Campb. 429, S. C.; 13 Fast, 99; but see Lowndes v. Collens, 17 Ves, 27; 5 Ves. S01; 8 Ves. 138. Since the 3 & 4 Will. 4, c. 42, s. 29, the jury might allow interest (x) Johnson v. Durant, 4 Car. & P. 327; and see 3 & 4 Will. 4, c. 42, s. 28, ante, 679.

(y) 15 East, 223; 3 Campb. 467; 4 Taunt. 346; 4 Car. & P. 124; Chit. jun. on Contracts, 197.

(z) Id. ibid; and see Ikin v. Bradley, 2 Moore, 206; 5 Price, 536, (Chit. j. 1025). (a) 2 Campb. 486; 2 Anstr. 495: Brace v.

Hunter, 3 Campb. 467; 5 B. & Ald. \$4; Chit. jun. on Contracts, 197.

(b) 1 Stark. Rep. 487; Eaton v. Bell, 5 B. & Ald. 40, (Chit. j. 1115).

<sup>(1)</sup> The law does not allow interest upon interest, even where a promissory note is made payable with interest annually. Doe v. Warren, 7 Greenleaf's Rep. 48. Hyde v. Brown, 5 Miller's Louisiana Rep. 33.

<sup>(2)</sup> A bank which by law is limited to six per cent. interest on all discounts, is entitled to recover at the rate of seven per cent. per annum from the time that the debt becomes due. U. S. Bank v. Chapin, 9 Wend. Rep. 471.

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though perhaps in the case of an express contract to pay interest independ- 11. laterently of the principal, it may be otherwise(c).

In some cases it is said that interest is payable from the date of the note, When it where it appears on the face of it to have been given for money last (4); begins to as where it appears on the face of it to have been given for money lent(d);  $r_{uu}$ or is payable with interest(e.) As against the acceptor of a bill, and the maker of a note, payable at a certain time after date or sight, interest is recoverable from the day on which the bill or note became due, without proof of any demand (f), or if payable on demand, without being expressed for payment of interest, from the time of the demand(g). And in a recent case it was held, that on a promissory note payable on demand, where there is no allegation or proof of any agreement for \*interest, the plaintiff is only [ \*682 ] entitled to interest from the day of issuing the writ of summons(h). where the maker of a promissory note promised for himself and his executors to pay A. B. (or her executors), one year after his (the maker's) death, 3001. with legal interest, it was held, that the interest began to run from the date of the note(i). The drawer or indorser of a bill, or indorser of a note, is only liable to pay interest from the time he receives notice of the dishonour(k); and in the case of an inland bill, it is not necessary it should be protested (l). If at the time a bill fall due there be no person legally authorised to receive it, as if the holder be dead intestate, and administration be not taken out, even the acceptor shall be charged with interest only from the time the administrator demands payment of the principal (m).

Under particulars of demand, stating that the action was brought to recover the amount of a note of hand, it was holden, that interest on it is re-

(c) See per Tindal, C. J. in Hollis v. Palmer, 2 Bing. N. C. 713, 716, 717; 8 Scott, 265, 266, S. C.; ante, 617, note (m). And see Baylis v. Ringer, 7 Car. & P. 691; ante,

(d) Cotten v. Horsemanden, Prac. Reg 357. (e) Kennerley v. Nash, 1 Stark. Rep. 452, (Chit. j. 977); Doman v. Dibden, Ryan. & Moo. 381, (Chit. j. 1293). A note promising to pay "1500! on demand with lawful interest" carries interest from the date; Weston v. Tomlinson and others, Guildhall, 23d December 1826, per Abbott, C. J. and see Roffey v. Greenwell, 2 Perry & Dav. 365; post, 692, note (i).

(f) 8 Ves. 134; 5 Ves. 803; Lithgow v. Lyon, 1 Coop. Ch. Ca. 22; Lowndes v. Collens, 17 Ves. 27; sed quære.

(g) Upton v. Lord Ferrers, 5 Ves. 801; Weston v. Tomlinson and others, supra, note (e); Farquhar v. Morris, 7 T. R. 124; Blaney v. Hendrick, 2 Bla. Rep. 761; 8 Wils. 205, S. C.; Vernon r. Cholmondeley, Bunb. 119; 17 Ves. 27; Firth v. Leroux, 2 T. R. 58; Marius, 18; Corten r. Horsewanden, Prac. Reg. 857; and cases and law in De Haviland v. Bowerbank, 1 Campb. 50 to 53; Porter v. Palsgrave, 2 Campb. 473, (Chit. j. 806); 3 Ves. 134.

(h) Pierce v. Fothergill, 2 Bing. N. C. 167; 2 Scott, 334, S. C.

(i) Roffey v, Greenwell, 2 Perry & Dav. 365, cur. adv. vult. Lord Denman, C. J. delivered the judgment of the court. "The question was from what period interest should be computed on a note in the following form—' I promise for myself and my executors to pay to

Frances Harris (or her executors) one year after my death, 300l. with legal interest,' no proof of the consideration being given. It was admitted that no case in point could be found, nor any which lays down the rule or principle by which it is to be decided. Generally speaking, an instrument of this sort carries interest from its date whether payable on demand or at a time specified. The reason is, that the party who makes the promise must be expected to keep it, and if he does, no interest can be due from any other period than the date. In the present case there is indeed another period from which it might be computed, that of the maker's death; but it appears improbable that if that was his intention he should not have expressed it with more distinctness. We think, in the absence of all particular proof, that we must presume the note to have been given for value, so that interest would be due from the date. If that be doubtful, the instrument ought to be construed most strongly against the maker. Plaintiff is therefore entitled to the larger sum, and judgment must be entered for it.'

(k) Walker v. Barnes, 5 Taunt. 240. From date of protest in France, 1 Pardess. 461. The case of Walker v. Barnes, so far as it decides that the drawer or indorser is entitled to a reasonable time after notice to make payment, (see Report of same case, 1 Marsh 36; ante, 341, note (p),) is overruled by Siggers v. Lew-is, 1 C., M. & R. 370; ante, 341, note (q), **898**, note (x).

(1) Windle v. Andrews, 2 Bar. & Ald. 696;

2 Starkie, 425, (Chit. j. 1062).
(m) Murry v. East India Company, 5 B. & Ald. 204, (Chit. j. 1121.)

II. Inter-

coverable, and that when a note is payable by instalments, in which it is stipulated that on failure of payment of any instalment the whole is to become due, the interest is to be calculated on the whole sum remaining unpaid on default of any instalment, and not on the respective instalments at the respective times when they would become payable (n).

With respect to the time when interest stops, Lord Mansfield declared(0),

When it stops.

that the general practice of the associates in taking damages in cases where the debt carried interest, was to stop at the commencement of the action(p); which practice was not founded in law, but in mistake and misapprehension; and that in point of justice, interest should be carried down quite to the actual payment of the money; but as that cannot be, it should be carried down to the time when the demand is completely liquidated by the judgment being signed, by which means complete justice is done to the plaintiff, and the temptation to a defendant to make use of all the unjust dilatoriness of chicane is taken away: for if interest were to stop at the commencement of the suit, when the sum is large the defendant might gain by protracting the cause in the most expensive and vexatious manner; though, even in a [ \*683 ] \*case of great hardship, interest beyond the time of final judgment has been refused (q). In trover for bills of exchange, interest from the date of the final judgment upon all such bills as has been received before the judgment, and upon all such as had been received afterwards from the time of the receipt, was allowed in the Exchequer Chamber on error(r); and though it was afterwards determined, that in trover for bills, interest could not be recovered after the time of the demand and refusal to deliver them up(s), this would now be otherwise, since the 3 & 4 Will. 4, c. 42, s. 29, which authorises the jury in all actions of trover, if they shall think fit, to give damages in the nature of interest, over and above the value of the goods at the time of the conversion. We have seen, that after a tender and wrongful refusal to deliver a bill, the interest thereon ceases to run(t).

At what rate.

The rate of interest allowed in this country is 51. per cent. per annum, as well in courts of equity as at law(u)(1). But when a higher rate of interest is allowed in a foreign country, it may be recovered here, and in India it is not always limited to 121. per cent. (x)(2). In an action against the

(n) Blake v. Lawrence, 4 Esp. Rep. 147, (Chit. j. 648.)

(s) Mercer v. Jones, 3 Campb. 477, (Chit. 900).

(o) In Robinson v. Bland, 2 Burr. 1085, (Chit. j. 355, 356).

(t) Ante, 680. (u) Upton v. Lord Ferrers, 5 Ves. 803; ante, 87.

(p) Randolph v. Raginder, Prac. Reg. 357. (q) Jarold v. Rowe, 8 Taunt. 582.

(x) Anonymous Case in House of Lords, 3 Bing. 193.

(r) Atkins v. Wheeler, 2 New Rep. 205, (Chit. j. 729).

(1) In a bond or note to pay a certain sum at a future day, with interest from the date at 5 per cent. a month if not punctually paid, the contract for interest from the date is a penalty. Only interest from maturity at 8 per cent. per annum is recoverable. Henry and Winston v. Thompson, 1 Minor's Alabama Rep. 209.

To carry interest at a rate exceeding 8 per cent. per annum, the contract must be in writing. signed by the party to be charged, and express that it is for the loan of money, &c. and such in-

terest is recoverable only for the stipulated time of forbearance. Ibid.

(2) When a judgment is obtained in England on a foreign contract, the foreign interest is calculated up to the time of the judgment, and after that, the English, if any interest is allowed. Verree et al. v. Hughes, 6 Halsted's Rep. 91.

Where a contract is made in reference to the laws of another country, and is to be performed there, the interest is to be calculated agreeably to the laws of the place where the contract is to be performed. Hosford v. Nichols et al. 1 Paige's Chan. Rep. 220.

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drawer of a foreign bill of exchange, dishonoured here by non-acceptance, II. Interwhere the plaintiff is allowed a per centage as of 10l. per cent. in name of est. damages, he is only entitled to interest from the day the bill ought to have At what been paid; but where there is no such allowance for damages, the plaintiff Rate. is entitled to interest from the day the bill was dishonoured for non-acceptance(y). And in an action upon a bill drawn in Bermuda on England, which ought to have been paid in England, the plaintiff recovered 7 1-2 interest, being the rate of interest at Bermuda(z). We have before suggested that it may be expedient to limit the amount of interest, as well as reexchange and expences, by the express terms of the bill(a).

## III. Expences, &c.

III. Expences, &c.

The only expence which the holder of a bill, at the time it becomes due, Noting and can be put to by the dishonour of it, is that of the charge for noting and Protesting, protesting, and he cannot demand more of any of the parties to the bill than a satisfaction for that expence; and this only in the case of a foreign bill. But a party who has been obliged to pay \*the holder in consequence of the [\*684] acceptor's refusal, frequently is put to other expences by the return of the bill, such as re-exchange, postage, commission, and provision(b).

An indorser of a bill having had an action brought against him by the in- Costs of dorsee, is not entitled to recover from the acceptor the costs incurred in Action.

(y) Gantt r. Mackenzie, 3 Campb. 51, (Ch. j. 837), This was an action on a bill of exchange for 1000l., drawn at Barbadoes, the Sth February, 1809, by the defendant, on Scott, Idles, and Co. in London, payable to the plaintiff at sixty days sight. The bill was refused acceptance on the 17th April, 1809, and was afterwards presented for payment on the 19th June following, and again dishonoured. The only question was, from what period interest was to be calculated. Lord Ellenborough left this, upon the custom of merchants, to the special jury, who said the holder of the bill was entitled to 10l. per cent. as damages, and that interest was to be allowed only from the time when the bill was presented for payment; and

Mr. Waddington, the foreman, observed, that he had known it to be so settled in a case before Mr. Justice Buller. Verdict accordingly. But in a case of Harrison v. Dickson, tried at the same sittings, which was an action against the indorser of a bill of exchange, drawn upon England from New South Wales, the plaintiff did not claim any per centage upon the principal as damages, and was allowed interest from the time the bill was dishonoured for non-acceptance.

(z) Coughan v. Banks, N. P. sittings after M. T. 57 Geo. 3, Dec. 12, Pocock, attorney.

(a) Ante, 165.

(b) Auriol v. Thomas, 2 T. R. 52, (Chit. j. 441).

As a general rule, interest is payable according to the laws of the place where the contract is made. Ibid.

The contract to accept the bills of exchange on which the action was brought, was made in Charleston, South Carolina. The bills were drawn in Georgia, on B. and H. in Charleston, with a view to their payment in Charleston, where the contract was to be executed. The interest on the bill which was so drawn, and was unpaid, is to be charged at the rate of interest in South Carolina. Boyce et al. r. Edwards, 4 Peters' Rep. 111.

A note to be paid in another State, carries interest according to rate there; which must be proved as other facts. Peacock v. Banks, 1 Minor's Alsbama Rep. 387. On general principles, in the absence of any agreement on the subject, the money is payable where the creditor resides, and the interest is to be computed at the rate allowed by the law of the country where the contract was made, or is to be performed. Stewart v. Ellies, 2 Paice's Chan. Rep. 604.

the contract was made, or is to be performed. Stewart r. Ellice, 2 Paige's Chan. Rep. 604.

A bill of exchange drawn by A of Tennessee on B. of New-Orleans, will carry interest according to the laws of Louisiana. Cooper, Carathers & Co. r. Sandford, 4 Yerger's Rep. 452.

By the laws of Louisiana, interest is either legal or conventional; by the former it is fixed; by the latter it may be contracted for, provided it does not exceed ten per cent., if the contract is in writing. Held, that the custom of the New Orleans merchants to charge eight per cent. by way of damages was illegal, and cannot be enforced upon protested bills accepted for the accommodation of the drawers. Ibid.

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III. Expenses, ALC. Costs of Action.

such action, unless there was an express and collateral contract of indemnity(c). In a later case, however, it seems to have been doubted whether such costs might not be recovered as unliquidated damages, in a special action by the drawer against acceptor (d).

Where an action was commenced against a surety on a promissory note, who agreed that if the plaintiff would take proceedings against the principal, he, the surety, would pay the extra costs occasioned thereby; and the plaintiff did so, and afterwards issued execution against the surety for the balance due on the note, and also the extra costs, it was held, that this was a collateral agreement upon which the plaintiff might sue, but that he could not issue execution for the costs incurred against the principal; and the court ordered the execution to be reduced accordingly (e).

IV. Reexchange (f).Nature of.

#### IV. RE-EXCHANGE.

RE-EXCHANGE is the expence incurred by the bill being dishonoured in a foreign country in which it is payable, and returned to the country in which it is made or indorsed, and there taken up: the amount of it depends on the cause of the exchange between the countries through which the bill has been negotiated (g). It is not necessary for the plaintiff to shew that he has paid the re-exchange; it suffices if he be liable to pay it; but if the jury find that there was not at the time any course of re-exchange between the two foreign places, then no re-exchange is recoverable (h)(1). It appears not to be decided whether any exchange or re-exchange can be allowed between this and an enemy's country (i). It is said, that the relative [ \*685 ] abundance \*or scarcity of money in different countries, is what forms the ex-

- (c) Dawson v. Morgan, 9 Bar. & Cres. 618, (Chit. j. 1440); and see Roach v. Thompson, 4 Car. & P. 194; Mood. & M. 487, (Chit. j. 1486). Per Lord Tenterden, C. J. ante, 586. (d) Stovin v. Taylor, 1 Nev. & Man. 250,
- 251.
- (e) Evans v. Pugh, 2 Dowl. P. C. 360, Exch.

(f) As to exchange and re-exchange, see 1 Pardess. 460 to 463; and the Cambist's Compendium, Part II p. 55, et seq.

(g) Cullen, 172; 1 Montagu's Bank. L. 146. For the nature of exchange, see Mont. Esp L. b. 2, l. 10; and Smith's Wealth of Nations, 2d vol. 144, 213, 234; and the observations in De Tastet v. Baring, 11 East, 269, (Chit. j.

(h) De Tastet v. Baring, 11 East, 269, 270;

2 Campb. 65, S. C.
(i) De Tastet v. Baring, 11 East, 265; 2
Campb. 65, (Chit. j. 768). It is there said the nature of the transaction which gives rise to the question of exchange and re-exchange, is this: A merchant in London draws on his debtor in Lisbon a bill in favour of another for so much, in the currency of Portugal, for which he receives its corresponding value at the time in

English currency; and that corresponding value fluctuates from time to time, according to the greater or lesser demand there may be in the London market for bills on Lisbon, and the facility of obtaining them: the difference of that value constitutes the rate of exchange on Lis-bon. The like circumstances and considerations take place at Lisbon, and constitute in like manner the rate of exchange on London. When the holder, therefore, of a London bill, drawn on Lisbon, is refused payment of it in Lisbon, the actual loss which he sustains is not the identical sum which he gave for the bill in London; but the amount of its contents, if paid at Lisbon, where it was due, and the sum which it will cost him to replace that amount upon the spot by a bill upon London, which he is entitled to draw upon the persons there, who are liable to him upon the former bill. That cost, whatever it may be, constitutes his actual loss, and the charge for re-exchange. And it is quite immaterial whether or not he in fact redraws such a bill on London, and raises the money upon it in the Lisbon market; his loss by the dishonour of the London bill is exactly the same, and cannot depend on the circumstance whether he repay himself immediately by re-

<sup>{</sup> The difference of exchange may be recovered on a bill of exchange. But this seems not to be the rule where the action is founded on a promissory note and there is no count or allegation in the declaration to cover the rate of exchange. Weed v. Mill, 1 McLewis Rep. 428.

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change between those countries(k). In the drawing of bills on a foreign IV. Recountry, the value of money in that country is the first thing to be inquired exchange. into; thus, for instance, supposing 71,000 livres turnois are worth 603l. 19s. Nature of 10d. English money sterling, and that an English merchant has sold goods of the value of 603l. 19s. 10d. to a Frenchman, who wishes to pay for the same by a bill of exchange payable in France, the bill must of course be drawn for 71,000 livres turnois: if at the time the bill is due the exchange is in favour of France, and consequently the value of 71,000 livres turnois exceeds that of 603l. 19s. 10d. English money, and the bill be returned to this country, and the drawer or an indorser be called on to take it up, he may (as in the case of Mellish v. Simeon(1) be obliged to pay 3001. 4s. 5d. more than the amount of the bill, which sum forms what is called the re-exchange, and is the difference between the draft and re-draft(m). In trover for certain billetes paid to the plaintiffs by the Pururian government, and purporting to be of the value of 16,000 dollars, the cause was referred to arbitration, and an award having been made in favour of the plaintiffs, the court ordered the value of the billetes to be estimated by the prothonotory at the rate at which they were current at the time of the award; and it was held, that such value was to be estimated as the value of a bill of exchange for the amount of the dollars specified in the billetes, upon a solvent house in the country where they were issued, although they were at a considerable discount at the time of making the award (n).

It appears that the drawer of a bill is liable for the whole amount of the reexchange, occasioned by the circuitous mode of returning the bill through various countries in which it has been negotiated, as much as for that occasioned by a direct return, although payment of the bill were expressly prohibited by the laws of the country on which it was \*drawn(0). But the ac- [ \*686 ] ceptor is not liable for re-exchange; for his contract cannot be carried further than to pay the sum specified in the bill, together with legal interest, where interest is due(p).

drawing for the amount of the former bill, with the addition of the charges upon it, including the amount of re-exchange, if unfavourable to this country at the time, or whether he wait till a future settlement of accounts with the party who is liable to him on the first bill here: but that party is at all events liable to him for the difference; for as soon as the bill was dishonoured, the holder was entitled to redraw. That therefore is the period to look to. It ought not to depend on the rise or fall of the bill market, or exchange afterwards; for as he could not charge the increased difference by his own delay in waiting till the exchange grew more unfavourable to England before he drew, so neither could the party here fairly insist on having the advantage, if the exchange happened to be more favourable when the bill was actually drawn. Where re-exchange has been recovered on the dishonour of a foreign bill, it has not been usual to prove that in fact another bill was redrawn. If the quantum of damage is not to be ascertained by the existing rate of exchange at the time of the dishonour, the rule will became extremely complex for settling what is to be paid on the bill between different indorsees, each of whom takes it at the value of the exchange when he purchased it. If then the amount of the re-exchange between the two

countries at the time of the dishonour be the true measure of damage which the holder at Liebon was entitled to receive from his indorsee in England, and that re-exchange consists of the amount of a bill on London, which would put the holder of the dishonoured bill in the same situation as if he had received the contents of it when due in Lisbon, it cannot make any difference whether the exchange between Lisbon and London at the time were carried on directly or through the medium of others. The more circuitous and difficult it was, the greater would be the loss of the holder by the dishonour.

(k) Cullen, 102, 172; 1 Montagu, 146. For the nature of exchange, see Mont. Esp. L. b. 2, 1. 10; 1 Pardess. 460 to 463; and Smith's Wealth of Nations, 2d vol. 144, 234; Camp. Comp. 55, et seq.; and see observations in De Tastet r. Paring, 11 East, 269; 2 Campb. 65, (Chit. j. 768). See last note.

(1) Mellish r. Simeon, 2 Hen. Bla. 378,

(Chit. j. 534); ride note, ante, 193, note (m).

(m) Francis r. Rucker, Amb. 674, (Chit. j. 380); 2 Smith's Wealth of Nations, 228.

(n) Denegal v. Naylor, 5 Moore & P. 443; 7 Bing. 460, S. C.

(o) Antc, 193.

(p) Napier v. Schneider, 12 East, 420, (Ch. j. 790); aute, 304, note (1). Per Lord Ten-

IV. Reexchange. To what Amount.

We have before suggested the expediency of limiting the amount of reexchange either on the bill or indorsement (q). Where A. deposited a sum of money at the banking-house of B. in Paris, for which B. gave him his note payable in Paris, or, at the choice of the bearer, at the Union Bank in Dover, or at B.'s usual residence in London, according to the course of exchange upon Paris, and, after this note was given, the direct course of exchange between London and Paris ceased altogether, having been previously to its total cessation extremely low, and the note was at a subsequent period presented for acceptance and payment at the residence of B. in London, at which time there was a circuitous course of exchange on Paris by way of Humburgh, it was holden, that A. was entitled to recover on the note according to such circuitous course of exchange upon Paris at the time when the Where, however, acceptance or payment has been note was presented (r). rendered illegal by an act of this country, the drawer, &c. may not be liable to be sued on the bill(s); and we have already seen, that if a person draw a bill in a foreign country upon another in England, and it be protested for non-acceptance, the drawer will be discharged from liability to be sued in this country, by his having obtained a certificate of discharge, according to the law of the country where he drew the bill(t). Between this country and India it is not customary to make a distinct charge of re-exchange; but it has been the constant course with respect to bills for payment of pagodas in the East Indies, and returned protested to allow at the rate of 10s. per pagoda, and 5 per cent. after the expiration of thirty days from the notice to the defendant of the bill's dishonour, which includes interest, exchange, and all other charges (u), and by an arrangement entered into in 1822, between certain persons connected with the East India trade, 25 per cent. appears to have been considered a proper sum(x). But that arrangement could of course only bind the parties to it.

It appears from the case of Francis v. Rucker(y) that the drawer and indorser of bills drawn in Pennsylvania on any person in Europe, and returned protested for non-payment to that country, were then liable to the payment of 201. per cent. advance for the damage thereof. But the liability to pay re-exchange does not extend to the acceptor of a bill accepted in Eng-[ \*687 ] land: he is only liable for the principal \*sum, together with interest, according to the legal rate of interest where the bill is payable(z).

In De Tastet v. Baring(a) a verdict having passed for the defendants in

terden, in Dawson v. Morgan, 9 Bar. & Cres. 620, (Chit. j. 1440); and see post, 687, n. (2).

(q) Ante, 165; see Camb. Comp. 15 to 17. (r) Pollard v. Herries, 3 Bos. & Pul. 335, (Chit. j. 672); ante, 399; and see Bayl. 5th

edit. 354. (s) Pollard r. Herries, 3 Bos. & Pul. 340, (Chit. j. 672).

(t) Ante, 168; Potter v. Brown, 5 East, 124, (Chit. j. 694).

(u) Auriol v. Thomas, 2 T. R. 52, (Chit. j. 441); Bayl. 5th edit. 354, 355.

(x) Extracts from the minutes of the East India Trade Committee, London, 3d Oct.

"The concurrence of all the houses connected with the East India trade having been signified to a proposition respecting the guarantee for the due honour of bills of exchange, it was resolved unanimously, that 25 per cent. on the

original consideration given for bills of exchange on the East Indies shall be deemed a fair equitable guarantee to cover all contingencies of exchange, or re-exchange, &c. up to the period when demand shall be made upon the drawer or indorsers, by the production of a regular protest of non-payment, and that the members of the society shall conform to the same as an established custom in all cases not determinable by specific contract.'

Signed J. Cockburr and Co. (y) Francis v. Rucker, Amb. 672, (Chit. j. 386).

(z) Woolsley v. De Crawford, 2 Campb. 445, (Chit. j. 798); Napier v. Schneider, 12 East, 420, (Chit. j. 790); but see Pothier, cited in Manning's Index, 64.

(a) De Tastet v. Baring, 11 East, 265; 2 (Chit. j. 769) and 628 and (1)

Campb. 65, (Chit j. 768); ante, 628, note (i)

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an action to recover the amount of the re-exchange upon the dishonour of a IV. Rebill drawn from London on Lisbon, upon evidence that the enemy was in exchange. possession of Portugal when the bill became due, and Lisbon was then block- To what aded by a British squadron, and there was in fact no direct exchange between amount. London and Lisbon, though bills had in some few instances been negotiated between them through Hamburgh and America about that period, the court refused to grant a new trial, on the presumption that the jury had found their verdict on the fact, that no re-exchange was found to their satisfaction to have existed between London and Lisbon at the time; the question having been properly left to them to allow damages in the name of re-exchange, if the plaintiff, who had indorsed the dishonoured bill to the holder, had either paid, or was liable to pay, re-exchange; and, saving the question of law, whether any exchange or re-exchange could be allowed between this and a country in the possession of the enemy. There cannot be any accumulation of re-exchange between several indorsers (b).

All questions as to exchange or re-exchange arising with regard to the currency between Great Britain and Ireland, were determined by the statute 6 Geo. 4, c. 79, which assimilates the currency and monies between the United Kingdoms.

### V. DAMAGES.

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In a late case a question arose upon the subject of damages, as to the sum Upon Disto be allowed as the damages upon the dishonour and protest of a foreign honour and Protest of It appeared in evidence that upon the dishonour of a bill drawn in De- Foreign merara upon England, and sent back dishonoured and protested, 251. per Bill. cent. was considered to be the amount of the loss; and the plaintiff accordingly claimed damages at that rate upon the whole amount of the bill of It appeared, however, upon further examination, that the bill had not been sent back protested for the whole amount, and that the usual practice in such cases was (to which some of the special jury pledged their own knowledge) to retain the dishonoured bill in this country, and send a protest to Demarara, where, upon the arrival of the protest, security was demanded of and given by the drawers, and that the whole of the loss from the dishonour was not incurred unless the bill in the result was not paid. It appearing, in the present instance, that the bill had been retained in this country until 4001. had been paid, and that ultimately it had been sent back protested and dishonoured to the amount of 100l. only, no more than 25l. damages were allowed in that respect(c)(1).

(b) 1 Pardess. 468. Bar. & Cres. 399; 2 Dow. & Ry. 531, (Chit. (c) Laing v. Barclay, 3 Stark. Rep. 41; 1 j. 1170).

<sup>(1)</sup> The damages on a protested bill of exchange, are not given as a liquidated, arbitrary mulct; but as a compensation for the expense of remitting the money to the place where the bill ought to

have been paid: And therefore, if the holder receive a part of the money of the acceptor, this diminishes the damages, pro rata.

Bangor Bank v. Hook, 5 Greenl. 174.

In Louisiana it has been held that damages allowed on the return of protested bills include all charges, such as premium, cost of protest, and postage. The holder can claim interest on those damages, but is not entitled to the difference of exchange. Robert v. Commercial Bank, 18 Louis Robert v. 13 Louis. Rep. 528.

Where a balance is due on account, payable in a foreign country, the creditor if he sues for the same in another country, is entitled to be paid at the rate of exchange. In other words he is entitled to have the money replaced where it was agreed to be paid. And it seems that there is

VI. Provision, &c.

#### VI. Provision, &c.

Meaning

WITH respect to provision it is said by Pothier (d), that it is usual for the holder of a bill to allow his agent, to whom he indorses it for the \*purpose of receiving payment for him, a certain sum of money called "provision," at the rate of so much per cent. to recompense him, not only for his trouble, but also, if such agent be a banker, for the risk he runs of losing the money, which he is obliged to deposit with his correspondents in different place: for the purpose of repaying his principal the amount of the money received on And it is said that one half per cent. is not an unreasonable allowance, whether the agent be a banker or not.

Amount of.

The charges above enumerated are the only legal ones, nor can any extraordinary loss, not necessarily incidental, which the holder or other parties may be put to by travelling, or by some advantageous engagement being delayed or defeated by the want of punctual payment, be in any case legally demanded(e). But where it is necessary or more convenient for the holder to send notice of dishonour by other conveyances than the post, he may send a special messenger, and he may recover the reasonable expences incurred by that mode of giving notice (f).

(d) Pothier, pl. 86 to SS. Campb. 445. (Chit. j. 798). (e) Lovelass, 235, cites Lex Merc. 461; Poth. pl. 65; Auriol v. Thomas, 2 T. R. 52, (f) Pearson r. Crallan, 2 Smith's Rep. 404, (Chit. j. 715); ante, 474, note (0). (Chit. j. 441); Woolsley r. De Crawford, 2

no difference between bills of exchange and other contracts for payment of money in a foreign country, in this respect, except that the usage of trade has fixed the rate of damages. Grant r. Heeley, 3 Sum. 523.

An inland bill of exchange drawn before the passage of an act taking off damages, but which bill is protested for payment after the passage of the act is not entitled to damages, Puckett r.

Redman, 2 How, 698; Allen v. The Union Bank, 5 Whart. 420.

Though the liability of the drawer or endorser of an inland bill is fixed on presentment for acceptance or payment, and notice, yet damages over accrue on the protest. Jordan v. Bell, 8 Porter, 53. And an averment of protest in the declaration is necessary to authorize damages to be given. Ibid.

Damages, other than interest, are never given by the law-merchant, against an acceptor of a

bill as acceptor merely. Hanwick v. The Farmers Bank, 8 Porter, 539.

Where a party draws a bill on himself, payable at the same place, he is liable for damages if the bill be dishonored. Randolph v. Parish, 9 Porter, 76.

In an action against an indorser of a bill of exchange, the law of the state where the endorse-

ment was made must govern as to the rate of damages. Culham r. Carey, id. 131.

Where a bill is paid supra protest, for the honor of the drawer, he can only recover of the drawee the costs of protest for non-acceptance. City Bank of New Orleans n. Girard Bank, 10 Curry's Louis. Rep. 562.

When damages are claimed by the drawer from the drawee, who was bound to honor the draft, the latter must indemnify the former for the damages resulting from the dishonor, i. e. whatever

he has had to pay the holder. Ibid.

Where a bill of exchange, properly drawn, by an authorized agent on the head of a department, is permitted by him to be protested for non-acceptance and non-payment under a mistake of fact concerning it, the agent is entitled to credit for the damages paid by him in consequence of the protest. Armstrong v. The United States, 1 Gilpin, 399.

A bill of exchange drawn, accepted, and indorsed by citizens of Kentucky, and there negotiated, payable at New Orleans, is not, by force of the statute of Kentucky of 1798, subject to the payment of ten per cent. damages. But being a foreign bill, and not having been affected by the statute of Kentucky, the holders, by commercial usage, are entitled to re-exchange, on a protest for non-payment. Bank U. S. r. Daniel, 12 Peters, 32.

### \*CHAPTER VII.

# OF THE ACTION OF DEBT ON A BILL OR NOTE.

689 I. ADVANTAGES OF. II. BY WHOM MAINTAINABLE.

#### I. ADVANTAGES OF.

THE remedy by action of debt to enforce payment of a bill or note is to be I. Advanconsidered in this chapter.

The action of debt on simple contract was formerly much in use, but was Of the Acafterwards disused on account of the wager of law(a); wager of law, how-tion of ever, is now altogether abolished by the 3 & 4 Will. 4, c. 42, s. 13; and Bill or even before this statute the action of debt had become a common remedy Note. for the recovery of money due on simple contract(b). The principal advantages arising from adopting this remedy are, first, that the plaintiff need not, after judgment by default, execute a writ of inquiry, or refer it to the master to compute principal and interest; and, secondly, that the defendant must, since the 6 Geo. 4, c. 96, in debt on a bill of exchange, if there be no other count in the declaration on another simple contract, put in special bail on bringing a writ of error(c). But before that act, bail in error was not necessary on a judgment by default in debt on a promissory note, the validity of which instrument was not established until after the statute James I, c. 8(d). And if a declaration in debt on a bill of exchange contained any one count on a contract for which debt would not lie at the time of passing the statute 3 James 1, c. 8, bail in error was not necessary (e). simple contract was also not sustainable against executors or administrators(f), except in the Court of Exchequer, where wager of law was not allowed (g), or by special custom in the city of London (h), until the 3 & 4 Will. 4, c. 42, s. 14, by which it is enacted, that an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator.

#### II. By WHOM MAINTAINABLE.

This action may be supported by the payee of a promissory note against II. By wbom

(a) Gilb. on the Action of Debt, 363, 364;

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- 1 Chitty on Pleading, 6th edit. 113, 114.

  (b) See King v. Williams, 4 Dow. & Ry. 3.

  (c) Ablet v. Ellis, 1 Bos. & Pul. 249;
  Trier v. Bridgman, 2 East, 359.
- (d) Trier v. Bridgman, 2 East, 359.
  (e) Webb v. Geddes, 1 Taunt. 540; Trier
- v. Bridgman, 2 East, 359.
- (f) Barry r. Robinson, l New Rep. 293; Maintain-Norwood v. Read, Plowd. 182; Palmer v. able. Lawson, 1 Lev. 200; Pinchon's case, 9 Co. 86, 87; 3 Bla. Com. 347; 1 Chitty on Plead.
  - (g) See last note.

6th edit. 113.

(h) The city of London's case, 8 Co. 126 (a).

II. By maintainable.

the maker, when expressed to be for value received(i)(1), or by the \*drawer against the acceptor of a bill expressed to be for value received in goods(k), and by the payee of a foreign or inland bill of exchange expressed to be for value received against the drawer(l); and by the first indorsee against the first indorser, who was also the drawer of a bill payable to his own order(m)(2). In Bishop v. Young(n) the court observed, "We do not say how the case would stand, if the action were brought by any other person than him to whom the note was originally given, or against any other person than him by whom it was signed and made, or if the note itself did not express a consideration upon the face of it." And in a late case, on demurrer to a declaration in debt by the payee against the maker of a promissory note, stating for cause that it did not appear that the note was expressed to be for ralue receired, or anything equivalent thereto, the Court of Exchequer refused to set aside the demurrer as frivolous within the meaning of the rule 2 H. T. 4 Will. 4(o).

Debt is not sustainable on a collateral engagement, as on a promise to pay the debt of another (p); and it has been holden, that debt cannot be supported on a bill of exchange by the payer against the acceptor(q), or by the indorsec against the acceptor(r); therefore bail in error was not necessary upon a judgment in debt against the acceptor of a bill(s); first, because no privity of contract exists between those parties(t); and, secondly, because in an action of debt on simple contract, the consideration ought to be shewn, which is not stated in a declaration on a bill, and an acceptance is only in the nature of a collateral promise or engagement to pay, which creates no duty(u).

(i) Bishop r. Young, 2 Bos. & Pul. 78, (Chit. j. 621); Selw. 9th edit. 538, note (k).

(k) Priddy v. Henbrey, 1 Bar. & Cres. 674: 3 Dow. & Ry. 165, (Chit j. 1179).

(l) Bishop v. Young, 2 Bos. & Pul. 82 to 84, (Chit. 621); Hodges v. Steward, Skin. 346, (Chit j. 184).

(m) Stratton v. Hill, 3 Price, 253; 2 Chitty's Rep. 126, (Chit. j. 975, 982).
(n) Bishop v. Young, 2 Bos. & Pul. 78, 84,

(Chit. j. 621)

(o) Cresswell v. Crisp, 2 Crom. & Mee. 634; 2 Dowl. 635; 3 Dowl. 243, S. C. And see Lyons r. Cohen, 3 Dowl. P. C. 243, Exch. (p) Anon. Hardr. 486; Com. Dig. tit. Debt,

B.; Purslow v. Bailey, 2 Ld. Raym. 1040; Hodsden r. Harridge, 2 Saund. 62 (b).

(q) Bishop v. Young, 2 Bos. & Pul. 80, 82, 83, (Chit. j. 612); Anon. Hardr. 485; Simmonds v. Parminter, 1 Wils. 185, (Chit. j. 321); Brown v. London, 1 Mod. 285, (Chit. j. 162); 1 Freem. 14; Gilb. Tit. Debt, 364; Com. Dig. tit. Debt, B.; Anon. 12 Mod. 345, (Chit. j. 212); Webb v. Geddes, 1 Taunt. 540; 2 Campb. 187, n. (a). But see Bayl. 5th edit. 355, 356, n. 53, where it is observed that the demand of an indorsee upon a bill against acceptor is continually allowed as an item of

(r) Cloves v. Williams, 3 Bing. N. C. 868; 5 Scott, 68, S. C. A count that defendant accepted a bill and promised to pay the amount, whereby an action had accrued to plaintiff to demand the amount, was held a count in debt; id. ibid.

(s) Webb v. Geddes, 1 Taunt. 540. (t) Rol. Ab. 597, pl. 4, 10; Core's case, 1 Dyer, 21 (a).

(u) Bishop r. Young, 2 Bos. & Pul. 83, (Chit. j. 621); Hodges v. Steward, 1 Salk. 125, pl. 5, (Chit. j. 184); Vin. Ab. tit. Bills, But, perhaps, the action of debt might now be sustainable by the payee against the acceptor, first, because with respect to privity of contract, it has been holden, that if one deliver money to another to pay over to a third person the cestui que use may sustain an action of debt against the bailee to recover it; Harris r. De Bervoir, Cro. Jac. 687; 1 Rol. Ab. 441, 597, l. 55; Whorewood v. Shaw, Yelv. 23. And the acceptance of a bill amounts to a promise in law to pay the amount of it to the person in whose favour it is drawn; Hussey v. Jacob, 1 Ld. Raym. 88, (Chit. j. 189, 191, 200, 201). And, secondly, because an acceptance is not a collateral engagement, nor is it similar to a promise by A. to pay the debt of B. if B. do not, an argument which was adduced in support of the doctrine, but the acceptor is primarily liable; Bishop v. Young, 2 Bos. & Pul. 83, (Chit. j. 621). And, lastly, because whenever the common law or custom raises a duty, debt lies for it; Anon. Hardr. 486; Com. Dig. tit. Debt, A.; Hassey v. Ja-

<sup>(1)</sup> The bearer of a sealed note payable to T. or bearer cannot maintain debt on it. Howell v. Hallett, 1 Minor's Hea. Rep. 102.

<sup>(2)</sup> An action of debt on a promissory note may be maintained by the indorsee against the maker. Wilmarth v. Crawford, 10 Wend. Rep. 341.

In Rumball v. \*Ball(x) the plaintiff recovered in an action of debt on a pro- II. By missory note; and it is said that debt will lie against the maker of a note, but whom not against an indorser(y)(1). In Welsh v. Craig(z) it was holden, that ble. debt would not lie upon a note; but, as it has been observed, it does not appear by or against what particular party that action was brought (a), though from the argument of counsel it may be inferred that the action was against an inderser(b). Debt is not sustainable on a promissory note payable by instalments, unless the whole be due(c).

cob, Ld. Raym. 88. On which ground Twisden, J. held, that indebitatus assumpsit would lie on a bill of exchange at the suit of the payee against the acceptor; Brown v. London, 1 Vent. 152, (Chit. 162); Anon. Holt, 296; Anon. 12 Mod. 345, (Chit. j. 212); Hodges r. Steward, Skin. 346, (Chit. j. 184); acc. Bayl. 5th edit. 355, 356; Brown r. London, 1 Freem. 14; 1 Mod 285; 1 Vent. 152, (Chit. j. 162); Hodges v. Steward, Comb. 204, (Chit. j. 184), contra. (x) Rumball v. Ball, 10 Mod. 38, (Chit. j.

231), observed on in Bishop v. Young, 2 Bos.

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& Pul. 84.

(y) 1 Mod. Ent. 312, pl. 18. (z) Welsh r. Craig, 2 Stra. 680; 8 Mod. 173, (Chit. j. 259), observed on in Bishop v. Young, 2 Bos. & Pul. 80 to 82, (Chit. j. 621).

(a) Bishop v. Young, 2 Bos. & Pul. 81, (Chit. j. 621); Bayl. 5th edit. 355, n. 52.

(b) Bishop r. Young, 2 Bos. & Pul. 80, (Chit. j. 621).

(c) Rudder v. Price, 1 Hen. Bla. 548, (Ch. j. 476).

<sup>(1)</sup> In Maryland debt will not lie on a note at the suit of a payce or his administrators against the maker. Lindo v. Gardner, 1 Cranch, 343. In Virginia debt will not lie against an acceptor of a bill, even in a suit by the payee. Smith v. Sagar, 3 Hen. & Munf. Rep. 394. Wilson v. Crowdhill, 2 Munf. Rep. 302. But an action of debt lies by statute for the holder of a bill against the drawer and indorser in case of a default in payment. Slacum v. Pomeroy, 6 Cranch,

An action of debt cannot be maintained on a note for the payment of a liquidated sum in current bank paper. Campbell v. Neister, 1 Litt. 80.

# \*CHAPTER VIII.

### OF BANKRUPTCY, AND DISCHARGE UNDER INSOLVENT ACT.

In the preceding chapters our attention has been principally directed to the consideration of the remedies in cases where the parties to a bill, or other negotiable security, may be supposed to be solvent. In this chapter the rights and liabilities of the parties, and the course of proceeding in the case of bankruptcy, and of a discharge under an Insolvent Act, will be treated of In the first part we shall only consider so much of the law of bankruptcy as peculiarly relates to bills of exchange and other negotiable securities, and this depends on the statute 6 Geo. 4, c. 16(a), and the decisions on prior statutes applicable to that act. The statute 1 & 2 Will. 4, c. 56(b), relates to the new court and the administration of the bankrupt law, and does not appear to alter the law itself, or at least any part of that connected with bills of exchange and promissory notes. The twelfth section of that act authorises the Lord Chancellor to issue a flat in lieu of a commission.

# PART FIRST, OF BANKRUPTCY.

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TRADING BY BEING PARTY TO A BILL I. WHAT CONSTITUTES A OR NOTE(c).

I. The Trading. WITH respect to the trading, drawing and re-drawing bills of exchange,

(a) And see 2 & 8 Vict. c. 29, ante, 206. (b) And see 2 & 3 Will. 4, c. 114; 3 & 4 Will. 4, c. 47; 5 & 6 Will. 4, c. 29; 6 & 7 Will. 4, c. 27, Chitty & Hulme's Stat. 47 to 64. (c) As to what is a trading in general under the 6 Geo. 4, c. 16, see Eden's Bank. Law, 4; Ambhold's Bank. Archbold's Bank. Law by Flather, 8th edit. P.

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for the sake of profit, is a trading sufficient to subject a party to be made a I. The bankrupt, without other circumstances, if it be \*general and not merely Trading occasional(d). This is founded on the 6 Geo. 4, c. 16, s. 2, which (re-[\*693] pealing the 13 Eliz. c. 7, and 21 Jac. 1, c. 19, s. 2, and all other acts) enacts, "That all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and all persons who either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders, liable to become bankrupt(e)." Instances of this description do not often occur. In the case of Richardson v. Bradshaw(f), the bankrupt, Wilson, for several years received money from officers and other persons, and his cashier gave accountable notes for it, and these persons drew from time to time upon Wilson for such sums, payable either to bearer or order, as they thought proper; and this repeated dealing was held to be a trafficking in exchange, and a trading sufficient in itself to subject him to a commission of bankruptcy (g), upon the principle that persons of this description make merchandise of money and bills, and gain an extensive credit upon the profits of that course of dealing, in the same manner as other merchants and traders do by buying and selling, or using the trade of merchandize in gross, or by retail, with respect to other goods and moveable chattels(h). On the same principle, borrowing money abroad, for the purpose of repaying it in England at a certain rate of exchange, and repaying it by bills upon bankers in London, to whom foreign bills were remitted to make the payment, was held to be a trading(i). But an occasional drawing and redrawing bills of exchange, through for the sake of profit, as where it is done for the purpose of raising money to improve a person's own estate, or for other private occasions, will not render a person liable to the bankrupt laws(k). And the statutes relating to exchequer bills(l) expressly provide, that a party circulating the same shall not be deemed a trader within the bankrupt laws.

Bankers are expressly made subject to the bankrupt laws by the 6 Gco. Bankers. 4, c. 16, s. 2(m). And it has been held, that it is not necessary that a person, to be considered a banker, should keep an open shop(n); but it seems that an army or navy agent is not a banker(o).

Brokers are also subjected to the bankrupt laws by the same statute (p). Brokers. And it has been held that bill-brokers are within the act(q); but the dealer in accommodation bills without further evidence of trading as a bill-broker(r), or merely discounting a bill, and procuring bills to be discounted for friends, where the party does not hold himself out as a bill-broker, but has

(d) Richardson v. Bradshaw, 1 Atk. 129, (Chit. j. 331); Hankey v. Jones, Cowp. 745, (Chit. j. 396); 1 Mont. 22; Cullen, 10; Cooke, 52.

(e) As to this section of the act, and cases thereon, see Eden's Bank. Law, 8. continuance of trading, 8 Swans. 627.

(f) Richardson v. Bradshaw, 1 Atk. 128,

(Chit. j. 331); Cooke, 61.
(g) Richardson v Bradshaw, 1 Atk. 129, (Chit. j. 331); Ex parte Wilson, 1 Atk. 218. (A) 2 Bla. Com. 475.

(i) Inglis v. Grant, 5 T. R. 530; 1 Mont. 22.

(k) Hankey v. Jones, Cowp. 745, (Chit. j.

396); 1 Mont. 26; Cullen, 18; Cooke, 60, 61; Harrison v. Harrison, 2 Esp. Rep. 555.

(1) See the statutes, Cooke, 84.

(m) Bankers were previously subject to the bankrupt laws under 5 Geo. 2, c. 30, s. 39.

(n) Ex parte Wilson, 1 Atk. 218.

(o) Waugh v. Carver, 2 Hen. Bla. 285; Eden, 6; 1 Mont. Bank. Law, 2.

(p) As they formerly were by the 5 Geo. 2, c. 30, s. 39.

(q) Ex parte Phipps, 2 Dea. Rep. 487; Archbold's Bank Law, by Flather, 8th edit.

(r) Id. ibid.

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another business, as a proctor, by which he ostensibly obtains his livelihood, I. The Trading. does not constitute a trading as a bill-broker(8).

II. The Act of Bankruptcy.

\*II. THE ACT OF BANKRUPTCY IN RELATION TO BILLS(t), &c.

Beginning o kee p House. [ \*694 ]

WITH respect to the act of bankruptcy, stopping payment, or refusing payment of or renewing a bill of exchange, does not amount to an act of But a denial by a trader to a holder of a bill of exchange actually due, or to his clerk, at any time of the day when it becomes due, constitutes an act of bankruptcy, as a beginning to keep house, which cannot be avoided by afterwards appearing in public, and paying the bill before five So if a trader deny himself to a person who desires o'clock of that day(x). that he may be told that a certain bill of exchange, mentioning the parties to it, is dishonoured, and that he wishes to see him in consequence, such denial is an act of bankruptcy, without further proof of the party's being a creditor, if the jury believe that the bankrupt so considered him(y).

Debtor absenting himself.

But if a country trader, having had proceedings taken against him on a bill, promise to attend next day to pay the same, and instead of so doing go to London to procure friends, and write to the creditor informing him that this will prevent his keeping the appointment this will not be an act of bankruptcy by absenting himself, there being no intent to delay(z).

Remaining Abroad (a).

The 6 Geo. 4, c. 16, s. 3, makes it an act of bankruptcy for the debtor to depart the realm, or being out of the realm to remain abroad, with intent to defeat or delay his creditors. And it has been held, that if a trader goes abroad, leaving a general power of attorney with his clerk to transact all his business for him, but provides no means of paying bills of exchange which fall due in his absence, he commits an act of bankruptcy, because such absence must necessarily delay his creditors (b).

Compounding with Petitioning Creditor.

The eighth section of that statute also makes it an act of bankruptcy for the trader to compound with the petitioning creditor after docket struck(c), either by the payment of money, or by giving or delivering to him any satis-

& A. 593.

(t) As to acts of bankruptcy in general under the 6 Geo. 4, see Eden's Bank. Law, 11 to 38.

(u) Cullen, 65; Anon. 1 Campb. 492, note. (x) Colkett v. Freeman, 2 T. R. 59, (Chit. j. 441); Mucklow v May, 2 Taunt. 479; Exparte Levy, 7 Vin. Abr. 61, pl. 14; Eden, 12, 13, 21. What a denial, Smith v. Moon and others, Moo. & M. 458.

(y) Bleasby r. Crossley, 2 Car. & P. 213;3 Bing. 430; 11 Moore, 327, (Chit. j. 1276). But a mere direction by the debtor to be denied, where no creditor is in fact denied, is not a beginning to keep house; Fisher r. Boucher, 10 Bar. & Cres. 705; Hare v. Waring, 3 M. & W. 362, 376, 377. And, semble, that in order to constitute an act of bankruptcy, by departing from the dwelling-house, the departure must be with an absolute intent to delay creditors; and that if it be only with intent to delay creditors in case a particular event occur,

(a) Ex parte Harvey, 1 Den 571; 2 Mont. and that event does not occur, it is not an act of bankruptcy; Fisher v. Boucher, 10 Bar. & Cres. 705.

(z) Ex parte Lavender, 2 Mont. & Ayr. 11; 4 Dea & Chit. 484, S. C.

(a) This, it seems, was not formerly an act of bankruptcy; see I Mont. Bank. Law, 23; Archbold's Bank. Law, by Flather, 8th edit.

p. 49.
(b) Ex parte Kilner, 3 Mont. & Ayr. 722;
2 Dea. 324, S. C.

2 Dea. 524, S. C.

3 Geo. 2, c. 80, 4

(c) The words used in 5 Geo. 2, c. 80, s 24, are "after the issuing a commission. But that ct was, nevertheless, held to extend to the case where nothing further was done than striking a docket; Ex parte Gedge, 3 Ves. 349; Cullen, 57. And even to the case of striking a docket, where nothing could be done upon it further, the party being in mistake as to the supposed act of bankruptcy on which he had proceeded; Ex parte Thomson, 1 Ves. jun.

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faction or security for his debt, or any part thereof, whereby he may re- II. The ceive(d) more in the pound than the other creditors; and declares such act Act of Bankruptof bankruptcy sufficient to support either a \*commission already issued, or cy. a new one; with a forfeiture by the creditor of his whole debt, and a repayment or delivery up of such money or security, &c. for the benefit of the pounding bankrupt's creditors. And where the bankrupt, after commission issued, with Peand before certificate, gave to the petitioning creditor, who was also as- tittoning Creditor. signee, a bill of exchange for part of his debt, the residue having been | \*695] proved under the commission, the bill was held to be void, as contrary to the general policy of the bankrupt law, and contrary to the spirit, although not strictly within the letter, of this section(e). And if the agreement of a petitioning creditor with the bankrupt is wholly or in part the consideration for a bill of exchange, the bill is void, and no action can be maintained upon it (f). But unless the proceedings against the bankrupt be continued, or a new flat issued, the original debt may be recovered (g). The obtaining of payment or security seems to be an act of bankruptcy, although it be uncertain at the time whether the person obtaining it will thereby receive more than the other creditors (h'. But where a friend of the debtor agreed to give a creditor 5s. in the pound on the amount of his debt, on condition that the creditor should sue out a commission against the debtor, this was holden to be a legal contract, and a bill given for the amount of it a valid bill(i).

The same statute also introduced a new description of act of bankruptcy, Fraudsdeclaring that every trader who shall make or cause to be made any fraudu-Transfer lent gift, delivery, or transfer of any of his "goods and chattels," shall be of Bill(j). deemed to have thereby committed an act of bankruptcy. And it was held, that a bill of exchange is a chattel within the meaning of this enactment, and that the fraudulent delivery or transfer of it, as a preference, would constitute an act of bankruptcy (k).

By the recent act of 1 & 2 Vict. c. 110, s. 8, as to the mode in which a Act of debtor may be made a bankrupt, it is enacted, "That if any single creditor, cy under 1 or any two or more creditors being partners whose debt shall amount to one & 2 Vict. hundred pounds or upwards, or any two creditors whose debt shall amount c. 110, to one hundred and fifty pounds or upwards, or any three or more creditors whose debts shall amount to two hundred pounds or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her majesty's Courts(1) of bankruptev that such debt or debts is or are justly due to him or them respectively, and that such

- (e) Rose v. Main, 1 Scott, 127; 1 Bing. N. C. 857, S. C.
- (f) Davis v. Holding, 1 M. & W. 159.
  (g) Davis v. Holding, H. T. 1840, Q. B. 4 Jurist, 336.
  - (h) Ex parte P. Pacton, 15 Ves. 463.
  - (i) Fry v. Malcolm, 5 Taunt. 117.
  - (j) See ante, 208 to 210.
- (k) Cumning r. Baily, 6 Bing. 363; 4 Moore & P. 33, (Chit. j. 1485); and per Tindal, C. J. "In some of the old books, and previously to the decision in Slade's case, bills of exchange seem not to have been considered as goods and chattels; but in modern times a different opinion has prevailed, and goods and chattels have been deemed to include not only

(d) Instead of "shall privately receive," things that pass by delivery, but also choses in a sin 5 Geo. 2, c. 20, s. 24.

action; and it is no answer to say, that bills of exchange have not been esteemed chattels under certain acts of parliament creating offences, and that an act of bankruptcy is in the nature of a crime; because although in times when trade was little practised or understood, some kind of criminality seems to have attached to such an act, such an opinion could no longer prevail, when the legislature itself permits a trader to commit an act of bankruptcy by declaring his insolvency in the Gazette.'

It was also held in the same case, that closing the doors of a bank is " a beginning to keep house," although the banker be not domiciled at the bank.

(1) Quare, Court.

II. The Act of Bankrupt-

1 & 2 Vict.

debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, \*and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not within twenty-one days(m) after personal c. 110, s. 8. service of such affidavit or affidavits and notice pay such debt or debts, or se-[ \*696 ] cure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the court in which such action shall have been or may be brought according to the practice of such court(n), or within such time and in such manner as the said court or any judge thereof shall direct, after judgment(n) shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit or affidavits and notice, provided a flat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise."

III. The Petitioning Creditor's Debt.

III. THE PETITIONING CREDITOR'S DEBT IN RESPECT OF A BILL OR NOTE.

Amount of.

With respect to the petitioning creditor's debt, when founded in part or the whole on a bill or note, there must be a debt, if to one creditor or firm, of 1001.; or if to two separate creditors, debts of 1501.; or if to more than two, debts of 2001. (o); and such debt must be independently of interest, unless it was expressly reserved, for otherwise interest is not a debt, but only in nature of damages, and cannot be added to the principal, so as to constitute? sufficient petitioning creditor's debt p). But if interest were specially made payable on the face of the instrument, it would be otherwise(p).

What Bills and Notes sufficient

If a creditor has received and transferred a bill of exchange, the holder of the bill is the proper petitioning creditor(q). And when the bill or note  $\frac{1}{11}$ is completely due and payable before the act of bankruptcy, the then holder's right to strike a docket stands precisely in the same situation as that of other demands completely due. But with respect to bills and other negotiable securities not due at the time of the act of bankruptcy, the holder And where the petitioning creditor's debt stands in a different situation.

(m) What amounts to a consent to defer payment beyond the twenty-one days, Ex parte Brown, 1 Mont. & Chit. 198, where see

as to requisites of affidavit.

(n) A defendant who has entered into a bond with sureties under this act is to be considered in the same situation as if he had been arrested and given bail, and may, therefore, be rendered before judgment, notwithstanding the use of the words "after judgment," in the subsequent part of the aection; Owston v. Coates, 2 Perry & Dav. 485.

(o) 6 Geo. 4, c. 16, s. 15; see sect. 18, and cases, post, 699.

A tender to petitioning creditor after docket struck and before fint issued, does not destroy

debt so as to invalidate fiat; Ex parte Jones, l Mont. & Ayr. 442; 3 Dea. & Chit. 697, 8.C.

(p) Cameron v. Smith, 2 Barn. & Ald. 305, (Chit. j. 1047); In re Burgess, 8 Taunt. 660; 2 Moore, 745, (Chit. j. 1042); Ex parte Greenway, Buck, 412, (Chit. j. 647). The 6 Ge. 4, c. 16. s. 57 now enables a holder of a bill 4, c. 16, s. 57, now enables a holder of a bill or note, over due at the issuing of the commission, to proce for interest, although interest were not reserved. But that enactment is continued to proof, and does not seem to enable a holder to continue to fine. holder to issue a commission in respect of interest of the terest not reserved. Sed quære, see Bayl. 5th (q) Ex parte Botten, 1 Mont. & B. 412. edit. 416.

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was founded on a bill of exchange, which he had negotiated when he issued III. Peia fiat against the drawer, and he afterwards produced a new fiat on the same tioning docket papers, having in the \*meantime got the bill into his hands, the court Debt. annulled the fiat(r). The date of a promissory note made by a bankrupt What Bills was once considered to be prima facie evidence, to show that the note existand Notes ed before the bankruptcy(s), but a contrary doctrine now prevails(t); and, sufficient. at all events, no declaration by the bankrupt, subsequent to his bankruptcy, [ \*697] would be admissible to prove the fact.

Where in an action by the assignee of a bankrupt, it appeared that a bill drawn and indorsed by the petitioning creditor and accepted by the bankrupt, had been produced at the opening of the commission, and had been then examined by the commissioners, and had afterwards been lost, and, though search had been made, could not be found or produced at the trial; it was held, that the petitioning creditor's debt was proved by evidence of

the contents of such bill(u).

The 6 Geo. 4, c. 16, s. 15(x), enables a person who has given credit to 6 Geo. 4, any trader upon valuable consideration, for any sum which shall not have c. 16, a. 15. become payable at the time such creditor committed an act of bankruptcy, to be a petitioning creditor, or join in petitioning, whether he shall have any security in writing for such sum or not. The words in italics are new, and not in the previous acts on this point. The previous acts only enabled creditors upon written securities to issue a commission (y).

Under this statute, if a bill be accepted before the act of bankruptcy, though it be not then payable, the then holder may issue a commission against the acceptor(z): and as a bill, although not due at the time of the bankruptcy of the drawer or indorser, may be proved under a commission against them(a), it should seem that a commission might also be \*issued against such [ \*698 ]

(r) Ex parte Patzker, 8 Mont. & Ayr. 829; 2 Dea. 469, S. C. Semble, he could have supported the fiat at law; id. ibid.

(s) Taylor v. Kinlock, 1 Stark. Rep. 175, 179, (Chit. j. 951); 2 Rose, 474; ante, 148, note (n); and see Obbard v. Beetham, Mood. & M. 486, (Chit. j. 1490), in which Lord Tenterden approved of this decision; but in Cowie v. Harris, Mood. & M. 143, it was held, the production of an indorsed acceptance was not of itself evidence that the indorsement was before the act of bankruptcy, and some other proof, such as delivery of the goods by the helder of the indorsement before the bankruptcy, was required; and 'see Rose v. Rowcroft, 4 Campb. 245, (Chit. j. 944); post, 699, note (n); but note, that in Obbord r. Beetham it was proved that the note was in existence before the docket was struck; however, Lord Tenterden appears to have considered the mere production of the note sufficient; see next note.

(t) Cowie r. Harris, Mood. & M. 143, in last note.

An I. O. U. bearing date before the bankruptcy, constitutes no evidence of a petitioning creditor's debt, without some proof that it was in existence before the bankruptcy; Wright r. Lainson, 2 M. & W. 789; 6 Dowl. P. C. 146. And in the recent case of Anderson p. Wes-

ton, 6 Bing. N. C. 296, ( 8 Scott, 583, S. C. ) the court, in laying it down as a general rule that a bill or note is to be presumed to have been made on the day on which it bears date,

observed, "There is one exception to which there are several cases which apply; it is not necessary to go through them in detail; that is where a bill or note is produced for the purpose of proving a petitioning creditor's debt to sup port a proceeding in bankruptcy; in that case, though there may be some variation between the different decisions relating to that subject, I apprehend it may be taken to be now settled, that some evidence besides the date is necessary to shew that the instrument produced for that purpose had its existence before the act of bankruptcy took place. But the ground for requiring that proof appears to be a very reasonable and substantial one, which is this, that a proceeding in bankruptcy differs from an ordinary suit. The effect of a proceeding in bankruptcy is retrospective, and the object of it is to invalidate all transactions which have taken place between the act of bankruptcy and the time when the commission takes effect. In order, therefore, to support such an instrument bearing date before the act of bankruptcy, it may be necessary to give evidence in addition to the date."

(u) Pooley v. Millard, 1 Cro. & Jer. 411; 1

Tyrw. 331; 9 Law J. 114, S. C.
(x) Repealing the [7 Geo. 1, c. 31, and 5 Geo. 2, c. 30, s. 22.

(y) Hoskins r. Duperoy, 9 East, 498; 6 Esp. Rep. 55, (Chit. j. 749); Cothay v. Murray, 1 Campb. 885.

(z) 1 Mont. 44; Cullen, 74.

(a) Macarty v. Barrow, 2 Stra. 949; 3

III. Petitioning Creditor's Debt.

What Bills and Notes sufficient.

parties(b); and though it was doubted at nini prime whether a bill of exchange is a good petitioning creditor's debt against the drawer, before it becomes due, or has been dishonoured by the acceptor(c), it has since been settled, that such a bill does constitute a sufficient petitioning creditor's debt, and that a commission may be issued against the drawer, although the bill was neither due nor had been presented for acceptance or payment, and though after the issuing of the commission, and when the bill became due, If two persons exchange acceptances, and the drawee had duly paid it (d). before the bills are mature, one of them commits an act of bankruptcy, there is not such a debt due from him as will sustain a commission(e). And a note, though absolute in its terms, but in fact given for securing a contingent debt, has been considered insufficient to support a commission(f). But this may be questionable, as verbal evidence is not admissible to defeat a bill absolute on the face of it(g).

It has been determined (h) that a bill of exchange to the precise amount of 1001., drawn and issued by a trader before an act of bankruptcy, but becoming due afterwards, is sufficient, after it has become due, to found a petition for a commission of bankrupt against him, though, allowing a rebate of interest, there was not, at the time of the act of bankruptcy, a debt of 100h; for the drawer contracts a debt the moment the bill is given. der of a bill or note to the amount of 1001. or upwards, though he may have bought it for less, is a creditor for that sum, and may issue a commission(i). But where a petitioning creditor's debt was created by his giving the bankrupt a check on the petitioning creditor's banker, it was held, that to establish the debt the payment of the check must be proved; that it was not sufficient (especially where the bankrupt's papers came to the hand of the petitioning creditor) to shew the check to have come to his hands again, and that his bankers, the day after the date of the check, paid on his account to the bankrupt's bankers, a sum corresponding with the amount in the check(k).

A creditor by a bill or note, made by the bankrupt before an act of bankruptcy, but not indorsed to the holder till after, is allowed to be a petitioning creditor; for this is a case in which the law allows the assignment of a chose in action, and the assignment relates to the original debt, and the assignee stands in the original creditor's place (l). For the same reason a creditor may, to a debt due to himself before, take a note of the bankrupt, indorsed to him after the bankruptcy, to make up a sum required by the statute: it being sufficient within the words of the act that there is an existing debt (of ther equisite amount) vested in the petitioning creditor at the time he [\*699] petitions(m). It was \*holden before the 6 Geo. 4, c. 16, that in such a

Wils. 16, (Chit. j. 272, 273); Ex parte Adney, Cowp. 460. (Chit. j. 603); 1 Mont. 150; Cullen, 98; Ex parte Thomas, 1 Atk. 73, (Chit j 320), where this was held as to a note.

(b) Starey v. Barns, 7 East, 435; 3 Smith, 441, (Chit. j. 729).

(c) Rose v. Rowcroft, 4 Campb. 245, (Ch. j. 944)

(d) Ex parte Douthat, 4 B. & Ald. 97, (Ch. j. 1092); Bayl. 5th edit. 413; Lloyd v. Lloyd, Exch. E. T. 1839, April 16th, MS.

(e) Sarratt v. Austin, 4 Taunt. 200, 208; 2

Rose, 112, (Chit. j. 844).

(f) Ex parte Page, 1 Glyn & Jam. 100. The note was in the form of a present debt, but in fact a security for a contingent debt under a marriage settlement.

(p) Ante, 142; Moseley v. Hanford, 10 Bar.

& Cres. 729, (Chit. j. 1493).

(h) Brett v. Levett, 13 East, 213; 1 Rose, 112, (Chit. j. 820); Bayl. 5th edit. 414.
(i) Ex parte Lee, 1 P. Wms. 782, (Chit. j.

249); Ex parte Malar, 1 Atk. 150, (Chit. j.

(k) Bleasby v. Crossley, 3 Bing 430; 11 Moore, 327, S. C.

(1) Ex parte Thomas, 1 Atk. 73, (Chit. j. 320); Anon. 2 Wils. 135, (Chit. j. 358); Bingley v. Mallison, 3 Dougl. 333; Cooke's Bank. Law, 19, (Chit. j. 425); nom. Bingley v. Maddison, Cullen, 74; 1 Mont. 43, 46; Glaister v. Hewer, 7 T. R. 498, (Chit. j. 596); 4 Campb. 246, in notes; Bayl. 5th edit. 416. (m) Glaister v. Hewer, 7 T. R. 498, (Chit.

j. 596); Cooke, 20; Cullen, 75; 1 Mont. 48.

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case it must be proved, in order to support a commission, that the bill was III. The indorsed by the bankrupt to the petitioning creditor before the suing out of Petitioning Creditor's the commission; for otherwise the instrument might have been made just be- Debt. fore the commission for the express purpose of founding it (n). And where What Bills a trader accepted a bill to the amount of some goods, leaving a blank for and notes the creditor's name as drawer, and the creditor did not sign his name to it sufficient. until after he had sued out a commission against the acceptor, it was holden that the bill in this case was not sufficient as a positioning creditor's debt to support the commission (o).

This statute does not affect bills of exchange or other securities given or indorsed after the particular act of bankruptcy on which the commission is founded, in respect of which a person cannot, in general, be a petitioning creditor(p); and though the act enables persons to prove debts contracted after a secret act of bankruptcy, and before the commission, yet it does not authorise a creditor to strike a docket in respect of such a debt(q). the acceptor of an accommodation bill, who had paid the amount of it after an act of bankruptcy, to a person to whom it had been negotiated, was holden not to have a sufficient debt to support a commission(r); for though he might have proved, he could not strike a docket. The acceptance, however, of a security of a higher nature after an act of bankruptcy, does not prevent a creditor suing out a commission on a pre-existing debt(s). And if a creditor take a bill after an act of bankruptcy for a debt contracted before, drawn by the bankrupt upon one who had no effects in his hands at the time, or previous to the bill's becoming due, the original debt is not extinguished by want of notice to the drawer of the bill's having been dishonoured, and is sufficient to support a commission; for want of notice, though, in general, tantamount to a payment, is not so in this case, because having no effects in the drawee's hands, he cannot be injured (t).

The 18th section of 6 Geo. 4, c. 16, also enacts, "that if after adjudi-Proceedcation the debt or debts of the petitioning creditor or creditors or any of of insuffithem be found insufficient to support a commission, it shall be lawful for the ciency of Lord Chancellor, upon the application of any other creditor or creditor's Creditor's having proved any debt or debts sufficient to support a commission, provid- Debt. ed such debt or debts has or have been incurred not anterior to the debt or 6 Geo. 4. debts of the petitioning creditor or creditors, to order the said commission c. 16, e.18, to be proceeded in, and it shall by such order be deemed valid." Under this section, where a petitioning creditor's debt turns out to be insufficient to support a fiat, and the Chancellor orders the fiat to be proceeded in on proof of a sufficient debt by any other creditor, the debt of the second may be added to that of the first, to make up the requisite amount(11). And a petitioning creditor who pays a bill which he has accepted for the bankrupt's \*accommodation, after it has been proved by the holder, may use the name [ \*700 ]

<sup>(</sup>n) Rose v. Rowcroft, 4 Campb. 245, (Chit. j. 944); Dickson v. Evans, 6 T. R. 57; Cowie v. Harris, Mood. & M. 141; ante, 697, note (s); and see other cases, ante, 697,

<sup>(</sup>o) Ex parte Farendon, Buck, 34. (p) Moss v. Smith, 1 Campb. 489, 490; Cullen, 78; 1 Mont. 40, 41; Eden's Bank. Law, 48; but see as to validity of all contracts entered into after secret act of bankruptcy, and before fiat, 6 Geo. 4, c. 16, s. 81; 2 & 3 Vict.

c. 29; ante, 205, 206, &c.

<sup>(</sup>q) Moss v. Smith, 1 Campb. 489; 6 Geo. 4, c. 16, s. 47.

<sup>(</sup>r) Ex parte Holding, 1 Glyn & Jam. 97, (Cbit. j. 1115).

<sup>(</sup>s) Ambrose v. Clendon, 2 Stra. 1048; Daw v. Holdsworth, Peake, 64; Cullen, 75; Eden, 43.

<sup>(</sup>t) Bickerdike r. Bollman, 1 T. R. 405, (Chit. j. 485); Cullen, 75; ante, 486, 487, &c.

Debt.

of the proving creditor as a substitution for his own insufficient debt, under II. The Petitioning the 18th and 52d sections of 6 Geo. 4, c. 16(x).

What bills and Notes sufficient.

By the 19th section of the act 6 Geo. 4, c. 16, it is declared that no commission shall be deemed invalid by reason of any prior act of bankruptcy, provided there be an act of bankruptcy subsequent to the petitioning The object of this section was to protect commissions regcreditor's debt. ularly sued out from being defeated by a prior act of bankruptcy. It should be observed, that this act does not, like the former (46 Geo. 3, c. 135, s. 4), contain the proviso that the petitioning creditor should have no notice of the prior act of bankruptcy, and for this reason the class of cases relating to such notice, and the requisites to support a prior commission, need not be Where a fiat has been issued founded on a bill of exchange of noticed(y). which the commissioner has refused the proof because the bill was fictitious, an assignee who has a sufficient debt to support the fiat ought not to petition to annul for want of a good petitioning creditor's debt, without praying for a new fiat (z).

In general, whatever objection would preclude the holder of a bill from recovering at law or in equity, will equally preclude him from issuing a commission of bankruptcy; for, as observed by Lord Chancellor Eldon, in the case of Ex parte Dewdney(a), "The meaning of the legislature in the bankrupt acts requiring the Lord Chancellor to give execution to all the creditors was, that this species of execution should be given to those creditors, who, if a commission had not issued, could by legal or equitable remedies have compelled payment." Hence it is necessary, in considering when a person may strike a docket or prove in respect of a bill of exchange, to keep in view the rules which have been stated in the previous part of this work, as well as those more particularly relating to this part of the subject.

Where the laches or conduct of the holder have deprived him of his remedy at law against the trader, who has committed an act of bankruptcy, it will be equally incompetent to him to strike a docket. And, in general, if the commission be against the drawer or indorser of a bill, it must be established that he had due notice of non-payment, the same as in an action(b); but proof that after an act of bankruptcy he admitted that he knew the bill would not be paid, will suffice(c). It was held in the case of Mann v. Shepherd (d), that if a creditor, knowing that his debtor has committed an act of bankruptcy, receive part of his debt, the payment is void, and the original debt remains in force, and will support a commission, founded on the petition of such creditor. But a debt which could not be recovered in an action, in consequence of a plea of the statute of limitations, nor in equity by analogy to it, will not be sufficient to support a commission, or he proveable under it(e). So where the bankrupt entered into a deed of composi-[ \*701 ] tion with \*his creditors, by which they released him from his debts, it was

(y) Rex v. Bullock, 1 Taunt. 71. (z) Ex parte Briggs, 3 Mont. & Ayr. 398;

2 Dea. 549, S. C.

(a) Ex parte Dewdney, 15 Ves. 479. That observation is still correct, though the principal case was qualified in Ex parte Ross, 2 Glyn & Jam. 331.

(b) Cooper v. Machin, 1 Bing. 426; 8 Moore, 586; Brett v. Levett, 13 East, 213, (Chit. j. 820); Giles v. Powell, 2 C. & P. 259.

(c) Brett v. Levett, 13 East, 213; 1 Rose, 103, note a, (Chit. j. 820).

(d) Mann v. Shepherd, 6 T. R. 79; Cullen, as to usury, post, 708.

(x) Ex parte Rogers, 2 Mont. & Ayr. 153; 69; 1 Mont. 35; and Doe v. Anderson, 1 Stark. 4 Dea. & Chit. 623, S. C. C. N. P. 262; 5 M. & Sel. 1.

(e) Ex parte Dewdney, 15 Ves. 479, 498; Eden's Bank. Law, 42, acc.; but see I Cooke, 15; In re Coles, 2 Glyn & Jam. 331, post, 703, note(t), contra; 15 Ves. 495. If bankrupt do not object no one else can; see 5 Burr. 2638; 1 Mont. 88; 15 Ves. 491, 493, 494. As to avoiding the statute by a writ and continuances, see Gregory v. Hurrill, S. B. & B. 212; 1 Bing. 324; 6 Moore, 525; 5 Bar. & Cres. 841; Dickenson v. Teague, 1 C., M. & R. 241; and see generally as to the operation of the staute of limitations, ante, 608 to 619; 11

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held that a promissory note subsequently given to a creditor for the remain- 111. The der of the debt, was nudum pactum, and consequently a bad petitioning Petitioning Creditor's creditor's debt(f). And where one of three partners undertook to provide  $\underbrace{\mathsf{Debt}}_{}$ . for bills of exchange, drawn by the three, such acceptances were holden not, What Bills to support a commission on a petition of the three against the acceptor(g). what pull

When the debt, in respect of which the docket is to be struck, is due to sufficient. several persons, whether as general partners or otherwise, they must all be petitioning creditors, and a commission, founded upon the petition of one of such creditors, could not be supported(h); the proceedings under a commission being analogous in this respect to an action(i). But a provision has been introduced in favour of co-partnerships of bankers, for one of their public officers to petition (k). And it is not necessary in any case that all the partners should join in the affidavit of the debt; and it will suffice if one of them swear that the debt is due to himself and partners (l).

Upon a promissory note or bill given to the wife dum sola the husband

alone may petition(m).

The petitioning creditor is considered as having determined his election by taking out a commission, and is not allowed afterwards to proceed at law, though for a demand which is alleged to be distinct from that on which he **sued** out the commission(n).

# IV. THE PROOF OF BILLS, &c. UNDER A FIAT.

PREVIOUSLY to the statute 7 Geo. 1, c. 31, no debt, unless it were completely due and payable at the time of the act of bankruptcy, could be prov- ments. ed, though it became due between that time and the issuing of the commis- 7 Goo. 1,

IV. Proof

of Bills,

This statute contained the following recital and enactments: sion(o). "Whereas merchants and other traders in goods have been very often obliged, and more especially of late years, to sell or dispose of their goods and merchandizes to such persons as have occasion for the same upon trust or credit, and to take bills, bonds, promissory notes, or other personal(p) securities for their monies, payable at the end of three, four, or six months, or other future days of payment; and the buyers of such goods becoming bankrupts, and commissions of \*bankruptcy being taken out against them, [ •702] before the money upon such bonds, notes, or other securities became payable, it hath been a question whether such persons, giving such credit on such securities, should be let in to prove their debts, or be admitted to have any dividend or other benefit by the commission, before such time as such se-

(f) Ex parte Hall, 1 Dea. 171.

(g) Richmond v. Heapy, 1 Stark. C. N. P. 202; 4 Campb. 207, (Chit. j. 952); and other cases, ante, 71, note (q).

(h) Buckland v. Newsome, 1 Taunt. 477; 1 Campb. 474, S. C.

(i) 1 Saund. 153, note 1; 291, f. g.; 2 Stra. 820; 1 Bos. & Pul. 73; see Guthrie v. Fisk, 5 Dowl. & Ry. 24; 3 Bar. & Cres. 178; 3 Stark. Rep. 153, S. C.

(k) 7 Geo, 4, c. 46, s. 9; 1 & 2 Vict. c. 96; ante, 64, 65. The former of these acts expressly mentions proceedings in bankruptcy, but not the latter: it has been held, however, that the two acts are to be taken together, and that the public officer may issue a fiat against any one of the members of the co-partnership;

Ex parte Hall, 3 Dea. 405. The 7 Will. 4 and 1 Vict. c. 73, s. 3, contains a similar provision in favour of trading companies; see the act, Chit & H. Stat. 1166; and ante, 66, 67.

(1) 2 Cooke, 1; 4 Mont. 14, note (b); Exparte Hodgkinson, 19 Ves. 291; Eden's Bank. Law, 49; Exparte Blakely, 1 Glya & Jam.

(m) Ex parte Barber, 1 Glyn & Jam. 1, (Chit. j. 1106); M'Neilage v. Holloway, 1 B. & Ald 218.

(n) Ex parte Lewis, 1 Atk. 154; Ex parte Callow, 3 Ves. 1; Ex parte Ward, 1 Atk. 153; Cullen, 154; Cooke, 25.

(o) Barnford v. Burnrell, 2 Bos. & Pul. 1. (p) The statute says, "persons," but this is a mistake, see 5 Geo. 2. c. 80, s. 22.

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of Bills,

Enactments. 7 Geo. 1, c. 31.

IV. Proof curities became payable, which hath been a great discouragement to trade, and great prejudice to the credit within this realm;" for remedy whereof it is enacted, "That all and every person and persons who have given credit, or at any time or times hereafter shall give credit on such securities as aforesaid, to any person or persons who is, are, or shall become bankrupts, upon a good and valuable consideration, bon fide for any sum or sums of money, or other matter or thing whatsoever, which is or shall not be due or payable at or before the time of such person's becoming bankrupt, shall be admitted to prove his, her, and their several bills, bonds, notes, or other securities, promises, or agreements for the same, in like manner as if they were made payable presently, and not at a future day; and shall be entitled unto and shall have and receive a proportionable part, share, and dividend of such bankrupt's estate, in proportion to the other creditors of such bankrupt, deducting only thereout a rebate of interest, and discounting such securities, payable at future times, after the rate of five pounds per centum per annum, for what he shall so receive, to be computed from the actual payment thereof, to the time such debt, duty, or sum of money should or would have become due and payable, in and by such securities as aforesaid." In the second section it is enacted, "That all and every person or persons who now are or shall become bankrupts, shall be discharged of and from all and every such bond, note, or other security as aforesaid, and shall have the benefit of the several statutes now in force against bankrupts, in like manner, to all intents and purposes, as if such sum of money had been due and payable before the time of his becoming a bankrupt."

The subsequent statute, 5 Geo. 2, c. 30, s. 22, was considered as a legc. 30, c. 22. islative construction of the 7 Geo. 1, c. 31, and to confine that statute to 49 Geo. 3, written securities (q). But by the 49 Geo. 3, c. 121, s. 9, its remedies c. 121, s. 9. were extended to all persons giving credit before the bankruptcy.

By the statute 6 Geo. 4, c. 16, s. 51, these provisions were consolidated 6 Geo. 4. c. 16, s. 51. and re-enacted as follows: "That any person who shall have given credit to the bankrupt, upon valuable consideration, for any money or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security, or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of five per cent. to be computed from the declaration of a dividend to the time such debt would have become payable, according to the terms upon which it was contracted."

\*Upon this section of the 6 Geo. 4, the proof of a bill of exchange, &c. [ \*703 ] under a fiat, may be considered under the following heads:

1. What bill, note, or check, may be proved.

2. Who may prove.

3. Against whom, and under what fiat.

4. For what sums, or to what extent, the proof may be made.

5. The time of proof, and of making claims.

(q) Hoskins v. Duperoy, 9 East, 503; 6 78, S. C. These cases settle the point doubt-Esp. Rep. 55, (Chit. j. 749); and Parslow v. ed in Cullen, 74, and 1 Mont. 45. Dearlove, 4 East, 439; 1 Smith, 281; 5 Esp.

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- 6. The mode and terms of proof, and remedy for the dividend.
- 7. The consequence of not proving, and effect of certificate.

IV. Proof of Bills.

# 1. What Bills, &c.; proveable.

From the judgment of Lord Eldon in the case of Ex parte Dewdney(r), 1. What it may be collected, that wherever a bill of exchange or other negotiable se-Bills, &c. curity would be valid at law, so as to support an action, it may be proved under a fiat; and on the other hand, it appears to be a general rule, that a bill not available at law or in equity cannot be proved under a fiat. fore when the remedy at law had been lost by the operation of the statute of limitations, it was considered that the bill or note could not be proved(s). But in a subsequent case it was considered that the holder might prove in respect of a bill or note, although his claim thereon would be barred at law by the statute of limitations, provided it were not so barred when the commission issued(t). A bill founded upon a consideration, rendering it absolutely void by some statute, cannot be proved even by a bona fide holder(u); and whenever the holder himself has received the bill upon any illegal contract, he cannot, in general, prove such bill in respect of the consideration(x); and the assignees and creditors have a right to insist that the whole security is void, and unless they submit to pay what is really due, the court cannot order it, and frequently applications of that sort have been refused (y). where the holder has received the bill or note without any knowledge of the illegality of the consideration, he will be entitled to prove it, except in the cases above mentioned, where the legislature has declared the bill absolute-And we have already seen, that by the 5 & 6 Will. 4, c. 41, bills and notes given for considerations arising out of gaming, usurious, and certain other illegal transactions, are to be deemed to have been given for an illegal consideration, and will, therefore, be proveable in the hands of an indorsee for value who had no notice of the illegality (a).

\*In Ex parte Bulmer(b), where promissory notes given by a stock-broker [ \*704 ] for the balance of an account of money advanced to him to be employed in stock-jobbing transactions, contrary to the Stock-Jobbing Act, and part of the consideration consisted of the profits upon those transactions, and the residue for money received, which he had applied to his own use, Lord Erskine would not permit the petitioner to prove the promissory notes as binding obligations, as the consideration for them was made up, though in a very

parte Mumford, 15 Ves. 289.

(s) Ex parte Dewdney, 15 Ves. 497; 1 Sch. & Lef. 48.

(t) Ex parte Ross, In re Coles, 2 Glyn & Jam. 331, which seems to qualify the case Ex

parte Dewdney, 15 Ves. 479.

Petitioners, in December, 1824, applied to prove, under a commission which issued 10th July 1810, two promissory notes, both dated 21st May, 1810. The commissioners rejected the proof, on the ground that more than six years had elapsed since the issuing of the commission, and since the notes became due. On petition, Leach, Vice Chancellor, held that the claim of the petitioner was not barred, because the commission was a trust for the benefit of all the creditors, and the statute does not run against a trust; and he referred it back to the commissioners to receive the proof. On appeal, Lord Lyndharst, Chancellor, agreed in opinion with the Vice Chancellor, and affirmed his or-

(r) Ex parte Dewdney, 15 Ves 495; Ex der. But observe the dates—the commission there issued in the same year in which the notes were dated and made; Ex parte Ross, &c.; and see Bayl. 5th edit. 411, 593.

(x) Ante, 81 to 101, as to illegality of consideration in general.

(u) Ex parte Skip, 2 Ves. jun. 489; Ex parte Mather, 8 Ves. 373; Ex parte Mogridge, Cooke, 233.

(y) Per Lord Hardwicke, in Ex parte Skip, 2 Ves. jun. 489; Cullen, 89; Banfield v. Solomons, 9 Ves. 84.

(z) Ante, 92, note(f), and 95.
(a) Ante, 90; and see further as to usury, ante, 63, note(h), 87, 88; 2 & 3 Vict. c. 37. A party whose debt was alleged to be usurious could not petition to annul the fiat, even for fraud, or stay the certificate; Ex parte Jarman, 2 Mont. & Ayr. 119; 4 Dea. & Chit. 393, S. C.

(b) Ex parte Bulmer, 13 Ves. 313, 320; see nate, 91, 92, as to stock-jobbing.

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IV. Proof of Bills. &c.

small part, of the fruit of the illegal use of the money lodged with the bankrupt, but allowed the petitioner to prove the sum applied by the bankrupt to his own use as money had and received.

1. Wbat Bills, &c.

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Where the consideration of the bill consists of two parts, one bad and the proveable. other good, and no statute declares that the bill, under such circumstances, shall be absolutely void, the rule in equity as well as in bankruptcy is, that the security shall avail as to what was good. And, therefore, where a broker having been employed to effect some insurances, one of which was illegal (being on a voyage from Ostend to the East Indies), the principal, in consideration of the money laid out in effecting them, indorsed to him a bill drawn by himself, and payable to his own order, upon and accepted by a person who afterwards became a bankrupt, the broker (the indorsee) was not allowed to prove under the commission issued against the acceptor, in respect of such part of the debt as arose on the illegal insurance, but it was held he might prove for the rest on the bill itself(c). Where there has been an antecedent legal debt, and a bill is afterwards taken, but which turns out to be invalid, the demand for the antecedent debt may be resorted to and proved(d).

In regard to the form of the bill, or the mode of acceptance or transfer, the same objections which would in general preclude the holder of a bill from suing at law would equally prevent him from proving under a commis-Thus a bill or note on an improper stamp is not proveable (f). But a bill or note payable at a certain time, or on demand, is proveable, though the demand be not made till after the act of bankruptcy(g). So, where a promissory note payable with interest twelve months after notice was expressed to be "for value received," and the maker became bankrupt before any notice was given, it was held the payee might prove it under the commission, because the payment was not contingent(h). If, however, a bill or note be payable on a contingency, rendering it void at law, it cannot So with regard to the acceptance, it must be of such a nabe proved(i). ture that the party might have supported an action. We have seen, that before [ \*705 ] the 1 & 2 Geo. 4, it was held (k) that a letter, undertaking to accept bills \*already drawn, was an acceptance, and that the bills might be proved as accepted; and though that act requires a written acceptance of inland bills, it is still otherwise as to foreign bills (l). The indorsement also is governed by the same rules in bankruptcy as in an action; and therefore, in re Barrington v. Burton(m), where B. handed over a negotiable note for valuable consideration to G., not indorsing it, but giving a written acknowledgment on a separate

paper, to be accountable for the note to G., and G. indorsed the note, which,

(c) Ex parte Mather, 8 Ves. 373; Cullen,

89; 1 Mont. 115.
(d) Ex parte Blackburne, 10 Ves. 206, (Chit. j. 706); Ferall v. Shaen, 1 Saund. 295; Phillips v. Cockayne, 3 Campb. 119, (Chit. j. 848); Barnes and others v. Hedley and another, 2 Taunt. 184; 1 Campb. 157, 180, S. C.; anle, 96.

(e) Ante, 126 to 145.

(f) Ex parte Manners, 1 Rose, 68; aute, 125, note (u). See generally as to Stamps on Bills, &c. ante, 102 to 125.

(g) Ex parte Beaufoy, Cooke's Bank. Law,

(h) Clayton v. Gosling, 5 Bar. & Cres. 360; 8 Dow. & Ry. 110, (Chit. j. 1287); ante, 136,

(i) Ex parte Adney, Coop. 460, (Chit. j.

603); Ex parte Tootel, 4 Ves. 872, (Chit. j. 595); Ex parte Minet, 14 Ves. 189; Ex parte Barker, 9 Ves. 110; In re Barrington, 2 Sch. & Lef. 112, (Chit. j. 697); 1 Mont. 127, note (c). Instances of contingencies, see ante, 132 to 144. In other cases debts contingent at time of bankruptcy are proveable after happening of contingency, 6 Geo. 4, c. 16, s. 56.

(k) Ex parte Dyer, 6 Ves. 9; ante, 289. It must be remembered this doctrine is limited by the 1 & 2 Geo. 4, c. 78, to inland bills, the acceptance of which must be in writing on the bill itself; ante, 287.

(l) Ante, 288.

(m) Barrington v. Burton, 2 Sch. & Let. 112; and see Ex parte Harrison, 2 Bro. C. C. 615; Cooke, 209.

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together with the written acknowledgment, came into the hands of M. for IV. Proof valuable considertion, and B. and the several parties to the note became of Bills. bankrupts, it was held, that M. could not prove the note against the estate of B., the written acknowledgment not being assignable, but was entitled to 1. What have the amount made an item in the account between B. and G. and to Bille, &c. stand in the place of the latter (n). So a written undertaking guaranteeing the proveable. payment of a note of a third person, not due at the time of the act of bankruptcy, is not a debt proveable(o). But where the guarantee becomes absolute before the bankruptcy, or, it should seem, where, since the 6 Geo. 4, c. 16, s. 56, the contingency happens between the issuing of the flat and the tender of proof, it is otherwise (p). And where a party accepted bills under the following document given by H. S., on behalf of his agents L. and Co. -" In consequence of your allowing Messrs. L. to draw on you to the extent of 12,000l., I hereby guarantee to you that amount, it being understood that payment of these drafts is to be provided for by myself, or Messrs. L. in direct discountable bills fourteen days at least before they fall due, &c." and H. S. became bankrupt before some of the bills became due, it was held that there was a debt proveable, such document amounting to an original undertaking, and not a mere guarantee (q).

Bills made payable to fictitious payees may be proved by the indorsees for a valuable consideration against the acceptor, or any party who knew at the time that the payee was a fictitious person(r). And where a party who has become bankrupt has transferred a bill, but has by mistake omitted to indorse it, he or his assignees may be compelled to indorse, so as to enable the holder to prove(s). A bill which has been lost before or after it is due, may be proved, upon the parties giving a sufficient indemnity to the satisfaction of the commissioners (t). And where a bill is exhibited at the time of proving, and afterwards is bond fide lost, the commissioner should give special directions dispensing with its production, on application for a di-

Wherever the holder of a bill has been guilty of such laches or conduct as would discharge the party at law, supposing he had continued solvent, they will equally preclude the holder from proving under a \*fiat against [ \*706] him(x). It has been held, that a holder who has not given notice himself to the drawer, cannot avail himself of notice given by any other person (y); but it is now settled that notice from any party to the bill or note will be sufficient (z). And where the remedy on the bill may have

1 Mont. 142, 149, 150.

(o) Ex parte Adney, Cowp. 460, (Chit. j. 603); ante, 244, 250.

(p) Ex parte Myers, Mont. & B. Rep. 229; 2 Dea. & Chit. 251, S. C.; Ex parte Simpson, 1 Mont. & Ayr. 541, next note.

(q) Ex parte Simpson and others, 1 Mont. & Ayr. 541; 3 Doa. & Chit. 792, S. C. Semble, it would have been proveable if a mere guarantee; id. ibid.; Ex parte Myers, Mont. & B. 229, lest note.

(r) Bennett v. Farnell, 1 Campb. 180, 180, (Chit. j. 743); ante, 157, in notes; Ex parte Clarke, 3 Bro. C. C. 288, (Chit. j. 498); and Ex parte Allen, Cooke's Bank Law, 172; 1

(s) Ex parte Greening, 13 Ves. 206; ante, 204, note (g); Cullen, 110, 111; 1 Mont. 142; 8mith v. Pickering, Peake's Rep. 50, (Chit. j.

(n) Ante, 246, note (n); Cullen, 100, 111; 479, 481); Carpenter and others v. Marnell, \$

Bos. & Pul. 40, (Chit. j. 646).
(t) Ex parte Greenway, 6 Ves. 812, (Chit. j. 647); Ex parte Trust, 8 Dea. & Chit. 750. See further as to lost bills, ante, 264, 265; and see Pooley v. Millard, 1 C. & J. 411; ante, 697, note (u).

(u) Ex parte Wallas, 2 Mont. & Ayr. 586; Dea. 496, S. C.; and see order of Lord

Chancellor, 14th May, 1836, post, Appendix.
(x) Ex parte Wilson, 11 Ves. 510, (Chit. j. 720); ante, 433, note (c); Cullen, 99, 100; Cooke, 167 to 169. In the case of an accommodation bill, that fact must be proved by the holder, to dispense with proof of notice of dispenser; Ex parte Heath, 2 Ves. & B. 240, (Chit. j. 894).

(y) Ex parte Barclay, 7 Ves. 597, (Chit. i. 656); ante, 493, 494, in notes. (z) See Cases, ante, 494, 495.

IV. Proof of Bills, &c.

been extinguished at law or in equity by the statute of limitations, it was once held, that the holder will not be allowed to prove under a commission(a), but this doctrine has been qualified (b).

1. What Bills, &c. proveable.

Where a bill has been paid, or considered as cancelled or settled by another bill, it cannot be proved. But the presumption that a bill when in the hands of the acceptor has been paid, is not sufficient to oust the holder of proof on a bill, which comes through the acceptor, where there is no fraud(c). And bills in lieu of which other bills are given, if permitted to remain with the holder, may be proved in the event of the latter bills not being paid, and of no laches with respect to the latter having been committed (d).

Where the husband receives a fortune with the wife, and gives a bond to pay a sum to her trustees "in case of bankruptcy," a note given for the amount on the eve of bankruptcy, creates a debt proveable(e). So a promissory note to trustees for money lent out of the trust property is proveable; and if the trustees are responsible to the wife they may also prove for interest,

but not otherwise (f).

# 2. Who may Prove.

2. Who may prove.

With respect to the person who may prove a bill, we will consider first, the proof by a person who, being the holder, gave value for it at the time it became so; and secondly, the proof by a person who did not originally give

value for the bill, but has since been compelled to pay it.

Holder of Bill for value.

The bona fide holder of a bill or note, made originally for a valuable consideration, may prove for the whole sum contained in it, either against the acceptor, the drawer, or indorsers, whether the bill was due or not at the time of the act of bankruptcy, deducting a rebate of interest(g); but he must be holder for his own use, not as trustee for another indebted to the estate(h); though under a fiat against a banker, one person will be allowed to prove on behalf of a large number of holders of small notes, he not interfering in the choice of assignces, or with the certificate(i). And an agent for a public company abroad may, to the prejudice of the bankrupt, prove, with the consent of the assignees, on behalf of the company, on bills of exchange(j). When a bill or note is drawn before, but indorsed after the secret act of bank-[ \*707 ] ruptcy \*of the acceptor to another person, the indorsee, (though before the 6 Geo. 4, c. 16, s. 50, he could not set off the amount of the sum payable to any demand on him by the assignees, because the statute 5 Geo. 2, c. 30, related only to mutual debts due before the bankruptcy (i), may be a peti-

(a) Ex parte Dewdney, 15 Ves. 479; ante, 703, note (s).

(b) Ex parte Ross, In re Coles, 2 Glyn & Jam. 331; ante, 703, note (t); Bayl. 5th edit.

(c) Ex parte Gill, 3 Mont. & Ayr. 590; 3 Dea. 288, S. C.

(d) Ex parte Barclay, 7 Ves. 597, (Chit. j. 656); ante, 433, note (c).

(e) Ex parte Wright, 3 Mont. & Ayr. 387; 3 Dea. 551, S. C.

(f) Ex parte Green, 2 Dea. & Chit. 113. (g) 6 Geo. 4, c. 16, s. 51; 7 Geo 1, c. 31; ante, 702; Starey v. Barnes, 7 East, 435; 3 Smith, 441, (Chit. j. 729).

(h) Fuir v. M'Iver, 16 East, 139, 140, (Ch. 865); see Lackington v. Coombes, 6 Bing.

N. C. 71; post, Set-off.

(i) Ex parte Gordon, 1 Mont. & Ayr. 282.

(j) Ex parte Cotesworth, 1 Mont. & B. 92. confirmed on appeal; Ex parte Chevalier, 1 Mont. & Ayr. 345.

Ex parte Chevalier, 1 Mont. & Ayr. 345. A firm abroad drew bills on one of its own partners, trading on his own account in England, payable to an agent of the foreign firm. The bills were not puid. Process of insolvency issued against the foreign firm, and a commission against the English purtner. It was held that the agent may prove under the commission, but will be restrained from receiving dividends, unless he elect not to prove under the insolvency abroad.

(j) Cooke, 567; Marsh v. Chambers, 2 Stra. 1234, (Chit. j. 316); Grove v. Dubois, IT. R. 114; Dickson v. Evans, 6 T. R. 57, (Chit j. 581); Ex parte Hale, 3 Ves. 304, (Chit j. 581) 574); Hankey r. Smith, 3 T. R 507, note 4;



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tioning creditor for the amount, or prove it under the flut, because he stands IV. Proof in the place of the person from whom he received the instrument; and the of Bills, debt is not created by the indorsement, but by the acceptance of the bill, or &c. making of the note (k); nor will the circumstance of a note being indersed 2. Who may prove after it was due make any difference(1). And if an indorser or drawer of a Holder of bill for a valuable consideration, take up and pay the whole bill after the bank-Bill for ruptcy of the acceptor, or of any other party liable to him on the bill, and Value. the bill has not been proved by some previous holder under the fat against such acceptor or other party, such indorser or drawer is entitled to prove it under the flat against the acceptor or such other party (m); and it has even been decided, that where the bankrupt had accepted a bill for the accommodation of the drawer, and the indorser had indorsed the bill also for the accommodation of such drawer, and had paid it after the bankruptcy, he might prove it under the commission against such acceptor (n). So in the case of Ex parte Hale(0) it was decided, that the acceptor becoming bankrupt, and the petitioner having indorsed it before the bankruptcy, took up the bill, he might prove under such commission. And it has been held, that if an acceptor for the honour of the drawer, after the bankruptcy of the original acceptor, pay the bill, he may prove it under the commission against such original acceptor(p). But this latter doctrine was over-ruled in the case of Ex parte Lambert(q), in which it was decided, that such acceptor supra protest could not prove under the commission against the original acceptor, where the latter had received no consideration from the drawer. And, in general, the person thus claiming to prove must have contracted a liability upon the bill before the date of the fiat(r).

If the holder of a bill prove it, and receive dividends under the flat against the acceptor, and also under a fiat against another party, the assignces of the latter cannot prove under the fiat against the acceptor the amount of the dividends so paid by them; upon this point all the judges agreed, in the case of Cowley v. Dunlop(s), for the same debt cannot be proved twice under the same flat, and there is no hardship \*upon the indorser whose estate has [ \*708] also been compelled to pay a dividend, because it cannot exceed the deficiency of the amount of the bill beyond the dividend paid by the acceptor, and such deficiency would be the very sum which the indorser would have lost, had he been the holder of the bill. And where a creditor, after the issuing of the fiat, assigns his debt (bills of exchange), this does not give the

Cullen, 205, 74; 1 Mont. 543. But the 6 Geo. 4, c. 16, s. 50, now gives a right to set-off in the case of mutual credits up to the time of issuing the commission; see post, Mutual Credit, and Set-off

(k) Ex parte Brymer, Cooke, 164, 165; 1
Mont. 43; Cooke, 19, 164, 165, cites Ex parte
Thomas, 1 Atk. 73, (Chit. j. 320); Anon. 2
Wils. 135, (Chit. j. 358); et ride Tonis r.
Mytton, 2 Stra. 744, note 1, (Chit. j. 264);
Glaister r. Hewer, 7 T. R. 499, 500, (Chit. 596); Share r. Herrare, 2 Res. 8, Pul. 395.

1. K. 495, 806, (Clin.) 1. 806, (Clin.) 1. 806; Sharp r. Iffgrave, 3 Bos. & Pul. 395; see 46 Geo. 3, c. 135, s. 5.
(1) Bingley r. Maddison, K. B. Mich. T. 1783, Cooke, 19; 7 T. R. 570; 3 Dougl. 333, (Clin.) 1875.

(Chit. j. 425).
(m) Joseph r. Orme, 2 New Rep. 180, (Ch. j. 728); Buckler v. Buttivant, 3 East, 72, (Ch. j. 659); Ex parte Brymer, Cooke, 164; Ex

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parte Seddon, cited 7 T. R. 565; Howle r. Baxter, 3 East, 177, (Chit. j. 664); and see 1 Mont. 147, note (k); Cullen, 98, note 36; Bayl. 5th edit. 416 to 418; 1 Rose, 20.

(n) Howle v. Paxter, 3 East, 177, (Chit. j. 664); 1 Mont. 152, but quære. See the cases, post, 708, et seq. as to a party to an accommodation bill.

(o) Ex parte Hale, 3 Ves. 304, (Ch. j. 574). Since over-ruled as to the point of set-off, see post, Mutual Credit and Set-off. (p) Ex parte Wackerbath, 5 Ves. 574, (Ch.

j. 627). (q) Ex parte Lambert, 13 Ves. 179, (Ch. j. 732).

(r) Ex parte Isbester, 1 Rose, 20; Eden's Bank. Law, 134, 135; Bayl. 5th edit. 418. (\*) 7 T. R. 565; 1 Mont. 148, note (o).

IV. Proof assignee a right to prove it, but merely a right to call upon the assignor to prove the debt as a trustee for the assignee(t).

Holder of dation Bill.

With respect to an accommodation bill, or a bill where one of the parties Accommo- may have subscribed his name without having received any value, many difficulties very frequently arise as to the right of the parties to prove. A party who has bona fide given a valuable consideration for such bill, we have seen, is not affected by the want of consideration between other parties(u), and consequently may prove under a commission against such other parties(z). So a party with whom bills accepted for the accommodation of the drawer are deposited as a security for advances, may prove the full amount under a flat against the acceptor (y). But a party who has not given value for the bill, but has, since the act of bankruptcy, been obliged to take it up, frequently stands in a different situation, and in many cases has been considered as unable to prove under the fiat, on the ground that he is not clothed with the rights of the bona fide holder, nor can justly swear that the bankrupt was indebted to him at the time of his bankruptcy. The rules upon this subject may be arranged under the following heads:-

First, Where there is cross paper exchanged between the parties to the

accommodation, and each to pay his own acceptances, &c.

Secondly, Where accommodation party has taken a security. Thirdly, Where accommodation party has no security.

1. When he has paid before the bankruptcy.

2. When he has not paid till after bankruptcy.

3. When he may compel holder to prove for his benefit.

Fourthly, When he may prove under the 52d section of the 6 Geo. 4, c. 16, which comprises the statute 49 Geo. 3, c. 121, s. 8.

First. Cross Bills.

First, If a bill of exchange or promissory note be given expressly in consideration of another bill or note, and in exchange, the consideration is valid, and the holder may prove it under a fiat of bankruptcy(z): and where bills or notes are exchanged, the doctrine of suretyship does not apply; for each acceptor of the bill, or maker of the note, in such case engages to pay his own acceptance or note(a). But mere reciprocal acceptances to accommodate each other, without specific exchange, will not create a debt on either side, or any right to prove before the party has actually paid, except indeed the case can be brought within the 52d section of 6 Geo. 4, c. 16(b). [ \*709 ] Whether there \*was an exchange of bills, and one bill was transferred in consideration of the other, must be determined by the particular circumstances of such case(c). The bills need not be payable at the same time(d),

(t) Ex parte Dickenson, 2 Dea. & Chit. 520.

(u) Ante, 80, 81; Ex parte Rushforth, 10 Vos. 416, 417.

(x) Cullen, 97.

(y) Ex parte Vere, 2 Mont. & Ayr. 123; 4 Dea. & Chit. 295, S. C. If, however, other bills have also been deposited as a security, the holder, though entitled to prove for the whole amount as against the accommodation acceptor, will be restrained as to the dividends; id. ibid.

(z) Ex parte Maydwell, and Ex parte Beaufoy, Cooke, 159, (Chit. j. 552); Ex parte Clanricarde, Cooke, 162; Rolfe v. Caslon, 2 Hen. Tan. 70, (Chit. j. 551); Cowley v. Dunlop, 7 T. R. 566, (Chit. j. 598); Buckler v. Buttivant, 3 East, 72; 1 Mont. 128 (Chit. j. 659);

Ex parte Solarte, 1 Mont. & Ayr. 270; post, 709, note (n).

(a) Bayl. 5th edit. 423; Rolfe r. Caslon, 2

Ben. Bla. 570, (Chit. j 551).

(b) Post, 718; Ex parte Walker, 4 Ves. 473; Ex parte Rawson, 1 Jac. 278; Ex parte Laforest, Mont. & B. 363; post, 710, note (s).

(c) Vide judgment of Lord Ellenborough, in Buckler v. Buttivant, 3 East, 72; 1 Mont. 133, (Chit. j. 659). As to the distinction between cross bills and reciprocal accommodation, see Bayl. 5th edit. 434. May prove, but cannot issue commission; Bayl. 5th edit. 434; Sarratt v. Austin, 4 Taunt. 200, (Chit. j. 844)

(d) Ex parte Maydwell, Cooke, 159, (Chit. j. 552); Buckler v. Buttivant, 3 East, 73; 1

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or for the same sums(e), but any variation in the times of payment or in the IV. Proof sums of the respective bills is evidence whether the parties did or did not of Billa, transfer the bills in consideration of each other. And it seems, that an agreement by each party to pay his own acceptance, is conclusive evidence 2. Who may prove. that the bills were given in consideration of each other (f). The consideration of the bill, for this purpose, may be an acceptance of the party to Cross Bills. whom it is transferred(g), or the acceptance of another person(h), or a promissory note (i).

There is a material difference, however, between the right of such a party to a bill to prove it, and that of a person who has actually advanced a valuable consideration for a bill. The latter is entitled, without qualification, to prove and receive a dividend immediately in equal proportion with the other creditors (k); but the former, though he is, by the present practice, entitled to prove the cross bill before he has taken up his own(l), yet the dividends will be withheld until the account relative to the cross bill has been finally settled and adjusted (m). Thus if A. gives an accommodation bill to B., which B. gives to C. in exchange for an accommodation bill given by C. to B., and the three become bankrupt, A.'s bill is proveable by the assignees

of C. against the estate of A., but the dividend will be reserved (n). A person who has accepted a bill in consideration of the drawer's accepting a cross bill, and where it is understood that each party shall pay his own acceptances, cannot prove under a fiat against such drawer any payment made on his own acceptance, either before or after the bankruptcy of the drawer, there being no implied contract of indemnity, in the case of such cross acceptances; but each party is considered as looking to the liquidation of his claim on the other by the bill which he took in lieu of his own, and his remedy thereon, and to those only; in which case the law will not raise any implied promise ultra the bills(a). The party, as acceptor, has no remedy against the drawer for payment of his own acceptances, because he did not accept in consideration of a promise of indemnity, but in consideration \*of [ \*710 ] an agreement, or rather of an actual and executed delivery of other acceptances to the same, or nearly the same amount (p). And consequently, in these cases of cross acceptance, the payment made by a party on his own acceptance cannot be proved under a fiat against the other acceptor, although no payment whatever has been made by the latter on his acceptance, the only reinedy being on the cross bill(q). It has been held, that if a per-

(e) Buckler v. Buttivant, 3 East, 72. (Chit. 659); Ex parte Lee, 1 P. Wms 782; 1 Mont. 839.

(f) Cowley v. Dunlop, 7 T. R. 565, (Chit. 599); Buckler v. Buttivant, 3 East, 72; 1 Mont. 139, (Chit. j. 659).

(g) See the observations of Le Blanc, J 3 East, 84; Cowley v. Dunlop, 7 T. R., 565; 1 Mont. 139, (Chit. j. 598); Bayl. 5th edit.

(h) Ex parte Clauricarde, Cooke, 162: Buckler v. Buttivant, 3 East, 72; 1 Mont 139, (Ch. j. 659); Ex parte Hustler, I (ilyn & Jam. 9, (Chit. j. 1019).

(i) Ex parte Maydwell, Cooke, 159, (Chit. j. 552); 1 Mont. 139; Bayl. 5th edit. 429,

(k) Ex parte Marshall, 1 Atk. 130, (Chit. j. 333); Ex parte King, Cooke, 157; Ex parte Crosley, Cooke, 158, (Chit. j. 493); Ex parte Brymer, Cooke, 164.

(1) Ex parte Charimarde, Cooke, 160; Ex-

parte Curtis, and Ex parte Lee, Cooke, 159; Cullen, 133, 134; 1 Mont. Bank. Law, 139, 554; Bayl. 5th edit. 424, 425.

(m) In Cooke, 5th edit. 162, it is stated that the surety cannot prove till he has taken up his own paper; but in 1 Mont. 139, it is stated to be settled otherwise, though formerly doubted. But the dividends are withheld, see Sarratt n. Austin, 4 Taunt. 204, 205, (Chit. j. 844); Bayl. 5th edit. 425, 431, 432; Ex parte Bloxham, 8 Ves. 531, (Chit. j. 685); Eden's Bank. Law, 142; and infra, notes.

(n) Ex parte Solarte and others, 1 Mont. & Ayr. 270; 3 Dea. & Chit. 419, S. C.

(o) Cowley r. Dunlop, 7 T. R. 565, (Chit. j. 598); Buckler r. Buttivant, 3 East, 72, (Ch. j. 659); Bayl. 5th edit. 426, 427.

(p) Per Lord Ellenborough, C. J. in Buckler v. Buttivant, 3 East, 81, (Chit. j. 659).
(7) Cowley v. Dunlop, 7 T. R. 565, (Chit.

598); Buckler r. Buttivant, 3 East, 72, (Ch. j. 659).

IV. Proof of Bills. & c. 2. Who niay prove. First. Cross Bills.

son become a bankrupt, and the dealings between the bankrupt and a creditor consist of cross bills, which are respectively dishonoured, and a cash account composed of payments in money and of payments on bills duly honoured, all the dishonoured bills must be struck out on both sides, and only the cash balance be proved under the fat(r). But this doctrine has since been qualified, and it has been held, that although where part of an account between two mercantile houses, which become bankrupt, consists on both sides of bills which may be proved against both estates, the cash balance as between the two houses is proveable, excluding the bills outstanding in both sides, yet in the event of a surplus, the bills on both sides are to be included in the account(s). And if the drawer of a bill accepted in consideration of his own acceptance, take up and pay the whole bill after the bankruptcy of the acceptor, and the bill has not been proved by the holder under the fiat, such drawer may prove it(t); though if the assignees of the drawer of a bill, accepted in consideration of his own acceptance, pay dividends to the holder, who also receives dividends under the fiat against the acceptor, the drawer cannot prove the amount of such dividends under the latter fiat (u). Where there are cross acceptances, and the right of set-off clear, the court will restrain the assignces from bringing an action (x).

Secondly, Where Accommodation Party has taken

Secondly. Besides these cases of cross paper, a party to an accommodation bill frequently receives by way of indemnity a bill or note. If an accommodation acceptor, or other party, who puts his name to a bill without having received value, take at the same time from the principal or party accommodated, by way of indemnification, a bill or note for a sum of money payable at a day certain, he will be allowed to prove immediately upon such counter security, though the debtor becomes a bankrupt before such counter security is payable, and before the surety himself has paid or been called upon, or even could, by the terms of his engagement, be called upon to pay the creditor(y); and this notwithstanding the counter security has been negotiated by the [ \*711 ] party \*and returned to him after the bankruptcy(z). It has been observed, that such a construction, however it may appear to a common apprehension repugnant to the real truth of the transaction, and the real justice of the case as between the parties, has been founded upon this, that such a counter security creates an absolute debt at law, for which the surety's liability is a sufficient consideration, and on which, therefore, he is entitled immediately to come in as a creditor under the commission. With a view, however, to prevent the injury which might be done to real creditors, by allowing such constructively absolute but really contingent creditors to receive dividends

But see Ex parte Solarte and others, 2 Dea. & Chit. 261. K. and Co. sent to A. five bills drawn by them on D. and S., and received from him in return his acceptances for the precise amount, which they discounted with their own bankers, but none of them being paid by A (who became bankrupt himself before they fell due) they were proved by the holders under K. and Co.'s commission: A. having never negotiated the five bills sent him by K. and Co., it was held that his assignces could not prove them under K. and Co.'s commission.

(7) Ex parte Walker, 4 Ves. 373; Ex parte Eurle, 5 Ves. 833; 1 Mont. 141, 148. See the observations of Lawrence, J. in Buckler v. Buttivant, 3 East, 83, 84, (Chit. j. 659); Cooke, 161, 162; Bayl. 5th edit. 428.

(s) Ex parte Laforest and another, 1 Mont.

& B. 363; 2 Dea. & Chit 199, S. C.; Ex parte Rawson, 1 Jac. 278, where see Ex parte Walker, 4 Ves. 373, and Ex parte Earle, 5 Ves 833, explained. An appeal was preferred against the decision of the Court of Review in Expanse Laforest, but not prosecuted for want of funds.

(1) Cowley v. Dunlop, 7 T. R. 565, (Chit. . 598); 1 Mont. 147; Joseph v. Ormer, 2 New Rep. 180, (Chit. j. 728).

(u) Cowley v. Dunlop, 7 T. R. 565; 1 Mont. 149, (Chit. j. 598); see Ex parte Solarte, 2 Dea. & Chit. 261; supra, note (p).

(x) Ex parte Clegg, 1 Mont. & Ayr. 91. (y) Ex parte Maydwell, Cooke, 157; 2 Hen. Bla. 570, (Chit. j. 552); Cullen, 133, 184; 1 Mont. 131, 132, 134, 158, 157, 158.

(z) Ex parte Seddon, cited in 7 T. R 570.

upon debts which may never exist but in law, it has been thought necessary, IV. Proof where there are cross demands between the surety and the bankrupt upon of Bills, counter paper, as it is called, and upon which, till either has actually paid, 2. Who they are substantially only sureties, though nominally creditors of each other, 2. WHO may prove. to suspend the dividends till it appear that the surety has actually paid, Secondly, and how far he has exonerated the bankrupt's estate from his own paper(a). Where Ac-

A security of this nature must be a bill, note, or bond, payable at all commodaevents, and not a mere parol or written undertaking to indemnify (b). A tion Party promissory note payable on demand, or a bill payable at all events, are suffiseeurity cient securities to enable a party to prove, though no demand has been made before the act of bankruptcy(c). But if the acceptor of a bill receive from the drawer an undertaking to indemnify, or a receipt for his acceptance, as for money received, this is not such a counter security as creates a debt capable of being proved(d). In Ex parte Metcalfe(e), where A. and B. became bankrupts, the assignees of B. were allowed to prove under the commission against A. a cash balance due from A. to B., but the dividends were ordered to be retained to reimburse the estate of A. what it should be compelled to pay upon a distinct transaction, viz. a loan of bills from A. to B., some of which had been dishonoured, so that the money, thus in the hands of A., was in the nature of a cross security and indemnification against the accommodation paper. So in the case of Willis v. Freeman(f), Lord Ellenborough said, that Wilkins v. Casey(g) had established, that if a man, who has funds in his hands belonging to a trader who has committed a secret act of bankruptcy, accept a bill for that trader without knowing of such act of bankruptcy, he may apply those funds, when the bill becomes due, to the discharge of his own acceptance, though a commission of bankruptcy may have issued in the interim, and will be protected against any claims the assignees may afterwards make upon him in respect of the funds so applied.

It is not necessary in all cases that the security to the accommodating party should be given expressly as an indemnity. Thus it was held in the case of Ex parte Bloxham(h), that bankers, who have accepted bills for the accommodation of the bankrupt, may prove upon the bills drawn by him and remitted to them in the course of their banking \*account, though their [ \*712] acceptances were not due at the time of the bankruptcy; and it being objected, that the acceptance, was not such a consideration as gave the bankers a right to prove upon the bills deposited but not due till after the bankruptcy, and when the banker accepted, not having bills, but bills were deposited afterwards to indemnify him, that is not such a giving credit as falls within the statute 7 Geo. 1, c. 31, (the provisions of which are included in the 51st section of the 6 (Ico. 4, c. 16,) and that in Ex parte Maydwell, the acceptance was upon the express credit of the note, and that consequently this case was distinguishable; the Lord Chancellor said, that "in Ex parte Maydwell it was held, that the liability by the acceptance was a good consideration for the promissory note, and the proof was permitted. Cases occurred afterwards

<sup>(</sup>a) Ex parte Curtis, Cooke, 159; Ex parte Lee, ibid. (Chit. j. 249); Cullen, 134; Eden's Bank, Law, 142.

<sup>(</sup>b) Vanderhayden v. De Paiba, 3 Wils. 523; Chilton v. Whitfin, 3 Wils. 13; Cullen, 131; 4 Mont. 153, (Chit. j. 378).

<sup>(</sup>c) Exparte Maydwell, Cooke, 150; 1 Mont. 158, (Chit. j. 552).

<sup>(</sup>d) Ex parte Beaufoy, Cooke, 159; Smith v. Gells, 7 T. R. 489; Snaith v. Gale, 7 T. R. 463; Cullen, 138; 1 Mont. 157.

<sup>(</sup>e) Ex parte Metcalfe, 11 Ves. 404, (Chit. j. 719); Madden r. Kempster, 1 Campb. 12, (Chit. j. 739); Willis r. Freeman, 12 East, 659, (Chit. j. 802).

(f) Willis r. Freeman, 12 East, 659, (Ch.

S02); Hammond r. Barclay, 2 East 227, . (Chit. j 646).
(g) Wilkins v. Cusey, 7 T. R. 711.

<sup>(</sup>h) Ex parte Bloxham, 8 Ves. 581, (Chit. j. 685); Bayl 5th edit. 484.

of Bills, & c.

2. Who may prove. Secondly, Where Action Party

security.

IV. Proof demonstrating some mischief in that doctrine: the party proving, but not take ing up his own acceptance; and the Lord Chancellor afterwards put that condition upon them, that they should take up their acceptances. Upon this sort of transaction, bankers accepting upon the credit of bills remitted from the country; they must be entitled to prove, but they should prove upon the securities.

Where a person has become a party to a bill or note for the accommodacommoda- tion of another, and has been obliged to pay it after the bankruptcy, he may set off such payment against a debt due from him to the bankrupt at the time has taken a of his bankruptcy (i), and now at the time of issuing the commission. But this is a case of mutual credit under the statute 6 Geo. 4, c. 16, s. 50, which will be hereafter more fully considered.

Thirdly, curity.

Thirdly. Where a person has become an accommodation party to a bill Where Accommoda- or note, though there is neither cross paper nor a security in his hands to intion Party demnify him, yet if he has paid the bill before the act of bankruptcy of his has no Se-principal, it is proveable under the fiat as money paid for his use(k).

1. When ruptcy, and 2. When paid till after Bankruptcy.

But if he paid such bill or note after the act of bankruptcy of his princihe has paid the Bill be- pal, he cannot, in general, prove under a fiat, unless he can avail himself of fore Bank- the provisions in the statute 49 Geo. 3, c. 121, s. 8, (which are repeated in the 52d clause of the 6 Geo. 4, c. 16(l). This is perfectly clear in the case of an accommodation acceptor, or maker of a note, who being the parhe has not ties primarily liable can have no remedy upon them. Thus where a person accepted a bill to accommodate the drawer, upon a parol promise by the latter to find money to take it up when due, and to save the acceptor harmless, but who did not take it up when it became due, and soon after was a bankrupt, and the acceptor, after the bankruptcy of the drawer, was sued upon the bill and taken in execution for the debt and costs, it was held, that no debt accrued to him from the drawer till he paid the debt and costs, or (which was the same thing as actual payment) till he rendered his body in satisfaction thereof, and this not being till after the bankruptcy, could not be [ \*713 ] proved under the commission against the drawer(m). And \*it makes no difference if, instead of a parol promise, the surety takes a promise in writing from the drawer that he will take up the bill when due(n).

Q uestion Accommodorser could

prove.

The right, however, of an indorser of a bill or note, who has become so whether an merely for the accommodation of another, and has paid the bill after the dation In- bankruptcy, seems not to have been perfectly settled (o), though since provided for by the 49 Geo. 3, c. 121, s. 8, and the present act 6 Geo. 4, c. It was held in the case of Brooks v. Rogers (q), that if the 16, s. 52(p).

> Hudson, 4 T. R. 211, (Chit. j. 476); Atkinson v. Elliot, 7 T. R. 378, (Chit. j. 592). See post, tit. Mutual Credit and Set-off.

> (k) Cullen, 129; 1 Mont. 131, 153; Stedman v. Martinnant, 13 East, 427, (Chit j.

827).

(1) See 6 Geo. 4, c. 16, s. 52, post, 718. (m) Chilton v. Whiffen, 3 Wils 13, (Chit. j. 378); Young v. Hockley, Bla. Rep. 839; 3 Wils. 346; 1 Mont. 154; Cooke, 203 to 205; Wood r. Dodgson, 2 Rose, 47; Yallop r. Ebers, 1 Bar. & Adol. 702, 703.

(n) Vanderhayden r. De Paiba, 2 Wils. 528; Heskingson v. Woodbridge, Dougl. 166;

Cooke, 203 to 205; Cullen, 131.

(o) The leading cases upon this point are Brooks v. Rogers, 1 Hen. Bla. 640, (Chit. j. 480); Howis r. Wiggins, 4 T. R. 714, (Chit.

(i) Ex parte Boyle, Cooke, 561; Smith r. j. 469); and Howle v. Baxter, 3 East, 177, (Chit. j. 664); 3 Bos. & Pul. 395; Bayl. 5th edit. 422.

(p) Post, 718.

(q) Brooks v. Rogers, 1 Hen. Bla. 640, (Ch. j. 480). In 1 Mont. 154, note (d), there is a question whether this case is law, and Cowley v. Dunlop, 7 T. R. 565, (Chit. j. 598), and Buckler v. Buttivant, 3 East, 72, (Chit. j. 659). are referred to; and it is suggested that the whole question is, whether the payee and drawer stood in the situation of principal and surely. In Cowley v. Dunlop, Lawrence, J. speaking of the case of Brook's v. Rogers, says, "I argued that case as being the case of principal and surety, and considered Brooks as lending his name to Rogers to get money on the draft of Rogers of the Olney bank, and that, in sabstance, it was an advance of money to Rogers

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payee of a bill of exchange, not being a creditor of the drawer, indorsed IV. Proof and got it discounted, merely for the purpose of raising money for him, and of Bille, handed the money to him, and was afterwards obliged to pay it to the indorsee, but not till after the drawer became a bankrupt, he could not prove may prove. it under the drawer's commission; because no debt accrued to him from the Accommodrawer till the money was actually paid, which was not till after the bank- dation Inruptcy. In the case of Howis v. Wiggins (r), where a party became payee dorser. and indorsee of a promissory note for the accommodation of the maker, who delivered it to a third person with the payee's indorsement, and afterwards became bankrupt, it was held that the payee and indorser, paying it after the bankruptcy, was not entitled to prove, his debt accruing only upon payment of the note(s). In the case of Howle v. Baxter(t), the bill had been accepted by the bankrupt for the accommodation of the drawer, \*and the [ \*714 ] plaintiff, at the request of the drawer, indorsed the bill, merely to give it additional credit, after which the drawer got it discounted, and the acceptor became bankrupt, and the plaintiff was afterwards obliged to pay the amount to a bona fide holder, after which the defendant obtained his certificate, and the court said, that the plaintiff contracted no liability at the defendant's request, and that he never became surety for him in this transaction, and that the plaintiff's demand against the defendant, the acceptor, arose solely upon the bill, and that there was nothing to prevent his proving it under the commission, and consequently that the bankrupt was discharged by his certificate (u).

It is submitted, that where the party from being acceptor of the hill or maker of the note was primarily liable, and could not have any claim by why Invirtue of the instrument itself upon any party to it, there were sufficient dorser grounds for his not being allowed to prove under the commission; because, ought to have been independently of 7 Geo. 1, c. 31, no person could prove, unless he had a allowed to subsisting legal demand actually payable at the time of the bankruptcy (x), prove.

on the credit of Brooks's name as surety to the bank; but I doubt if that argument is not fallacious; for on Brooks carrying the bill to the bank, the bank lent him the amount of it on the security of the bill, on which Brooks was entitled to recover when returned to him for nonpayment."

(r) Howis r. Wiggins, 4 T R. 714, (Chit. j. 496); Bayl. 5th edit. 421, 422. Mr. Montagu, in vol. i. 155, note (e), observes on this decision, "that it is a stronger case of principal and surely than the case of Brooks v. Rogers, 1 Hen. Bla. 640, (Chit. j. 480), above mentioned, because in Howis r. Wiggins no money consideration passed between the payee and maker before the bankruptcy of the latter. And see the argument in Howle v. Baxter, 3 East, 177, (Chit. j. 664). In Cowley v. Dunlop, 7 T. R. 565, (Chit. j. 598), Grose, J. say, "The case of Howis v. Wiggins came on before this court on a motion for a new trial; and possibly under a misapprehension of it, I considered it as a case of indemnity; and the ground on which the rule was refused was, on the sup-position that Vanderhayden and De Paiba, which was a case of indemnity, was in point. I then considered Howis the plaintiff, and payee of the two promissory notes, as having indorsed them as surety for the defendant, with a view to give credit to the notes, and without any consideration given to him for his so doing. In

any other way of considering that case, I think it is not to be supported." It was also observed by Lord Ellenborough, in Buckler r. Buttivant, 3 East, 82, (Chit. j. 659), "It is unnecessary to say any thing of the cases of Brooks r. Rogers, and Howis r. Wiggins, though I have a decided opinion on the subject; it is sufficient for the present to observe that the noble lord by whom the former of those cases was determined, afterwards changed his opinion in the case of Ex parte Seddon, and that the latter case has since been doubted in this court by some of the judges in Cowley v. Dun. lop." It is observable, however, that the case of Ex parte Seddon, cited in 7 T. R. 570, is distinguished from Brooks v. Rogers, and Howis r. Wiggins, for Seddon was not allowed to prove on his own paper, but on the note given to him in exchange for it, which rendered that case an instance of cross paper, or counter security, which (it has never been disputed) may be proved; Bayl. 5th edit. 421, 422.
(s) Id. ibid.

(t) Howle v. Baxter, 3 East, 177, (Chit. j. 664).

(u) Howle v. Baxter, 8 East, 177, (Chit. j. 664).

(x) Parslowe v. Dearlove, 4 East, 498; 1 Smith, 281; 5 Esp. 78, S. C.; Hoskins v. Duperoy, 9 East, 498; 6 Esp. Rep. 55, (Chit. i. IV. Proof and there was no ground for permitting him to prove under that statute, be of Bills, & c.

2. Who may prove. Accom-

anodation

Indorser.

cause he being the person primarily liable to pay such bill or note, could not be considered as a person giving credit on such securities within the meaning of that statute. But a person who had indorsed a bill at the request of another might fairly be considered as giving credit within the meaning of the statute, which enabled "any person who shall give credit upon such securities to any person or persons who shall become bankrupts upon a good and valuable consideration for any sum or sums of money, or other matter or thing whatsoever, which shall not be due at the time of the bankruptcy," to prove such The question seems to have been, whether such an accommodation indorser could be considered as a person giving credit on such securities for "money, for other matter or thing," within the meaning of the stat-Now we have seen that in the case of cross bills, the acceptance on one side is deemed a sufficient consideration for the acceptance on the other, to enable a party liable to pay his own acceptance to prove the acceptance of the other party under the commission of those who had become bankrupt(y); and that where there had not been an exchange of bills, yet if a bill or note payable at all events had been given by way of indemnity, it might be proved(z); and we have seen that when a bill had been taken up by an inderser, who became so for valuable consideration, although after the act of bankruptcy, he may prove under the commission(a). If the acceptance of a cross bill, or the holding of a bill or note by way of indemnity, is to be deemed a sufficient consideration to enable the party to prove the bill or note in his possession, it must be on the ground that his liability on that paper, which he himself is bound to take up, is a good and sufficient consideration for "other matter or thing" besides money, within the meaning of the stat-The decision in Howle v. Baxter(b) was only susute 7 Geo. 1, c. 31. tainable upon this ground, for in that case the plaintiff had neither advanced money or credit in the way of trade before the bankruptcy, and was merely an accommodation party, who had afterwards paid the bill. It is true that [ \*715 ] the \*words in the preamble of the 7 Geo. 1, c. S1, afforded only a presumption of an intention in the legislature to assist those merchants and traders who were obliged to sell their goods on trust or credit, and take bills or notes in payment for them; but the preamble could not control the express enacting words, "for money, or for other matter or other thing whatsoever(c)." There appears to be no substantial difference in this respect between a transaction where, in consideration of a party's indursing a bill, he receives another bill or note by way of indemnity, which it is admitted be may prove, and a transaction, in which a drawer or indorser hands over a bill

or note in his possession to the same party and obtains his indorsement by way of giving credit to the instrument, without giving such cross security. In the latter case, according to the decision in Howle v. Baxter(d), the principle of which appears to have over-ruled the cases of Howis v. Wiggins, and Brooks v. Rogers) the transaction implied, that in consideration of the accommodating party becoming so, the party accommodated gives to

ties for a raluable consideration, where the time of payment is certain, though postponed to a future day, and several cases are collected to prove this position. But it is observable that the section alluded to only mentions securities for their money payable at a future day, by which they are embled to prove their debts. and consequently the words of the statute are less general than are supposed.

(d) 3 East, 177.

<sup>(</sup>y) Ante, 708, &c. (z) Ante, 709, &c.

<sup>(</sup>a) Aule, 706, &c. (b) 3 East, 177.

<sup>(</sup>c) In Co. B. L. 188, it is observed, that there is a legislative construction of this very act in 5 Geo 2, c. 30, s. 22, which, without conceiving a doubt, takes it for granted that the statute is not merely confined to securities for goods sold and delivered in the course of trade, but that it extends generally to all personal securi-

him all the beneficial interest which a bona fide indorser could have, and IV. Proof when such indorsec has actually been obliged to pay the bill, though after of Bills, the bankruptcy, he is entitled to prove. This, however, was a question of &c. considerable difficulty and could not be considered as fully settled(e) until 2. Who may prove. the passing of the 6 Geo. 4, c. 16, s. 52(f).

In a recent case, it appeared that the defendant, on certain considerations, detion Inundertook to pay a balance due on a bill of exchange of which the plaintiff dorser. was the acceptor; and he afterwards by a new undertaking engaged to deliver up the acceptance to the plaintiff within a month or to indemnify him against it; defendant became bankrupt, and did not pay or give any indemnity, and the plaintiff was obliged to take up the bill, the bankrupt having then obtained his certificate; and in an action brought by the plaintiff for the breach of such promise, it was held, that he could not have proved in respect of it under the defendant's commission, either for a debt not payable at the time of bankruptcy, or for a contingent debt, or in the character of a surety, and that therefore the bankruptcy and certificate were no defence (g).

We have seen that a surety or party to an accommodation bill, having 3. When no absolute counter-security, cannot, in some cases, come in as a creditor Party liadirectly in his own right, if he has not paid till after the bankruptcy of the ble may principal(h). Yet if the creditor has proved the whole(i) debt before he compel called upon the surety, the court will direct that he shall stand as a trustee prove for for the surety, and will allow the latter (or in case he too has become a bank- his Benefit. rupt, and his estate has paid dividends on account of the principal, will allow his assignees) to have the benefit of the principal creditor's proof, and to receive dividends upon \*it, but so as that no more shall be paid than 20% in the [ \*716] pound upon the whole debt(k). And a Court of Equity on a bill filed for that purpose, and on the surety's bringing the money into court, has ordered the creditor to go before the commissioners and prove his debt for the benefit of the surety (l) and stayed his proceedings at law against the surety till he had done so(m). An accommodation acceptor is entitled to the same benefit of proof(n). And where the surety, previous to the proof by the creditor under the commission against the principal, had lodged the amount of the debt with a banker in trust for the creditor, the surety has been permitted to retake the money for the purpose of enabling the creditor to prove

(h) Ante, 712, &c.

(i) See the observations of Lord Eldon in Ex parte Rushforth, 10 Ves. 420.

(k) Ex parte Ryswiche, 2 P. W. 88, (Chit. j. 251); Ex parte Wulton, 1 Atk. 122, (Chit. j. 853); Ex parte Atkinson, Cooke, 210; Cullen, 156; 1 Mont. 135, 158, 159; Bayl. 5th edit. 420, 421.

(1) Wright v. Simpson, 6 Ves. 784; Ex parte Atkinson, Cooke, 210; Beardmore v. Cruttenden, Cooke, 211; Cullen, 156; 1 Mont. 185, 189; Ex parte Rushforth, 10 Ves. 412, 414; Bayl. 5th edit. 422, note 22.

(m) Phillips v. Smith, Cooke, 211; Cullen, 156. Mt. Cullen, in his work, p. 156, note 55, says, "Is this to be considered as established, that sureties, having merely conditional securities, and not paying till after the bankruptcy, may come in place of the creditor and receive dividends? Are they to be so suvoured beyond all other creditors, and without relief to the bankrupt? For such sureties may still, after receiving under the commission, recover the residue of their debt against the bankrupt afterwards, they not being barred by his certificate " But note, the statute 49 Geo. 3, c. 121, s. 8, precludes a surety who can prove as there pointed out, from suing the bankrupt when he has obtained his certificate, and, in effect, prevents him from receiving a greater dividend than any other creditor. The argument, therefore, in Paley c. Field, 12 Ves. 437, 438, is no longer

(n) See Lord Eldon's observations in Ex parte Rushforth, 10 Ves. 417; Ex parte Turuer, 3 Ves. 248.

<sup>(</sup>e) Cullen, 131, 132; 1 Mont. 154, 155; Ex parte Isbester, 1 Rose, 20, and Bayl. 5th edit. 419, note 17. But see Lord Ellenborough's observations in Buckler v. Buttivant, 3 East, 82, (Chit. j. 659).

<sup>(</sup>f) Post, 719. (g) Yallop v. Ebers, 1 Bar. & Adol. 698. See also Ex parte labester, 1 Rose, 20; Bayl. 5th edit. 419, note 17; and Soutten r. Soutten, B Bar. & Ald. 832; 1 Dow. & Ry. 521, S C.

of Bills,

2. Who may prove. Thirdly, Where Accommodation Party

has no Security.

8. When he may compel Holder to prove for his Benefit.

IV. Proof against the principal(o). Where, however, a banker having money of the bankrupt's in his hands, has paid it after notice of the act of bankruptcy, though to creditors whose debts were antecedent, and who would have been entitled to prove under the fiat, yet he will not be permitted to stand in the place of those creditors so paid, and to receive dividends thereon with the other creditors (p).

In Ex parte Mathews(q) it was held, that if the drawer of a bill take up and pay the whole bill, after the indorser has proved it under the commission against the acceptor, the drawer has an equitable right to the benefit of the proof made by the indorser. If the payment by the surety be after the bankruptcy of the principal, and before the creditor has proved the debt, it cannot be proved either by the creditor or by the surety; the creditor, cannot, in such case, prove, because he cannot swear to an existing debt, and the surety cannot prove, because his payment is after the bankruptcy (r). It is therefore in general advisable for an accommodation party to compel the holder of the bill to prove before he pays him the amount. When such proof has been made, and in consequence of the party proving having afterwards received his debt from the surety, such proof has been expunged, it may, in in some cases, at the instance of the surety, be reinstated for his benefit(s). But the creditor cannot be turned into a trustee for the surety, to the prejudice of any right the former may have against the principal debtor's estate, on a further and distinct demand; and in such case the surety will only be allowed such part of the dividend as will remain, after allowing out of it to the creditor as much as will make up the proportion which he would have received, upon the residue of the debt proved beyond the debt to the surety, [ 717] if this debt has been \*expunged(t). Thus, in the case of Ex parte Turner(u), the petitioner had lent his name by acceptance and indorsement for the accommodation of the bankrupt, who discounted the bills so accepted and indorsed with Snaith and Co. After the bankruptcy, upon the application of Snaith and Co., the petitioner paid the full value of those bills, amounting to 8151. 15s. to them. They were creditors of the bankrupt to a much larger amount, and they proved their whole demand, including the amount of the bills received from the petitioner. The petitioner prayed that Snaith and Co. might assign to them the dividends due upon the proofs in respect of the bills which he had paid. The Lord Chancellor observing that Snaith and Co. could not be turned into trustees to the prejudice of any right they may have, made the order, that Snaith and Co. should take out of the dividend upon the 8151. 15s. so much as would make up the proportion, which they would have received upon the residue of the debt proved beyond the 8151. 15s. if that debt of 8151. 15s. had been expunged, and the rest of the dividend upon the 8151. 15s. belonged to the petitioner: and that the dividend should remain in the hands of the assignees, till it shall appear what proportion Snaith and Co. are entitled But in the case of Ex parte Rushforth(x), this doctrine was qualified,

(p) Hankey v Vernon, 3 Bro. C. C. 813; Cullen, 158, 159.

(q) Ex parte Mathews, 6 Ves. 285, 784,

(Chit. j. 643); 1 Mont. 147.

(r) Cooke, 152; 1 Mont. 135. (s) Fx parte Mathews, 6 Ves. 285, (Chit. j.

643). (t) Ex parte Turner, 3 Ves. 248, (Chit. j. 570); see the reason in Cullen, 157, note 56, and observed upon by Lord Eldon in Ex parte

(o) Ex parte Atkinson, Cooke, 210; 1 Mont. Rushforth, 10 Ves 415, 418, and in Paley s. Field, 12 Ves. 437; Lord Eldon'sppears, in Ex parte Rushforth, 10 Ves. 411, not to have perfectly acceded to the principle of the decision in Ex parte Turner; see also Paley v. Field, 12 Ves. 437, and it is at least qualified in the subsequent cases. See Ex parte Libbon, 17 Ves. 334; 1 Rose, 219.

(u) Ex parte Turner, 3 Ves. 243, (Chit. j. 570).

(x) Ex parte Rushforth, 10 Ves. 409, 422.

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and it was held that bankers, who had proved their whole demand against IV. Proof the principal, beyond the amount of their claim on the surety, who had guar- of Bills, anteed advances to that extent, were bound, upon payment to them by the &c. surety of the whole demand on him, to give him the whole benefit of their 2. Who may prove. proof to that extent against the principal, on the ground that it was not competent to such bankers to go on giving an enlarged credit to such principal, Where Acwithout the concurrence of the surety, so as to prejudice his equitable right commodato the benefit of their proof. So, in the case of Paley v. Field (y), it was tion Party had no Seheld that a surety for indemnity to a limited amount, having paid to the ex-tent of his engagement, is entitled to dividends upon proof by the creditor 8. When under the bankruptcy of the principal debtor, subject to a deduction of the he may proportion of the dividend upon the residue of the debt proved beyond that compel for which the surety was engaged, supposing that expunged. And the Mas-Holder to ter of the Rolls said, "If, in consequence of those ulterior advances, the his Benefit. bankers are to keep dividends which they would otherwise be trustees for the plaintiff, does he not contribute in effect to indemnify them for a loss, against which it is expressly provided that he shall not be called upon to indemnify them, viz. a loss occasioned by their advancing more than the sum of 1500l.? It is clear, that as between these parties that sum is to be considered as the The law resulting from that view of the facts, is not amount of the debt. a subject of controversy between the parties; for it is agreed upon that statement, that the plaintiff is entitled to the equity he seeks by the bill, to consider them as trustees for him of whatever dividends they draw from the bankrupt's estate on account of this sum of 1500l." It was, however, held in the same case, that the surety is not entitled to the benefit of the proof made by the creditor against other estates upon a distinct security, with which the *plaintiff* had nothing to do.

\*Fourthly. Many of the difficulties with respect to the proof by a surety, Fourthly, who has no cross paper or counter-security to indemnify him, were remov- When a ed by the statute 49 Geo. 3, c. 121, s. S, comprised in the 52d section of Person lia-6 Geo. 4, c. 16, which enacts, "That any person who at the issuing the ble may commission shall be surety(a) or liable(b) for any debt of the bankrupt(c), or Prove unbail for the bankrupt either to the sheriff or to the action(d), if he shall have 4, c. 16, s. paid the debt, or any part thereof, in discharge of the whole debt (although 52(z). he may have paid the same after the commission issued), if the creditor shall [ \*718] have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends, and all other rights(e) under the said commission, which such creditor possessed, or would be entitled to, in respect of such proof; or if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment, as a debt under the commission, not disturbing the former dividends (f), and may receive dividends with the oth-

(y) Paley r. Field, 12 Ves. 435.

(a) Id. ibid.

(b) An accommodation acceptor is not, strictly speaking, a surety; and for that reason the words "person liable" were used in the 4 Geo. 3, c. 121, s. 8, and 6 Geo. 4, c. 16, s. 52. See 2 Ves. & Bea. 40.

(c) See Ex parte Porter, 2 Mont. & Ayr. 281; and Clements v. Langley, 5 Bar. & Adol. 372; post, 721, note (a).

(d) These words were not in 49 Geo. 3, c. 121, s. 8.

(e) These words, which are omitted in the (2) Who not a surety, Yallow r. Ebets, 1 49 Geo. 3, c. 121, s. 8, have been held suffi-Bar. & Adol. 698; ante, 715, note (g). was the petitioning creditor and who has paid the bill to the holder after a commission against the drawer, to come in and use the name of such holder for the purpose of substituting the debt so proved for his own insufficient petitioning debt, under 6 Gco. 4, c. 16, s 18; Ex parte Rogers, 2 Mont. & Ayr. 153; 4 Den. & Ch. 623, S. C.; see ante, 700, note (x).

(f) This means not compelling the creditors to refund any part of the dividend received. The point was raised in Stedman v Martinnant. IV. Proof of Bills, & c. 2. Who

may prove.

Fourthly, When a Surety or Person liable may prove under 6 Geo. 4, c. 16, s. 52.

er creditors, although he may have become surety liable, or bail as aforesaid, after an act of bankruptcy committed by such bankrupt(g), provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy(h) by such bankrupt committed(i)."

Upon this statute it has been decided, that an accommodation acceptor is a person liable for the debt of the bankrupt drawer, and may prove under his commission (k); and if an acceptance for the accommodation of the drawer of a bill be given before, but renewed after he has committed an act of bankruptcy, such renewal is a continuation of the same suretyship; and therefore, if a commission of bankruptcy be issued against the drawer, and the accommodation acceptor afterwards pay such second bill, he will be entitled to prove the amount under such commission; though before the renewal of the acceptance he had notice of such act of bankruptcy having been committed. Nor [ \*719 ] will \*the case be varied by the circumstance of the holder of the first bill having, before the renewal, given time to the drawer; or by that of an additional name, as that of an indorser, having been lent upon the second bill(m). And where the defendants indorsed bills of exchange for the accommodation of one T., and to enable him to raise money by discounting them for the purpose of taking up a former bill then due, of which they were the acceptors for his accommodation, and T. became bankrupt and obtained his certificate, and the defendants were not called upon to pay the bills until after T.'s bankruptcy; it was held, that they were within the meaning of the words of the 52d section of the 6 Geo. 4, c. 16, "persons liable at the issuing of the commission for a debt of the bankrupt," and, therefore, that T.'s certificate discharged him from all liability to them on account of the bills, and render-

> 12 East, 664, (Chit. j. 827), but not determined. In re Wheeler, a bankrupt, 1 Sch. & Lef. 242.

> (g) A surety who is not able to pay in time to avail himself of this clause, may, it is apprehended, still avail himself of the right of compelling the holder to prove for his benefit; see ante, 715, 716, &c. sed quære.

> (h) The words, "that he was insolvent, or had stopped payment," in the statute 49 Geo. 3, are omitted in 6 Geo. 4, c. 16, s. 52.

> (i) As to any difficulty in the mode of plending the certificate, which existed formerly under the 49 Geo. 3, it is now removed by the 126th section of the 6 Geo. 4, by which it may be pleaded generally, and given in evidence in all cases of debts, claims, or demands made prove-

> able by the act; Eden, 151.
>
> (k) Ex parte Yonge, 3 Ves. & Ben. 40; 2 Rose, 40, S. C.; Laxton v. Pent, 2 Campb. 168, (Chit. j. 773); Moody v. King and another, 2 Bar. & Cres 558; 4 Dow. & Ry. 30, (Chit. j. 1290); and see next note. See also Waller Eber. 1 Bus. A. A. J. 200 Yallop v. Ebers, 1 Bar. & Adol. 198; aute, 715, note (g).

> (1) Stedman v. Martinant, 13 East. 427; 12 East, 664, (Chit. j. 827). On the 5th of Jannary, 1807, the plaintiff accepted a bill for the accommodation of the defendant the drawer, which became due on the 19th of March, when it was dishonoured. On the 18th March, 1807, a docket was struck against the defendant, and on the 21st a commission of bankrupt was issued, which was superseded on the 15th of April. A meeting of the defendant's creditors

was then held, when time was given to him to pay his debts by instalments. On the the 9th of June, 1807, the plaintiff accepted a second bill for the defendant, in order to take up the former one, for the same sum, with the addition of interest and stamp and the indorsement of a third person was lent an as additional security, which was required by the holders of the former bill. On the 6th of August' 1807, a valid commission was issued against the defendant, founded on an act of bankruptcy committed in the preceding March. The second bill became due on the 12th of September, 1807, when the plaintiff paid it. The first dividend under the commission was declared and made on the 6th of August, 1808. On the 4th of September, 1809, the defendant obtained his certificate. In an action for money paid, and the bankruptcy and certificate pleaded, a verdict was found for the plaintiff, subject to the opinion of the court as to whether the certificate was a discharge. The court (Le Blanc, J. absente) held, that the second acceptance was a continuation of the same suretyship which was created by the first, and that as such suretyship commenced before any act of bankruptcy committed, and consequent ly before the plaintiff could have any notice of such act, the plaintiff might, by the 49 Geo. 3, c. 121, s 8, have proved his demand under the commission, and therefore the certificate was a bar. Postea to the defendant. And see Ex parte Skinner, 1 Dea. & Chit. 403.

(m) Id. ibid.; Bayl. 5th edit. 441.

ed him a c being due drew a bil then indor subsequen was dishor B., and, t tificate(o). exchange i a security ed for their ceived a ( the bills, v of the proto any fen And in the bill, at

> judzmeat, debt may and the ju by the ca against the ed the ba bill, the c and that ti Mature 49 But the prove, or tion being the drawe bankrupto obtained holder ha The st in dischar cum:tang personal an action have see

(n) Bag  $B_{ing=653}$ Gow's Rep (o) Hai sed tide 1 where it drawer of drawn by  $\text{first }_{lad(r)}$ the deby of the  $_{49}$ Bth Nov

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necessar.

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ed him a competent witness on their behalf (n). So where a sum of money IV. Proof being due from A. to B., C., at B.'s request, and for his accommodation, of Bills, draw a hill of evaluation of A. for the amount which A. accounted and C. &c. drew a bill of exchange on A. for the amount, which A. accepted, and C. then indersed the bill and gave it to B., who indersed and negotiated it, and may prove. subsequently became bankrupt; it was held, that the amount of the bill which Fourthly, was dishonoured and paid by C. was proveable by him under the fiat against When a. B., and, therefore, that his right of action against B. was barred by the cer-Surety or tificate(o). And where a party as surety for the bankrupt accepted bills of Person lia-exchange drawn by the bankrupt, and by him deposited with his bankers as prove un-a security for his floating balance, and upon the bankruptcy the bankers prov- der 6 Geo. ed for their balance a sum including therein the amount of the bills, and re- 4, c. 16, a. ceived a dividend; it was held that the surety, who had subsequently paid 62. the bills, was entitled to the dividends received by the bankers on so much of the proof as related to the bills, and also to stand in their place in regard to any future dividends upon that portion of the proof (p).

And it has been decided, that if an accommodation acceptor having paid the bill, afterwards sues the drawer as for money paid, and having obtained judgment, assign the judgment debt to a third person, such assignee of the debt may prove the original debt under the commission against the drawer, and the judgment debt, though greater than the original debt, will be barred by the certificate(q). So where a bill after \*proof under a commission [ •720 ] against the acceptor, was paid by the drawer, and he after a dividend arrested the bankrupt for the balance, and was also a surety for him on another bill, the chancellor made an order that the bankrupt should be discharged, and that the plaintiff should be restrained from lodging any detainer under the

statute 49 Geo. 3, c. 121, ss. 8 and 14(r).

But there are not any words in the statute compulsory upon the party to prove, or precluding him from suing the bankrupt (though subject to such action being rendered in flectual by his obtaining his certificate), and therefore the drawer of a bill who has paid the amount to the holder, after a fiat of bankruptcy issued against the acceptor, may sue such acceptor before he has obtained his certificate, and arrest him upon the bill, notwithstanding the

holder has proved the bill under the flat(s). The statute applies only where the surety has paid the whole debt, or part in discharge of the whole, and therefore where a surety paid part, under circumstances which, in substance, made such payment in discharge of his own personal liability, it was holden that the bankrupt's certificate was no bar to an action by the surety to recover the money so paid by him(t). And we have seen, that the party must be substantially a surety, or liable for the But in order to bring the case within the statute, it is not original debt(u. necessary that the principal creditor should be enabled to prove, or that the bankrupt should be discharged by his certificate, if he do not (x).

(n) Basset v. Dodgin, 2 Moore & S. 777; 9 Bing. 653, S C.; but see Mayer r. Meakin, Gow's Rep. 198, next note.

(o) Haigh r. Jackson, 3 Mee. & W. 598; sed vide Mayer v. Meakin, Gow's Rep. 183, where it was held by Holroyd, J. that the drawer of a bill payable to his own order, but drawn by him for the accommodation of the first indorsee, was not " surety for or liable for the debt" of that indorsee, within the meaning of the 49 Geo. 3, c. 21, s. 8.

(p) Ex parte Holines, cor. Lord Chancellor, 6th Nov. 1939, 8 Jurist, 1023, reversing S. C.

3 Dea. 662; see Arch. Bank. Law, by Flather,

8th edit. 130, note (n). (q) Ex parte Loyd, 1 Rose, 4.

(r) Ex parte Lobbon, 17 Ves 334, 335; 1 Rose, 219

(s) Mend v. Braham, 3 Maule & S. 91, (Ch. j. 911); Townend v. Downing, 14 East, 565; see Eden's Bank. Law, 105.

(1) Yallop v. Ebers, 1 Bar. & Ald. 698; ante., 715, note (g).

(u) Soutten v. Soutten, 5 Bar. & Ald. 852; 1 Dowl. & Ry. 521, S. C.; ante, 715, note (g). (x) Westcott v. Hodges, 5 Bar. & Ald. 12.

IV. Proof of Bills, &c.

A surety cannot prove for *interest* due and paid subsequent to the commission under the 6 Geo. 4, c. 16, s. 52(y).

Pariners.

A partner is considered as a person liable for the joint debt of himself and his co-partners, and it the latter become a bankrupt, and the solvent partner be afterwards obliged to pay the whole debt, the certificate of the bankrupt partner will protect him from liability to make contribution to such solvent partner; and therefore where a partner continuing the business took an assignment of all the stock, &c. and covenanted to indemnify the retiring partner from the debts then owing from the partnership, and the continuing partner became a bankrupt, and obtained liis certificate, and subsequently an action was commenced against the retiring partner upon an acceptance of the partnership, and judgment was obtained against him, and he paid the debt and costs; it was held, that no action would lie against the bankrupt upon the covenant; since, under the 49 Geo. 3, c. 121, s. 8, the retiring partner might, in respect of his liability, have resorted to and proved under the commission, and was therefore barred by the certificate(z).

Co-sure-. ties. [ \*721 ]

\*But the 6 Geo. 4, c. 16, s. 52, does not extend to co-sureties(a); and, therefore, if A. and B. give a joint and several promissory note for the debt of C., and B. becomes bankrupt, and, after the bankruptcy, A. is obliged to pay the note, A. cannot prove for a moiety of the note against B's estate; because in such case A. is not a surety for B., but both are co-sureties for the debt of C., and there is no debt from the bankrupt at the time of the bankruptcy b).

# 3. Against whom, and under what Fiat.

8. Against whom and under what Figt.

We have next to inquire against whom, and under what, and how many fiats, proof in respect of a bill may be made. And this may be considered under two heads; first, with reference to the particular situation of the party who has become bankrupt; and secondly, to the number of the parties.

First, a party who was a bona fide holder of a bill, drawn regularly for value, is, we have seen, entitled to prove in all cases under fiats against every one of the parties against whom he could have supported an action on the bill, though such party became bankrupt before the bill was due, and at the time when it was uncertain whether it would be paid by the acceptor(c). So a bill drawn by way of accommodation, though it cannot be proved as between the parties to the accommodation, yet it may be proved by a bona fide holder against all parties, whether they have received value or not(d). Wherever the holder could have sustained an action on the bill against the

(y) Ex parte Wilson, 1 Rose, 137.

(2) Wood v. Dodgson, 2 Maule & S. 195;
 Rose, 47; Ex parte Ogilby, 3 Ves. & Bea.
 133; Ex parte Yonge, id. 31; Ex parte Taylor, 2 Rose, 175; Eden's Bank. Law, 167.

But see In re Goodchilds and Co. 2 Law J. 137; Ch. Ca. January, 1824. Seven partners carried on a bank in Durham, and also in London, where the two managing partners also carried on a separate trade as ironmongers; monies were from time to time raised for the banking firm by the indorsement of the partnership of two, and a commission of bankrupt having issued against all the seven, it was found that a large sum was due from the banking firm to the partnership of two: held, that that sum could

not be proved by the partnership of two against the estate of the banking firm, because it was not a debt arising from dealings in those articles which were the subject of the separate

(a) Clements v. Langley, 5 B. & Ad. 372; 2 Nev. & Man. 269, S. C.

(b) Ex parte Porter, 4 Dea. & Chit. 774; 2 Mont. & Ayr. 281, S. C.

(c) Ante, 708; Ex parte Marlar, 1 Atk. 150; Cullen, 96, (Chit. j. 318).
(d) Ex parte Marshall, 1 Atk. 130, (Chit. j. 318).

(d) Ex parte Marshall, 1 Atk. 130, (Chit. j. 833); Ex parte King, Cooke, 157; Ex parte Crossley, id. 158, (Chit. j. 493); Ex parte Brymer, Cooke, 164; Cullen, 97; 1 Mont. 152.

party, had should bed already bethe various bill or note quently pro the dividen also consid have seen. ment, the r the party to strument its and that in to any party over a nego giving a wr the note to acknowleds and B. an prove the r ing assignal between B person tran rant the pa come a bar fiat against dorse it, be good credii afterwards bill without appeared in but with th as if he ha pe brosed red by way against the But if the for which fiat(m).

CHAP. VII

(e) Aufe. (f)  $A_{t,t_0}$ (g) In re (Chit. ), 697 (h) Ex pa Ex parte sh 583); Culle (i) Ez pa i 583); E1 (Chit. j 10e (k) H. O (I)  $B_{au_8}$  $Ra_{700,-142}$ Cooke, 120 have  $M^{\rm sttr}$ (m) 11 117, (Cha Ex parte

party, had he continued solvent, he may prove under his fiat, in case he IV. Proof should become bankrupt. The rights and liabilities of parties at law have of Bills, should become bankrupt. already been considered, and therefore it is unnecessary here again to notice &c. the various decisions on the subject. In the case of cross bills, and of a short whom and bill or note given by way of indemnity, we have seen that a party may fre-under what quently prove before he has actually paid money or been damnified, though Fiat. the dividends will be withheld till his own paper has been paid( $\epsilon$ ). We have also considered the liability at law of a person transferring a bill, and we have seen, that in the case of a transfer by mere delivery, without an indorsement, the party is not in any case liable to be sued by the holder, except the party to whom he immediately transferred it, and then not upon the instrument itself, but for the precedent debt or consideration between them; and that in the case of the sale of a bill, the party transferring is not liable to any party (f). So in the event of bankruptcy, it appears that if B. hand over a negotiable note for valuable consideration to G., not indorsing it, but giving a written acknowledgment on a separate paper to be accountable for the note to G., and G. indorses the note, which, together with the written acknowledgment, comes into the hands of M. for valuable consideration, and B. and the several parties to the note become bankrupts, M. cannot prove the note against the estate of B. (the written acknowledgment not being assignable), but is entitled to have the amount made an item in the account between B. and G., and to stand in the place of the latter(g). So if a person transfer a bill without \*indorsing it, but by a written instrument war- [ \*722 ] rant the payment, in the same manner as if he had indorsed it, and he become a bankrupt before the bill is due, the holder cannot prove it under a fiat against him(h). And if a trader procure cash for a bill, but do not indorse it, because the person paying the cash thinks that the bill will have as good credit without his indorsement, the bill cannot be proved under a fiat afterwards issued against the trader(i). And where a trader transferred a bill without indorsing it, and there was a private mark upon the bill, and it appeared in evidence that all bills transferred by him without indorsement, but with this mark, were considered by him as rendering him liable to pay as if he had indorsed them; it was nevertheless held, that such bill could not be proved under a commission against him(k). So where a bill is transferred by way of sale, without being indorsed, it cannot be proved under a fiat against the party transferring, even by the party to whom he transferred it(l). But if the bill were deposited merely as a pledge, the residue of the debt for which it was deposited, after a sale of the bill, is proveable under the fiat(m). And the circumstance of indorsement does not make a difference

(e) Ante, 708, &c.

(f) Ante, 244 to 248.

(g) In re Barrington, 2 Sch. & Lef. 112, (Chit. j. 697).

(h) Ex parte Harrison, 2 Bro. Ch. Ca. 615; Ex parte Shuttleworth, 3 Ves. 368, (Chit. j. 583); Cullen, 100, 101; ante, 246 to 248.

(i) Ex parte Shuttleworth, 3 Ves. 368, (Ch. j. 583); Ex parte Blackburn, 10 Ves. 206, (Chit. j. 706); Cullen, 100, 101; Eden, 136,

(k) Id. ibid.

(1) Bank of England v. Newman, 1 Ld. Raym. 442, (Chit. j. 207); Ex parte Smith, Cooke, 120; 1 Mont. 142, (Chit. j. 457); Ex parte Witter, Cooke, 173; ante, 246, 247.

(m) Id. ibid.; Ex parte Hustler, 3 Madd. 117, (Chit. j. 1019); Buck, 171.

Ex parte Britten and others, 3 Dea. & Chit.

35. H., a money broker, was in the habit of depositing bills of exchange with B. and Co. as a security for advances, but he did not indorse the bills, nor were they negotiated by B. and Co. or ever presented for payment. Among the bills so deposited was one for 1000/, accepted by C., who became bankrupt on the 5th of March, 1824, which was some time after the bill fell due. H. also became bankrupt on the 12th of December, 1825, when B. and Co. proved the amount of the balance he owed them, excepting this bill as a security, but made no attempt to prove the bill under C.'s commission until January, 1826, when the commissioners rejected the proof: held, that the delivery of the bill by H. to B. and Co. must be taken to have been by way of pledge to secure the amount of the advances then due from H. to B. and Co., and not with an intention to transfer the pro-

1V. Proof if the real meaning of the transaction between the parties was a deposit; but it must be clearly shewn, that notwithstanding the indorsement, the object was a mere deposit(n). And where there is an antecedent debt (unless 3. Against the bill has been taken expressly in payment, with an agreement to run all whom and under what risks(o)), and the bill is taken without indorsement, if it turns out to be bad, the demand for the antecedent debt may be resorted to (p). Fiat.

Under sereral Fiats.

Secondly, With respect to the number of parties, the holder of a bill or note, is entitled to prove it under different fiats against all the several parties to the instrument, under their respective fiats, and to receive dividends upon the whole sum under each, to the extent of 20s. in the pound(q); for it is a creditor's right in bankruptcy to prove and avail himself of all collateral securities from third persons to the extent of 20s in the pound(r); and the [ \*723 ] holder of a bill drawn by a firm \*upon some of their members constituting a distinct firm, has a right to prove it against all the parties according to their liabilities upon the bill, provided he was ignorant of their partnership(s); or such holder may prove it under one or more commissions against some of the parties, and proceed at law against the others (t). In Ex parte Rushforth(u), Lord Eldon said, "It is clear, that where a person has a demand upon a bill or bond against several persons, and no part of that demand has been paid before the bankruptcy by any of them, he may prove against each; and the circumstance that one is a surety, and the other the principal, or a co-surety as between themselves, does not give a right to stop the holder from receiving dividends till he has received 20s. in the pound; that is well settled in Ex parte Marshall and Ex parte Wildman, and it applies to joint and several demands either by bill or bond."

> It has long been settled in bankruptcy, that a creditor cannot prove against the joint estate of two bankrupt partners, and also against the separate estate of one of them, but must elect, though he has distinct securities(x), unless there is a surplus(y); and even the holder of a bill who has no notice that the drawers, acceptors, and indorsers are all members of the same firm, is

not entitled to double proof(2).

Nor can a joint debt be proved under a separate fiat, except for the purpose of assenting to or dissenting from the certificate, and recovering a dividend out of the surplus, after satisfaction of the separate creditors; although

perty in it; and that the amount of those advances having been since paid, B. and Co. could not, under these circumstances, prove the bill under C.'s commission.

(n) Ex parte Toogood, 19 Ves. 232, 229; 2 Rose, 55, (Chit. j. 871).

(o) Owenson v. Morse, 7 T. R. 65.

(p) Ex parte Blackburn, 10 Ves. 204, (Ch. j. 706); Ex parte Rathbone, Buck, 215.

(q) Ex parte Wildman, Atk. 109, (Chit. j. 330); Tate r. Hilbert, 2 Ves. 113, (Chit. j. 510); Ex parte Lefebre, 2 P. & W. 407, (Ch. j. 266): Cowper r. Pepys, 1 Atk. 1071; Exparte Eloxham, 6 Vcs. 449, 600, 645, (Chit. j. 643). See the argument in Paley v. Field, 12 Ves. 438; Cullen, 96; 1 Mont. 143; Cooke, 170; Bayl 5th edit. 441, 442; Ex parte The Royal Bank of Scotland, 19 Ves. 310, (Chit. j. 927); Ex parte Reed, 3 Dea. & Chit. 481; post, 729, note (d).

(r) Ex parte Parr, 18 Ves. 65, (Chit. j. 929); Davison v. Robertson, 3 Dow's Rep. 220, 230, (Chit. j. 934); Ex parte Reed, 3 Dea. & Chit.

481; post, 729, note (d).

- (s) Ex parte Adams, 2 Rose, 36; 1 Ves & Ben. 495; Ex parte Parr, 18 Ves. 65, (Chit.) 929); Davison v Robertson, 3 Dow, 220, 230, (Chit. j. 934); Ex parte La Forest, Cooke's Bank. Law, 5th edit. 251; Bayl. 5th edit. 452, 454; Ex parte Husbands, 2 Glyn & Jam. 6.
- (1) Ex parte Wildman, 2 Atk. 109, (Chit.) 330); Wilks r. Jacks, Cooke, 168; 1 Mont. 143.
- (u) Ex parte Rushforth, 10 Ves. 416; Ex parte Recd, 3 Dea. & Chit. 481; post, 729; note (d).
- (x) Ex parte Husbands, 2 Glyn & Jam. 5, 6; but see Bayl. 5th edit. 452, 453; Ex parte Bonbonus, 8 Ves. 642; Ex parte Wensley, 2 Ves. & Bea. 254.

(y) Ex parte Rowlandson, 8 P. W. 405; Ex arte Bankes, 1 Atk. 106; Ex parte Bond and

Hill, 1 Atk. 98.

(z) Ex parte Moult, 1 Mont. & B. 28; 2 Den. & Chit. 419, S. C.; Ex parte Law, 3 Des. 541; 1 Mont. & Chit. 111, S. C.; see Ex parte Chevalier, 1 Mont. & Ayr. 345; ante, 706, note (j).

if there b the joint may then estate(a); tive estate allowed to Bielby(d) joint and were perr estate, on even recei of a secur rule, also, partner, \*0 in a pron ners( / ). In Exp

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the firm, v them as p estate (k)So, on may be ad taken a joi ment of o

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A petition separate hat debt due ut their joint whether such in trade or a terwards so soco nut a tot be comin rate fiats, un or negligene Duncan, Col Pet, 363 (a) Ex p 21, note a : (b) Ex pa pane Banke Hill, 1 Atk. 258 Et F (d) Ex

if there be no joint effects and no solvent partners, or no separate debts, or IV. Proof the joint creditors will pay the separate creditors 20s. in the pound, they of Bills, may then vote in the choice of assignees, and go at once against the separate state(a); and they must have time to look into the accounts of the respectively whom and tive estates, to see which will be most beneficial to them (b), and have been under what allowed to defer their election till a dividend declared (c). In Ex parte Fiat. Bielby(d), where creditors had proved under a joint commission upon a Under sevjoint and several promissory note, but had not received a dividend, they eral Fiats. were permitted to waive their proof and to prove against the separate estate, on the terms of not disturbing any dividends already made. even receiving a dividend is no determination of an election, and the holder of a security has been allowed to claim on refunding the dividend(e). rule, also, that proof cannot be made on a joint debt, if there is a solvent partner, \*only applies to actual partnerships, but not to cases where one joins [ \*724] in a promissory note as surety, &c. for another, they not being partners(f).

In Ex parte Bonbonus(g), Lord Eldon said, "There have been many cases where three or more partners being also concerned in other trades, the paper of one firm has been given to the creditors of another, and they were permitted to take dividends from both estates;" and in the case of joint debts paid by a bill drawn by one of the debtors and accepted by another, each carrying on distinct trades, there may be proof under their separate fiats upon the bill(h).

When the credit has been joint, the creditor may be admitted to prove under a fiat against all the partners, notwithstanding he has taken a separate And if money be lent on the separate notes or bills of different partners in the same firm, and be applied to the use of the partnership, and the firm, when solvent, agrees to consolidate the debts, and to consider them as partnership debts, the creditor may be admitted against the joint estate(k).

So, on the other hand, when the credit has been separate, the creditor may be admitted to prove against the separate estate, notwithstanding he has taken a joint security(1). And if a firm of three be dissolved by the retirement of one, and after the dissolution a creditor of the three draw on the three, and the two accept in the style of the three, and the three afterwards become bankrupt, the creditor will be entitled to prove under a joint fat is-

A petitioning creditor, who sued out two separate fiats against two individuals, upon a debt due upon a bill drawn and accepted in their joint names, but where it is doubtful whether such debt is due by them as partners in trade or as separate individuals, and who afterwards supersedes these separate fints, and sues out a joint fiat upon the same debt, will not be compelled to pay the costs of the separate fiats, unless there be a case of misconduct or negligence brought home to him; Ex parte Duncan, Court of Review, E. T. 1840, 4 Jurist, 368.

(a) Ex parte Taitt, 16 Ves. 194; 1 Rose, 21, note a; Heath v. Hall, 4 Taunt. 328.

(b) Ex parte Rawlandson, 3 P. W. 405; Ex arte Bankes, 1 Atk. 106; Ex parte Bond and Hill, 1 Atk. 98.

(c) Ex parte Clowes, Cooke's Bank. Law,

(d) Ex parts Bielby, 13 Ves. 70, (Chit. j.

732), quære; see Ex parte Husbands, 2 Glyn & Jam. 4, (Chit. j. 1245).

(e) Ex parte Rowlandson, 3 P. W. 405; supra, notes (y) and (b).

(f) Ex parte Crosfield, 2 Mont. & Ayr. 543; 1 Dea. 405, S. C. See post, 825, (71). (g) Ex parte Bonbonus, 8 Ves. 546; Ex

parte Wensley, 2 Ves & Bea. 254.

(h) Ex parte Wensley, 2 Ves. & Bea. 254.

(i) Ex parte Hunter, 1 Atk. 223; 1 Mont. 619; Cullen, 462; Ex parte Bates, 8 Dea.

858; Ex parte Ladbroke, 2 Glyn & Jam. 81.
(k) Ex parte Close, 2 Bro. C. C. 595; Ex parte Bonbonus, 8 Ves. 542. See other instances in Cullen, 462, 763; 1 Mont. 620; Exparte Whitmore, 3 Dea. 365; 8 Mont. & Ayr. 627, S. C.; Ex parte Jackson, 3 Dea. 651.

(1) In re Bate, 3 Ves. 400; Ex parte Lobb. 7 Ves. 592, (Chit. j. 656). See other instances, 1 Mont. 621; Ex parte Hitchcock, 1 Mont. &

Chit. 60; 3 Dea. 507, S. C.

proof as a

of Bills. &c.

8. Against whom and

4. To what

Proof may

be made.

[ \*725 ]

Extent

IV. Proof sued against the two(m). But a creditor of one of several partners for 1001., who has received the indorsement of the firm of a bill for 3001., and delivered such debtor a check for 2001., as the difference, cannot prove more than the 100l. against the separate estate of the debtor(n). And under what where one partner raised money for partnership purposes by the sale of certain shares in a joint stock company, which shares he personally engaged to Under ser- assign but did not, and the purchasers accepted a bill for the amount drawn eral Fiate. in the name of the firm, and duly paid the same at maturity, it was held, that proof for the amount of the purchase money could be made against the firm only, through the partner might be separately liable to an action of damages for non-fulfilment of his engagement(o). A creditor, however, who draws a bill upon a firm for his separate debt, due from one partner, which is accepted by that partner in the name of the firm, cannot prove against the joint estate without shewing the assent of the other partner to the firm being liable (p).

## 4. For what Sums, or to what Extent, Proof may be made.

With respect to what sum, or to what extent, proof may be made, it \*seems that the discounter of a bill or note is entitled to prove the full amount, without deducting the discount (q). So a holder, who has purchased the bill for less than the amount of it, may prove for the whole (r). So if a debtor give to his creditor an accommodation bill or note of a third person to a larger amount than his debt, the creditor is entitled to prove the whole amount of the bill, under a fiat against such accommodation party (s). And the holder of a bill or note, transferred or pledged to him by his debtor as a collateral security for his debt, may prove the whole amount of the security under a flat against any of the parties, except the debtor from whom he received it, although he has received part-payment of his debt from such his debt-And although it has been held, that in dealings between a banker and customer, each discount transaction is to be considered as a distinct isolated transaction, and that if any one bill is subsequently paid, so much of the

(m) Ex parte Liddiard, 2 Mont. & Ayr. 87; ham, 5 Ves. 448, was overruled. 4 Dca. & Chit. 603, S. C.

(n) Ex parte Kirby, Buck, 511. T. was in partnership with M. and F. He also carried on a separate trade, and being indebted 1001. on his separate account to K., he sent him a bill of exchange that wanted two months becoming due for 3001., indorsed by T., M., and F., but not by T. in his individual character, and requested K. to give him credit for 1001., and to send him a bill for the remainder of the 300l. K. gave credit for 1001., and sent him a bank-The bill for 300l. was dishonoured. T., M., and F. becamo bankrupts: held, that K. was not entitled to prove for any part of the 300l. against the separate estate of T.

(o) Ex parte Raleigh, 8 Mont. & Ayr. 670; 8 Dea. 160, S. C.

(p) Ex parte Thorpe, 3 Mont. & Ayr. 716; 2 Dea. 16, S. C.; Ex parte Goulding, 2 Glyn & Jam. 118.

(q) Ex parte Marlar, 1 Atk. 150; Cooke, 174; 1 Mont. 143, (Chit. j. 318).
(r) Ex parte Lee, 1 P. W. 782, (Chit. j.

(a) Ex parte Lee, 1 1. v. 182, (Cnit. j. 249); Cullen, 96, 97; ante, 698, note (i).
(a) Ex parte King, Cooke, 159; Ex parte Crossley, id.; Ex parte Bloxham, 6 Ves. 449, 600, (Chit. j. 449), in which Ex parte Blox-

Ex parte Fairlie and Co., 3 Dea. & Chit. F. and Co sold cochineal to John W. for which a small part of the price was paid in cash, and the remainder by two bills at four months, but the cochineal was to remain in the hands of F. and Co. as a security for the pay ment of the bills. The bills not being paid when due, John W. sent F. & Co. two other bills drawn by himself on Joshua W., for which no consideration was given to Joshua W. the acceptor. Before these bills fell due both John W. and Joshua W. became bankrupts, and the price of cochineal had fallen so much in the market that F. & Co. sold it for not a third of the price at which John W. had bought it, and they then proved for the deficiency under John W.'s commission: held, that they had also a right to prove the amount of the two bills under Joshua W.'s commission, without deducting the proceeds arising from the sale of the cochi-

(t) Id. ibid.; 1 Mont. 144, (Chit. j. 626); Bayl. 5th edit. 449; and see Ex parte Prescote, 4 Den. & Chit. 23; post, 726, note (g). Ex parte Groom, 2 Des. 265; 8 Mont. & Ayr. 157, S. C. when not, Ex parte Britten, 8 Dea. & Chit, 85; ante, 722, note (m).

where A. with D.. and C. be titled to h another b In the note is en and indors vided he So if A. separate fi son for wh reduced th for all that der a fiat only provtinction it having rec received a ing has re as remains the bill fro upon the s part as rer is to be an parte Blos persons, a prove and tent of 20. ed upon it or, a bank ditor may debtor in t them, and original de in  $E_{\Sigma Dar}$ "A party upon the another bi right to Dr

> (n) Ex b: (Chit. j. 117 (s) Er bi 4 Dea. & C case, as rep Dote (b),) ti ous securitie not separate proof of thes of the  $p_{\text{art}_{\parallel +}}$ of one of th expunged. (y) Ant

In a case

proof as relates to it must be expunged(u); yet in a more recent case(x), IV. Proof where A. drew bills on B., and indorsed them to C., who discounted them of Bills, with D., together with other bills to which A. was no party, and A., B. and C. became bankrupt; it was held, that the assignees of A. were not entitled to have the bills indorsed by him delivered up on paying their amount, Proof may another bill indorsed by C., but to which A. was no party, being unpaid.

In the case of several parties, we have just seen that the holder of bill or note is entitled to prove his debt under a fiat against the drawer, acceptor, and indorsers, and to receive a dividend from each upon his whole debt, provided he does not in the whole receive more than 20s. in the pound (y). So if A. being an indorsee of B. and Co.'s acceptances for 1364l., issue a separate fiat against B., and, at the time of suing out the fiat, D., the person for whom A. discounted the acceptances, has, by payments on account, reduced the debt to 4201., A. is entitled to prove for the whole amount, and for all that he receives above the 420l. will be a trustee for D.(z). But under a fiat against the party from whom this holder received the bill, he can only prove to the amount of the actual debt then due(a). There is a distinction in these cases, where the creditor applies to prove his debt after having received a part, and where he applies to prove previous to his having received any payment or composition. If the creditor at the time of \*prov- [ \*726] ing has received any part of the bill or note, he can only prove for so much as remains; but if, after having proved for the whole, he receives a part of the bill from any of the persons liable to pay it, he is entitled to a dividend upon the whole, provided it does not exceed 20s, in the pound, upon such part as remains due(b); and as to any overplus beyond 20s. in the pound, it is to be accounted for to the party next entitled to the benefit(c). In Ex parte Bloxham(d) it was decided, that a creditor having securities of third persons, accommodation acceptors, to a greater amount than the debt, may prove and receive dividends upon the full amount of the securities to the extent of 20s. in the pound upon the actual debt; and Lord Eldon said, "I looked upon it as settled, that a creditor cannot hold the paper of his original debtor, a bankrupt, and prove beyond the actual debt upon it, but that such creditor may have the paper of third persons, who are debtors to such original debtor in more, and prove to the whole amount under the commission against them, and it is not material whether such third persons were indebted to the original debtor, for you cannot attach equities upon bills of exchange." in Ex parte Bloxham(e) the same point was decided, and Lord Eldon said, "A party wants to have a bill discounted, and the banker refuses to discount upon the credit of that bill only, and then the party says, he has in his hands another bill, and offers that as a security for the former, what is that but a right to prove against both estates until 20s. in the pound has been obtained?" In a case where a bill was given by the bankrupt to A. for goods delivered

(u) Ex parte Barratt, 1 Glyn & Jam. 327, (Chit. j. 1176).

(y) Ante, 722.

(z) Ex parte De Tastet, 1 Rose, 10.

(a) Id. ibid.; Bnyl. 5th edit. 442; and see Ex parte Rufford, 1 Glyn & Jam. 41.

<sup>(</sup>x) Ex parte Dickson, 2 Mont. & Ayr. 99; 4 Dea. & Chit. 614, S. C. In a note to this case, as reported in Mont. & Ayr. (p. 100, note (b),) the rule is stated to be, that if various securities be held for one general debt, and not separately applicable to parts, and after proof of these securities under a fiat against one of the parties, the creditor receive full payment of one of the securities from another party to the instrument, the proof thereon is not to be expunged.

<sup>(</sup>b) Cooke, 150 to 153; Cullen, 96; Ex parte The Royal Bank of Scotland, 19 Ves. 810; 2 Rose, 197, (Chit. j. 927); Bayl. 5th edit. 442, 443.

<sup>(</sup>c) Cullen, 96

<sup>(</sup>d) Ex parte Bloxham, 6 Ves. 449, (Chit. j. 626); Bayl. 5th edit. 449; and see Ex parte

Fairlie, 3 Dea. & Chit. 285; ante, 725, n. (s).
(e) Ex parte Bloxham, 6 Ves. 600, (Chit. j. 449), in which the case in 5 Vec. was overruled.

or commit

of Bills, 4. To what

Extent

Proof may be made.

IV. Proof by A. to a third person, at the request of the bankrupt, the Vice-Chancellor held, that there was the same immediate contract between the bankrupt and the holder, and the bills were equally payment for the goods, as if given in payment for goods delivered by the holder to the bankrupt, and therefore that he could only prove for the sum due for the goods, and not the full amount of the bill(f). And where goods in which the bankrupts were jointly interested with A. and B. were pledged with a creditor to secure the payment of an acceptance of the bankrupts, and part of the proceeds were received by the creditor before he applied to prove, it was held that he must deduct the amount so received before he could prove on the acceptance(g). So if A. agrees to be responsible to B. for the due payment to him by C. of 24,000l. by yearly instalments of 1200l., and B. afterwards agrees to accept six joint notes of A. and C. for 2000l. each, and delivers up the original agreement to C., but only one of these notes is paid, B. cannot prove under a fiat against A. the original debt of 24,000l., but only the amount of the five notes remaining unpaid (h).

We have just seen, that if the holder of a bill or note, at the time of proving, has received any part of it, he can prove only for the remainder(i). So it has been held, that where different parties to a bill or note become bankrupt, and a dividend has been declared, though not paid, under one of the commissions under which the holder has proved his debt, he cannot afterwards prove under another commission for more than the residue, after de-[ \*727 ] ducting the amount of the dividend \*declared(k). In Ex parte Leers(l) the Chancellor made an order, that the dividends should be deducted from the proof, according to the practice as stated by Mr. Cooke, still expressing doubt as to the principle of it. Hence it is in general advisable, where there are several parties to a bill, to prove under the fiat against each as soon as possible, or at least before any dividend has been received, or even

a fiat opened against other parties.

Friendly Bocieties.

In favour of Friendly Societies, the 4 & 5 Will. 4, c. 40, s. 12, enacts, "That if any person already appointed or who may hereafter be appointed to any office in a society established under the said recited act(m) or this act, and being intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any money or effects belonging to such society, or any deeds or securities relating to the same, shall die, or become bankrupt or insolvent, or have any execution or attachment or other process issued, or action or diligence raised against his lands, goods, chattels, or effects, or property or estate, heritable or moveable, or make any assignment, disposition, assignation, or other conveyance thereof, for the benefit of his creditors, his heirs, executors, administrators, or assignees, or other persons having legal right, or the sheriff or other officer executing such process, or the party issuing such action or diligence, shall within forty days after demand made in writing by the order of any such society

(f) Ex parte Reador, Buck, 381.

(h) Ex parte Powell and others, 1 Dea. 378: 2 Mont. & Ayr. 533, S. C.

granted, that in the case of Cooper v. Pepys, the holder had received the dividend before he attempted to prove his debt against the indorser; I Mont. 144; Bayl. 5th edit. 441, 442.

(1) Ex parte Leers, 6 Ves. 644, note. (Ch. 646). The reason there assigned by Mr. j. 646). Cooke fails, since 49 Geo. 8, c. 121, s. 12. See the Royal Bank of Scotland, Ex parte, 19 Ves. 810, note, (Chit. j. 927); Ex parte Todd, 2 Rose, 202, note.

(m) 10 Geo. 4, c. 56.

thereof, di society to pay, out c son, all su of his said satisfied. ( or which n the party lands, goo ment and of the legi creditors, the party i commence ceiving in to a sum : them pron became a able on or was held. entitled to the societ bankrupt and in the money wa clerks, by by him it and sterra debt for 1 carrying i a debt for ceases to io Ex bai given to creditors. officers bi did not e missorv

> The { ings' Ba ing to fri

(n) Th Geo. 3, c. except an (o) Ex cases in no 583, in. F (b) E<sup>2</sup> Ross, 6 V (d) E7 (r) Id. (s) Ez 6 γ<sub>66. 9</sub>,

(t) Ex

<sup>(</sup>g) Ex parte Prescott, 4 Dea. & Chit. 23. Aliter, if the goods had belonged to A. B. alone, id. ibid; and see ante, 725, note (t).

<sup>(</sup>i) Supra, 1 Mont. 143, 144. (k) Cooper v. Pepys, 1 Atk. 106, (Chit. j. 291); The Royal Bank of Seotland, Ex parte, 19 Ves. 310; 2 Rose, 197, (Chit. j. 927). But see in Ex parte Wildman, 1 Atk. 109, (Chit. j. 830), where the chancellor took for

or committee thereof, or the major part of them assembled at any meeting IV. Proof thereof, deliver and pay over all monies and other things belonging to such of Bills, society to such person as such society or committee shall appoint, and shall &c. pay, out of the estates, assets, or effects, heritable or moveable, of such per- 4. To what son, all sums of money remaining due which such person received by virtue Proof may of his said office or employment, before any other of his debts are paid or be made. satisfied, or before the money directed to be levied by such process as aforesaid, Friendly or which may be recovered or recoverable under such diligence, is paid over to Societies. the party issuing such process, or using such diligence; and all such assets, lands, goods, chattels, property, estates and effects shall be bound to the payment and discharge thereof accordingly (n)." It seems that this provision of the legislature, in preferring the claim of friendly societies to that of other creditors, is not favoured; and that the debt, &c. must have been due from the party in his official capacity (o). Thus where an attorney was, from the commencement of the establishment of a friendly society, in the habit of receiving from the stewards the money of the society, whenever it amounted to a sum which they considered worth placing out at interest, and of giving them promissory notes from time to time carrying interest, and the attorney became a bankrupt, and indebted to the stewards upon promissory notes payable on one month's notice, and no person had been appointed treasurer, it was held, that under the former act, 33 Geo. 3, c. 54, the society was not entitled to a \*preference(p). So where no treasurer had been appointed by  $\lceil \cdot \cdot \rceil = 1$ the society, and the president and stewards were chosen annually, and the bankrupt has served the office of president and steward in different years, and in the capacity of steward had received the money of the society, and money was afterwards from time to time paid to him by the stewards and clerks, by order of the society, upon promissory notes bearing interest, given by him in the name of a firm of which he was a member, to the president and stewards, the society was held not entitled to a preference (q). debt for money lent by the consent of the society, upon a promissory note carrying interest, seems not to be entitled to a preference (r). At all events, a debt for money lent to a member of the society, upon his security, after he ceases to be an officer of the society, is not entitled to a preference(s). in Ex parte Stamford Friendly Society (t) it was held, that the preference given to friendly societies by the statute 33 Geo. 3, c. 54, s. 10, over other creditors, was confined to debts in respect of money in the hands of their officers by virtue of their offices, and independent of contract, and, therefore, did not extend to money held by the treasurer, upon the security of his promissory note, payable with interest on demand (u).

The 3 & 4 Will. 4, c. 14, s. 28, contains a provision in favour of Sav. Savings ings' Banks, similar to the above act of 4 & 5 Will. 4, c. 40, s. 12, relat- Bank. ing to friendly societies. Where an actuary embezzled various sums render-

(n) This enactment is the same as the 33 Geo. 3, c. 54, s. 10, and 10 Geo. 4, c. 56, s. 20, except as to the words in italics.

(o) Ex parte Ross, 6 Ves. 804. See other cases in note (a) to 2 Burn's Justice, 26th ed. 583, tit. Friendly Society.

(p) Ex parte Ashley, 6 Ves. 441; Ex parte Ross, 6 Ves. 804; 1 Mont. 524.

(q) Ex parte Ross, 6 Ves. 804.

(r) Id. ibid.

(t) Ex parte Stamford Friendly Society, 15

Ves. 280.

(u) Cooke, 254, 255.

(x) Ex parte Jones and others, Trustees of the Carmarthen Savings' Bank, 2 Mont. & Ayr. 193. Where money belonging to the depositors in a savings' bank has been embezzled, the remedy of the depositors is not by action against the trustees and managers, but by mandamus to compel them to appoint an arbitrator under 9 Geo. 4, c. 92, s. 45; Rex v. Trustees, &c. of Mildenhall Savings Bank, 2 Nev. & Perry,

<sup>(</sup>s) Ex parte Amicable Society of Lancaster,

IV. Proof of Bills, &c.

ing forty indictments necessary, and became bankrupt, and five indictments were preferred, which failed from technical reasons, which would apply to any other indictment, the proof was allowed for the whole sum embezzled(x).

4. To what Extent Proof may be made. Interest.

The interest which is recoverable at law has already been stated (y). With respect to the proof of interest under a fiat, the former rule was, that whenever by the express terms of the bill or note interest is reserved, or where there is a contract or agreement between the parties that the debt shall carry interest, it is payable and proveable under the fiat(z). And it has been held, that even upon notes payable on demand, not reserving interest, the interest might be proved, where it appeared to be the known and established custom of the trade to allow it, and that it had actually been paid by the bankrupt, and accounts settled with him, in which it had been charged and allowed between the parties (a). And in Ex parte Hankey(b), and Ex parte Mills(c), it was held, that where by the custom of the trade interest is payable on [ \*729 ] a debt, and at the regular time of stating the accounts the \*debtor is debited for interest, and afterwards becomes a bankrupt, the interest is proveable under his commission, notwithstanding the debt was secured by four promissory notes, of which only one upon the face of it was payable with interest, and the other three were merely notes payable on demand. And now, by the 57th section of the 6 Geo. 4, c. 16, interest is made proveable (though not reserved), to be calculated down to the date of the commission, at such a rate as is allowed by the Court of King's Bench in an action. And where B. and Co., being largely indebted to R. and Co. indorsed to them various bills which had been drawn or indorsed by C. and Co. for the accommodation of B. and Co., and B. and Co. and C. and Co. respectively became bankrupt, and R. and Co. proved the bills under each commission; it was held, that the estate of C. and Co. was a security to make good the amount of principal and interest due to R. and Co. from B. and Co., and that R. and Co. were entitled to receive dividends on their proof under C. and Co.'s commission, until not only the balance of the principal sum due from B. and Co., but also all interest thereon was fully satisfied (d).

A creditor by bill or note is entitled to prove the whole interest due whatever may be the amount, though a special creditor can never have interest beyond the penalty contained in his security(e). And we have seen that the ereditor may prove the whole sum for which the bill or note was given, notwithstanding he received 51. per cent. discount, though the statute(f) enacts, that upon bills and notes payable at a future time, a rebate of interest shall be deducted from the actual payment of the dividend to the

time when the security would have been payable.

When interest is allowed to be proved, it is never, in any case of an insolvent estate, allowed to be computed later than the date of the fiat, because it is said, the estate being a dead fund, a salvage of part to each is all

(y) Ante, 679 to 683.

(b) Ex parte Hankey, 8 Bro. C. C. 504.

(d) Ex parte Reed and another, 3 Dea &

that in suc be made ( cept in th which the above ena cases of r interest sti tate which bankrupt, time of pa the instru formerly, sion of U this is ana \*The d fore the t bankrupte bills, incu after the from which or costs a the fiat, th law of Pl with 201.

> From t delay sho cases, if though no of his bill allowed 1 until distr made of laches, c to be div coming it not fraud

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the bill w

(g) Bigt  $B_{romley}\ _{\mathfrak{v}}$ Bennett, 2 178; Ex p: (A) Ex Ex parte G(i) Ex | (k) Bro kan, 119; (l) Ex Parte Mich Batcher r 564, <sub>565.</sub> (m) Ex te  $W_{\mathrm{ill}_{\mathrm{lin}_{1}}}$ (a) (g)

<sup>(</sup>z) Cooke, 174, 183; Cullen, 117; 1 Mont. 145, 169; Bayl. 5th edit. 415, 456, 457; Exparte Marlar, 1 Atk. 150, (Chit. j. 318); 1 Mont. 170; Cooke, 174, 183; Parker v. Hutchinson, 3 Ves. 134; Upton v. Lord Ferrers, 5 Ves. 801.

<sup>(</sup>a) Ex parte Champion, 3 Bro. C. C. 436; Ex parte Hankey, id. 504; Ex parte Mills, 2 Ves. jun. 295.

<sup>(</sup>c) Ex parte Mills, 2 Ves. jun. 295; 1 Mont. 172, (Chit. j. 498. Interest is recoverable at law where goods have been sold upon the terms that a bill should be given; Marshall v. Poole, 13 East, 98; Farr v. Ward, 3 M. & W. 25; 6 Dowl. 163, S. C.

<sup>(</sup>e) Bromley v. Goodere, 1 Atk. 75; Cullen, 119.

<sup>(</sup>f) 6 Geo. 4, c. 16.

that in such a general loss can be expected (g); and as such proof cannot IV. Proof be made directly, so neither can it be indirectly thrown upon the estate, ex- of Bills, cept in the event of a surplus(h). And where the act of bankruptcy to which the commission related was ascertained, no interest was, before the 4. To what Extent above enactment, allowed after that act of bankruptcy (i). And in some Proof may cases of mutual credit, when both debts carried interest, the computation of be made. interest stopped on both sides at the same time(k); but in the case of an estate which turned out to be solvent, and where a surplus would come to the bankrupt, it was held, that creditors had a right to interest up to the actual time of payment, without regard to the date of the commission (l); provided the instrument expressly entitled the holder to interest(m). And though, formerly, the rule was to allow only 41. per cent., it appears from the decision of Upton v. Lord Ferrers(n), that 51. per cent., is to be allowed; and this is analogous to the different statutes with regard to the rebate of interest.

\*The difference upon the re-exchange of bills protested and re-drawn before the bankruptcy, is proveable under the fiat, but if incurred after the [ \*730] bankruptcy, it is not proveable (p). So the costs and charges of protesting bills, incurred before the bankruptcy, may be proved, but not those incurred after the bankruptcy (q). But where by the particular law of the country from which the bill is drawn, or when by express stipulation the re-exchange, or costs and charges, are fixed at a particular rate, they may be proved under the fiat, though not incurred till after the act of bankruptcy. Thus, by the law of Philadelphia, the drawer of a returned bill must pay its contents, with 201. per cent. advance as liquidated damages; in this case, if he become bankrupt, the 201. per cent. may be proved under his commission, though the bill was not protested till after his bankruptcy(r).

5. The Time of Proof and of making Claim.

From the preceding observations it may be collected, that no unnecessary 5. The Time of delay should take place in making the proof, and we have seen that, in some Proof and cases, if the proof be delayed till after the dividend has been declared, of making though not received, it will prevent the holder from proving the whole amount of his bill under a fiat against another person(s). Formerly, creditors were allowed to come in and prove their debts at any time within four months and until distribution made, but they were not admitted after distribution actually made of any part of the estate; now, however, except in cases of gross laches, creditors are allowed to come in at any time while any thing remains to be divided(t). And in Re Wheeler(u) it was decided, that a creditor coming in to prove his debt after a dividend made (provided the delay was not fraudulent, but owing to accident, or unavoidable circumstances) should

change(o).

(g) Blutcher v. Churchill, 14 Ves. 573; Bromley v. Goodere, 1 Atk. 79; Ex parte Bennett, 2 Atk. 528; Cullen, 118; 1 Mont. 178; Ex parte Williams, 1 Rose, 401.

(h) Ex parte Paton, 1 Glyn & Jam. 832; Ex parte Gass, id. 838, note.

(i) Ex parte Moore, 2 Bro. C. C. 597.

(k) Bromley v. Gooders, 1 Atk 79; Cullen, 119; 1 Mont. 544.

(1) Ex parte Goriag, 1 Ves. jun. 170; Ex parte Mills, 2 Ves. jun. 295, (Chit. j. 498); Butcher v. Churchill, 14 Ves. 573; 1 Mont. 564, 565.

(m) Ex parte Cocks, 1 Rose, 317; Ex parte Williams, id. 401.

(\*) Upton v. Lord Ferrers, 5 Ves. 801, 803.

(o) When recoverable, see ante, 684, 685, and notes.

(p) Ex parte Hoff ham, Cooke, 173; Francis v. Rucker, Amb. 672, (Chit. j. 380); Cullen, 102; 1 Mont. 146.

(q) Ex Parte Moore, 2 Bro. C. C. 597; Anon 1 Atk. 140, (Chit. j. 385); Cullen, 101; 1 Mont. 145.

(r) Francis v. Rucker, Amb. 672, (Chit. j. 380); Ex parte Moore, 2 Bro. C. C. 599; Cullen, 102.

(s) Ante, 726, 727; Ex parte Leers, 6 Ves. 645, (Chit. j. 646).

(t) Ex parte Peachy, 1 Atk. 111;) Ex parte Styles, id. 208 and id. 79. (u) Ex parte Wheeler, 1 Sch. & Lef. 242.

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of Bills,

5. The Time of Proof and of making Claim.

IV. Proof be put on a footing with the other creditors, before any further dividend was A creditor who has neglected to prove before a meeting to declare a second dividend, is, in strictness, only entitled to be paid future dividends pari passu with the other creditors(x); but it is the practice to permit such creditor to be paid former dividends rateably with those who have been paid, and then to direct a general distribution of the residue (y). Where a creditor has a reasonable excuse for not baving proved in time to receive a first dividend, he is, upon proving, entitled first to be placed on an equality with the other creditors who received a first dividend, but not so as to disturb a former dividend, and then to receive the future dividends rateably with the other creditors (z). The mode of being admitted to receive in respect of former dividends, is by making an affidavit of the cause of delay, and by petition to the Chancellor, upon which an order may be obtained; and the assignees should not pay without it(a). We have seen, that in the case of a surety paying the debt of his principal after a fiat against him, he may at any time prove under the fiat, not disturbing \*the former dividends, and receive a dividend or dividends proportionably with the other creditors (b).

Where a party may not be able to swear to the precise amount of his debt, secured by a bill or note, it is advisable for him to make a claim, as a means of securing a dividend, when his proof is afterwards established, without the necessity of applying to the Chancellor; and when a proper claim has been made, the dividend must be apportioned for it, and be withheld,

until the validity of the claim has been ascertained (c).

# 6. The Mode and Terms of Proof, and Remedy for the Dividend.

 The Mode and Terms of Proof, &c.

The mode of proof on bills of exchange and promissory notes is governed by the general rules affecting proof under a fiat in other cases, and consequently it will be here only necessary to consider the peculiarities in the case The ordinary proof is by the oath of the creditor (d). of bills and notes. When it is upon the bill or note, the form of the deposition varies according to the mode in which the creditor obtained the bill or note. Under a first against the party from whom the creditor immediately received the bill or note, the deposition states that the bankrupt is indebted to the deponent upon the consideration for the instrument, and alleges that no security has been obtained except the bill or note; but when the bill or note has not been received from the bankrupt himself by the creditor, the deposition states, that he is indebted on the instrument, and then shews the means and consideration by which the deponent became the holder(e). The affidavit in support of a deposition of proof on a bill must state the consideration; though, if a defective affidavit be produced, the commissioner should not reject, but should adjourn the proof(f).

Where bills have been deposited by way of pledge, the proof is upon the original debt, and the deposition concludes by stating the delivery of the bills as a security, the particulars of which, if numerous, may be stated in a And where several persons, whether general partners or othschedule(g).

(x) Ex parte Long, 2 Bro. C. C. 50; Ex parte Styles, 1 Atk. 208; Harding v. Marsh, 2 Chan. Ca. 153.

(a) Mont. 556.

(b) Ante, 718; 6 Geo. 4 c. 16, s. 52,

(d) Cullen, 140, 141.

(c) See Mont. 93.

erwise, a ors in the only of th or, if lost creditor i whether I the time exhibited bankrupt' amount, i note with In gene the securi sioners to due(o). debt (aris compositi compositi paymen! fault is n for the w tain the \ be set up ntv, deliv upon the transfer o fiat again: them up ( ciency (q) der a fiat not proveto indenni sums of for the d come a b ances, he not provi cv(s npo bas Part are

> (h) See ante. 64 (i) 2 C  $\{k \mid E_{\lambda}$ j. 6471; E Ex parte : 705, notes  $G^{p_0p(\epsilon)|\epsilon^{i}}$  $0 \cdot E^I$ thi E:  $\{u_j\}_{j=1}^n$  $l \in \Gamma'$

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<sup>(</sup>y) Cooke, 521; 1 Mont. 556. (z) Ex parte Long, 2 Bro. C. C. 50; Ex parte Styles and Pickart, 1 Atk. 208.

<sup>(</sup>c) Cooke, 255; 1 Mont. 459, 553; Eden.

<sup>(</sup>e) See 2 Cooke, 26, 27; Mont. 91 to 93 And see Ex parte Knight, 1 Dea. 408; 2 M. & A. 545, S. C. as to production of creditor's. books in order to prove consideration.

<sup>(</sup>f) Ex parte Maberly, 2 Mont. & Ayr. 23.

erwise, are the holders of the instrument, they must all be named as credit- IV. Proof ors in the deposition(h); but it is sufficient, if the deposition be made by one of Bills, and of the partners (i). If a hill has been lost the proof must be admitted &c. only of the partners(i). If a bill has been lost, the proof must be admitted, or, if lost after proof, the dividend must be paid, upon an indemnity (k). creditor is obliged, at the time of proving his debt, to state in his deposition Terms of whether he has a security or not; and every security must be produced at Proof, &c. the time when he proves, and the commissioners will mark it as having been And it seems doubtful whether if A., being holder of the exhibited (l). bankrupt's promissory note, and having a security in his hands for the full amount, indorse the note to B., but still retain the security, B. can prove the note without deducting or mentioning the security (m).

In general, if a party insist upon proving under a fiat, he must deliver \*up [ \*732 ] the security for the benefit of the creditors (n), or must apply to the commissioners to have the pledge sold, and to be admitted a creditor for the resi-Thus if a creditor having agreed to accept a composition for his debt (arising on seven bills of exchange), takes bills for the amount of the composition, and also has a bond assigned to him as part security for the composition; and the composition deed contains a clause that in default in payment of the instalments, the composition shall fall to the ground; and default is made, and subsequently a fiat issues; the creditor may either prove for the whole of the original debt, on surrendering the bond, or he may retain the bond, and prove for his original debt, minus the value which shall be set upon the bond (p). And where a debtor, by way of collateral security, delivers a bill of exchange or promissory, without his name appearing upon the paper, this is to be considered as a pledge, and not as an absolute transfer of the bill; and the creditor will not be allowed to prove under the fiat against such debtor, and also to retain the securities, but must either give them up or obtain an order for the sale of them, and then prove for the deficiency (q). Where a creditor, by a debt partly proveable and partly not under a fiat of bankruptcy, has a general pledge, he may apply it to the debt not proveable under the fiat(r). Thus if a security is deposited by a debtor to indemnify his creditor for a balance then due, together with such further sums of money as shall be due to him for money to be advanced and paid for the debtor, either by bill accepted or to be accepted, and the debtor become a bankrupt, and the creditor, after the bankruptcy, pay various acceptances, he may apply the security, in the first place, to reduce the demand not proveable, on account of its not having been paid till after the bankruptcy(s). So if a security be deposited by a drawer to indemnify the acceptor, who pays part of his acceptances before the bankruptcy of the drawer, and part after such bankruptcy, the acceptor may apply the security to reduce the demand paid after the bankruptcy (t).

Where, however, the bankrupt does not merely deposit the bills or notes

ante, 64, 701.

<sup>(</sup>i) 2 Cooke, 25; ante, 701.

<sup>(</sup>k) Ex parte Greenway, 6 Ves. 812, (Chit. j. 647); Ex parte Trust, 3 Dea. & Chit. 750; Ex parte Wallas, 2 Mont. & Ayr. 586; ante. 705, notes (t) and (u); and see Order of Lord Chancellor, 14th May, 1836, post, Appendix.

<sup>(1)</sup> Ex parte Bennett, 2 Atk. 528. (m) Ex parte Paramore, 1 Dea. 279.
(n) Ex parte Bennett, 2 Atk. 528.

<sup>(</sup>o) Ex parte Coming, Cooke, 123.

<sup>(</sup>p) Ex parte Reay and others, 4 Dea. & Chit. 255; 2 Mont. & Ayr. 33, S. C.; Ex parte 103

<sup>(</sup>h) See exceptions in 7 Geo. 4, c. 46, s. 9; Ackroyd, 1 Glyn & Jam. 893, 394; Ex parte Amphlets, Mont. 77.

<sup>(</sup>q) Ex parte Trowton, &c. Cooke, 124; Ex parte Hillier, id. 123; Cullen, 147; 1 Mont. 458; Eden, 97; Arch. Bank. Law, by Flather, 8th edit. p. 141.

<sup>(</sup>r) Ex parte Haward, Cooke, 120; Ex parte Arckley, Cooke, 126; Ex parte Hunter, 6 Ves.

<sup>(</sup>a) Ex parte Haward, Cooke, 120; Ex parte Hunter, 6 Ves. 94.

<sup>(</sup>t) Ex parte Arckley, Cooke, 126; Ex parte Hunter, 6 Ves. 94.

Formerly a creditor, who had proceeded at law, might also prove his

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IV. Proof as a pledge, but indorses them to the creditor, he has a right to retain the security and proceed against the other parties, and also to prove his whole debt at the same time under the fiat(u), provided he has not received part, 6. The and no dividend under a fiat against another estate has been declared, before Mode and Terms of he comes to prove, and so that he do not receive more than 20s. in the **Proof, &c.** pound upon his whole debt(x).

Proceeding at Law, and proving also.

debt under the commission against the same party, renouncing any benefit under the commission, so as to afford him an opportunity of preventing, as far as he could, the very remedy he had chosen from being defeated by the rest of the creditors discharging the person of the bankrupt by signing his certificate without concurrence or control; and a party might also make [\*733] a claim and still proceed at law(y). \*But the provision in the statute 49 Geo. 3, c. 121, s. 14(z), (which is re-enacted in the 59th section of the 6 Geo. 4, c. 16), directs that a creditor who has brought an action against a bankrupt, shall not be permitted to prove, or make a claim, without reliaquishing such action, and that the proving or claiming a debt under a commission shall be deemed an election by such creditor to take the benefit of the commission with respect to the debts so proved or claimed. And if a party prove a debt on a bill, and proceed at law for the same debt, the court will issue an injunction to restrain the action(a). The statute, however, does not affect the right of a person not being the petitioning creditor, to prove one debt under a fiat, and to proceed at law for another(b). And in Ex parte Grosvenor(c), Lord Eldon said, "That if a creditor has a note for one sum and a bond for another, as the remedies and the relief under those securities are different, he may prove one debt and hold the bankrupt in execution for the other. But an entire demand cannot be split, and if there be a demand upon several notes or securities given in respect of the same transaction, it seems that the creditor cannot adopt these double remedies(d)." It has, nevertheless, been decided at law, that where there are distinct demands the election is confined to the particular debt so proved or claimed, and accordingly creditors who had proved on one demand were holden entitled to sue upon distinct demands (e). By the 59th section of the 6 Geo. 4, c. 16, a creditor must, before proving, in case he has the bankrupt in custody, give a written authority for his discharge; and by the same section a creditor, who has elected to come in under the commission, if it be afterwards superseded, is restored to his former right.

> (u) Ex parte Bennett, 1 Atk. 528; ante. 722; 1 Mont. 458; Cullen, 146.

(x) Cullen, 146; 1 Atk. 110.

bill under the commission: held, that notwithstanding his proof, he may proceed at law against the bankrupt for the amount of the other bill. And see cases next note.

(c) Ex parte Grosvenor, 14 Ves. 588; Watson v. Medex, 1 B. & Ald. 121, S. P.; Harley v. Greenwood, 5 B. & Ald. 95; and Bridget v. Mills, 4 Bing. 18; 12 Moore, 92, S. C.; Howell v. Golledge, 5 Taunt. 174.

(d) Ex parte Grosvenor, 14 Ves. 588; Ex parte Dickson, 1 Rose, 98; Eden, 103.

(e) Watson v. Medex, 1 B. & Ald. 121; Harley v. Greenwood, 5 B. & Ald. 95; 2 Dowl. & Ry. 337, S. C. In the latter case it was also held, that proof is not pleadable in bar to an action for the same debt, but only gives to the bankrupt an opportunity of applying for relief, either in the court in which the action is brought to stay the proceedings, or to the chancellor to

it ought from a c altered: or to exp securities as a secu fully satis the futur a credito tual recei tatives of it seems, pound w of the su composit of the bi decisions and we h a bill by known to compour under a upon tha ment. a promis and the whole d 4s. in th ed to be the said the prin pound; is to be proof, i and, to bills, at under , prove ( Prev

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<sup>(</sup>y) Ex parte Sharp, 11 Ves. 203; Cullen,

<sup>(2)</sup> See the construction of this section in Atherston v. Huddleston, 2 Taunt. 181.

(a) Ex parte Diack, 2 Mont. & Ayr. 675.

See post, 825, (72).
(b) Cooke, 135; Cullen, 149; Eden, 102.
Ex parte Schlesinger, 7 Law J. 27; Ch. Ca.
M. T. 1828; 2 Glyn & Jam. 392. Proof of one debt no election or bar to suing for another. A. purchases from B. a parcel of goods, and accepts a bill of exchange for the amount. A. purchases another parcel of goods from B. and accepts another bill of exchange for the amount; both bills are dishonoured. A. is declared bankrupt, and B. proves the amount of the first

It sometimes happens, after a creditor has made his proof, that either IV. Proof from the disclosure of facts not before known or understood, it appears that of Bills. it ought not to have been admitted, or at least not to the extent; or that, 6. The from a change of circumstances, the state of the debt proved is materially Mode and altered: and in such cases it becomes necessary either to reduce the proof, Terms of or to expunge it altogether (f). Thus, if any bills proved and accepted as Proof, &c. securities by a creditor who discounted them for the bankrupt, or took them Reducing as a security for a general balance, are afterwards paid in full, or in any way and Exfully satisfied, the amount of each bill must be deducted from the proof, and Proof. the future dividends only paid on the residue of the debt(g), although where a creditor holds a bill as a security for the debt he proves and after the \*ac- [ \*34] tual receipt of dividends by the creditor the bill is paid in full, the representatives of the creditor cannot be compelled to refund the dividends; nor, as it seems, could the creditor, if alive (h). So, if the holder of a bill compound with the prior parties upon it, without the previous assent of assignees of the subsequent parties, the latter are discharged; and if he takes such composition after having proved under the fiat against the latter, the amount of the bill must be deducted from the proof(i). But the principle of these decisions is the same as that which precludes a party from recovering at law, and we have seen that at law the holder does not discharge a prior party to a bill by compounding with a subsequent one, even though the former was known to be an accommodation acceptor (k); so in the case of bankruptcy, compounding with a subsequent party will not affect the right to the dividends under a fiat against a prior one, because the estate of the latter has no claim upon that of the former, and therefore cannot be prejudiced by the arrangement. It was on this ground held, in the case of Ex parte Gifford(1), that if a promissory note be made by one principal and three sureties, two of whom and the principal become bankrupts, and the holder of the note prove his whole debt under each commission, and afterwards receive a composition of 48. in the pound from the remaining surety, the receipt for which is expressed to be for 1911., and two notes, which, when duly paid, will be in full of the said debt and all other demands; and the dividend paid by the estate of the principal in 4s. in the pound and by the bankrupt sureties is 5s. in the pound; no part of the proof under the commission against the bankrupt sureties is to be expunged. It is also a rule that security is not to go in reduction of proof, unless the property of the estate against which the proof is tendered; and, therefore, if A. and B., partners, are indebted to C. in 10,000l. on bills, and A. alone assigns to C. certain securities to secure the 10,000l., under which 84141. are received, C., on the bankruptcy of A. and B. may prove for the whole 10,000l. without deducting the 8414l.(m).

Previous to the 6 Geo. 4, c. 16, the commissioners could not expunge a debt without an order upon petition, except by consent of the parties (n).

expunge the debt; see id. 103. And see Ex parte Sly, 1 Glyn & Jam. 163; Ex parte Con-

(k) Ante, 418, 419.

(m) Ex parte Groom, and Ex parte Adams. 3 Mont. & Ayr. 157; 2 Den. 265, S. C. (n) Ex Parte Graham, 1 Rose, 456.

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roy, 1 Molloy's Rep. 1.

(f) Cullen, 158; 1 Mont. 545.

(g) Ex parte Smith, Ex parte Bloxham, Ex parte Wallace, Ex parte Crossley, Cooke, 155, 156; Ex parte Brunskill, 2 Mont. & Ayr. 220; 4 Dea. & Chit. 442, S. C

<sup>(</sup>h) Ex parte Carr, 3 Mont. & Ayr. 64; 2 Dea. 273, S. C.; see the cases cited 3 Mont. & Ayr. 65, note (e). But see as to the case of a surety, Ex parte Holmes, M. T. 1839, Chan. 3 Jurist, 1023; ante. 719, note (p); and poet, 785, note (u).

<sup>(</sup>i) Ex parte Smith, 3 Bro. C. C. 1, (Chit. j. 457); Cooke, 168, 169; and Ex parte Smith and others, Cooke, 171; Cullen, 159; 1 Mont. 546; ante, 408 to 423.

<sup>(1)</sup> Ex parte Gifford, 6 Ves. 805; see also Williams r. Walsby, 4 Esp. Rep. 220. But see observations in Nicholson v. Revill, (4 Ad. & El. 675, 683; 6 Nev. & Man. 192, 200, S. C.; ante, 418, note (e),) upon the judgment of Lord Eldon in Ex parte Gifford.

of Bills, &c.

6. The Mode and Terms of

IV. Proof But by the 60th section of this act, whenever it shall appear to the assignees, or to two or more creditors, who have each proved debts to the amount of 201. or upwards, that a debt proved is not justly due in whole or in part, they may apply to the commissioners to have it expunged: and the commissioners are empowered to summon the person who has proved, together with Proof, &c. any one else whose evidence they may think material on either side, and may upon the evidence expunge it either in the whole or in part. If the person who has proved do not attend on being summoned, the commissioners are empowered to proceed ex parte. The party making the application to expunge must sign an undertaking to pay such costs as the commissioners shall adjudge. Power is reserved to apply in the first instance to the Lord Chancellor, or by way of appeal(o).

OF BANKRUPTCY.

[ \*735 ]

\*Where A. combines with B., also A. with C., and A. with D. to prove fictitious debts, in pursuance of a fraudulent plan, a petition will not lie praying that A., B., C., and D. may pay the gross amount of costs incurred by the estate, and consequential to such fraudulent plan, and if such debts are subsequently expunged, the court cannot order the fictitious bills on which the proof was made to be delivered up, unless they were delivered up by the bankrupt after his bankruptcy(p).

Restoring Proof.

We have seen that in some case, where the proof has been expunged, it may be restored, in order that the party himself, or some third person, may have the benefit of the original proof, and receive dividends which would not otherwise be recoverable (q).

Benefit of another's Proof.

Where, between the time of proving his debt and of applying for a dividend under a fiat against a principal debtor, as acceptor of a bill, maker of a note, or prior indorser, who ultimately ought to pay it, the holder has received from a surety or subsequent indorser, or of an accommodation acceptor, the whole of his debt, such party, thus standing in the situation of a surety, is entitled to the benefit of the proof made by the creditor; and he must receive the dividends as trusted for the surety (r), provided the creditor be not thereby prejudiced in respect of any other claim upon the estate(s). The surety is allowed the entire benefit of the principal creditor's proof(t): thus, where A. accepted bills as an accommodation for B., which B. deposited in the way of business as a security with his bankers, and B. became bankrupt, and the bankers proved their debt under the fiat, and afterwards A. paid the full value of the bills to the bankers; it was held, that the bankers were liable to refund the dividend of 2s. in the pound which they had received on the sum covered by the bills (u).

If a person, having a demand upon a country firm, who have dealings with a house in London, obtain permission from the country firm for one of his creditors to draw upon the London house, and the country firm and the London house become bankrupts, and the drawer, after proving under the fiat against the London house, receive payment from his original debtor, that is, the person having a demand upon the country firm, such person is entitled to the benefit of the drawer's proof against the London house, if he have

(o) See Eden's Bank. Law, 353; Archbold's Bank. Law, by Flather, 8th Edit. p. 158 to 160. (p) Ex parte Brand and others, 2 Mont. & Ayr. 708; 1 Dea. 308, S. C.

(q) Ex parte Matthews, 6 Ves. 285, (Chit. j.

643); Cooke, 154. (r) Ante, 715, 716; Ex parte Ryswicke, 2 P. Wms. 89, (Chit. j. 251); Cooke, 152; Eden's

Bank. Law, 152.

(s) Ante, 716. (t) Ex parte Brook, 2 Rose, 334.

(u) Ex parte Holmes, Mich. T. 1839, Chan. 3 Jurist, 1023; Arch. Bank. Law, 180, note(u); ante, 734, n. (h); reversing the judgment of the Court of Review, 3 Dea. 602.

not proved seems he of bankrup favour of a the banker bave stood dend rateal The 49 mission sho in respect o tificate. '] entitled to s rights unde be entitled

Former) the commi party who tion the pro the debt: 1: tiff to the h which ade: for any div shall have pay any sug of, with int of the appli clause. Ind Though wh creditor a l cause he of ing the assi of which. dend decla ceived by , a lapse of If an as which they bankers, it were four  $\text{credit}_{068,\beta}$ ets to hav creditors ( signees." dishoneure that all the

(z) Lx pi j. 643). (v) H<sub>350</sub>. (z) 6 (iee 1 Jac. & II & A<sub>71, 150</sub>; 700, note (a) Brow parte Leers

not proved the debt under the fiat against the country firm, but if he has, it IV. Proof seems he is not entitled(x). If, however, a banker, after notice of an act of Bills. of bankruptcy committed by his customer, pay the drafts of a customer, in Xe. favour of a creditor whose debt would have been proveable under the fiat, Mode and the banker is not entitled to stand in the place in which the creditor would Terms of have stood had his debt not been paid, and as so standing to receive a divi- Proof, &c. dend rateably with the other creditors (y).

The 49 Geo. 3 merely expressed, that the surety so paying after the commission should be allowed to stand in the place of the creditor, having proved in respect of dividends; but there was no provision with respect to the cer-The 6 Geo. 4, however, expressly \*provides, "that he shall be [ \*736] entitled to stand in the place of such creditor, as to the dividends and all other rights under the said commission, which such creditor possessed, or would

be entitled to in respect of such proof(z)."

Formerly, when a dividend of the bankrupt's estate had been declared by Remedy to the commissioners, an action might be maintained against the assignees by a pividend. party who had proved a bill, for his share of the dividend, and in such action the proceedings before the commissioners were conclusive evidence of the debt; nor were the assignees suffered to set off any debt from the plaintiff to the bankrupt(a). But by the 111th section of the 6 Geo. 4, c. 16, which adopts the 45 Geo. 3, c. 121, s. 12, it is enacted, that "no action for any dividend shall be brought against the assignees by any creditor who shall have proved under the commission; but if the assignees shall refuse to pay any such dividend, the Chancellor may, on petition, order payment thereof, with interest for the time that it shall have been withheld, and the costs of the application (b)." The creditor, to be cutilled to interest under this clause, must have previously applied to the assignee for payment(c). Though where a dividend has been ordered, and the assignees forward to a creditor a bill for the amount of his dividend, which the creditor rejects, because he claims more than is offered, (namely, full payment without allowing the assignces a set-off which they claimed against him, and the amount of which, together with the sum tendered, made up the amount of the dividend declared on the creditor's proof), and the proceeds of the bill are received by one assignee and by him invested at interest, the creditor is, after a lapse of twenty years, entitled to the fund, and all interest made by it(d).

If an assignee sign checks for a dividend, and deposit them in a desk, from which they are fraudulently taken by a clerk, who obtains payment from the bankers, it seems the assignce is liable to the creditor(e). And where there were four assignees, and upon the choice it was agreed by the assignees and creditors present, that one only should act, and notice was given to the bankers to pay his drafts, and a dividend being declared, notice was given to the creditors that they might receive the dividend upon application to "the assignees," and the acting assignee paid the dividends by checks, which were dishonoured, he having overdrawn his account and absconded, it was held,

that all the assignees were liable (f).

(x) Ex parte Matthews, 6 Ves. 285, (Chit. j. 643).

(y) Hankey r. Vernon, 3 Bro. C. C. 313. (z) 6 Geo. 4, c. 16, s. 52; see Ex parte Gee, 1 Jac. & Walk. 580; Ex parte Rogers, 2 Mont. & Ayr. 153; 4 Dea. & Chit. 623, S. C.; ante, 700, note (x).

(a) Brown v. Bullen, Dougl. 407; and Ex parte Leers, 6 Ves. 645, (Chit. j. 646).

(b) See Archbold's Bank. Law, by Flather, 8th edit. p. 306 to 308

(c) Wackerbath r. Powell, Buck, 508.

(d) Ex parte Holford and another, 4 Den. & Chit. 798; see De Haviland r. Bowerbank, 1 Campb. 50.

(e) Ex parte Griffin, 2 Glyn & Jam. 114. (f) Ex parte Booth, Mont. Rep. 248.

IV. Proof of Bills, Arc.

7. The Consequence of not proving, and Effect of Certificate.

7. Effect of

It may be laid down as a clear and established principle, that the dis-Certificate. charge of the bankrupt should be commensurate and co-extensive with the relief to the creditor, and consequently that all debts should be discharged by the certificate that either have been, or that might have been, proved under the flat(g); and, on the other hand, the bankrupt's remaining still [ \*737 ] liable, and the creditor's not being able to \*prove his debt under the commission, are convertible terms(h). The various instances in which bills and notes may be proved have been considered. The statutes which enable the holder of a bill to prove in particular cases contain a clause, that in cases where the holder could avail himself of the proof, the certificate shall protect the bankrupt from all further responsibility: thus the 6 Geo. 4, c. 16, s. 121, enacts, "That every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he shall obtain a certificate of such conformity so signed and allowed, and subject to such provisions as herein after directed, but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound, or had made any joint contract with such bankrupt." And the statute 49 Geo. 3, c. 121, s. 8, (which is adopted by the 6 Geo. 4, c. 16, s. 52,) having enabled sureties to prove in various instances where he has been compelled to pay the bill or note after the issuing of the commission, has greatly enlarged the effect of the certificate(i).

There are, however, still some cases relating to bills and notes, in which the certificate will not be a bar to any future action. Thus, if the bill or note be drawn and payable in England, and the cause of action accrue here, a certificate abroad will not be any bar to an action in this country, although at the time of making the contract the bankrupt resided abroad in the country where he afterwards obtained his certificate(k). And an accommodation bill drawn in Ireland, and accepted and paid by the plaintiffs in England, is a debt contracted in England, and cannot therefore be discharged by a certificate under an Irish commission (l). But where the cause of action accrues abroad, a certificate in the country where the cause accrued, is a bar to any action in this country (m). And where a bill of exchange was drawn and accepted in Ireland, and the acceptor became a bankrupt in Ire-

(g) Ex parte Groom, 1 Atk. 119; Chilton v. Wiffin, 3 Wils. 13, (Chit. j. 378).
(h) Per Lord Kenyon, in Cowley v. Dun-

lop, 7 T. R. 565, (Chit. j. 598); and see 49 Geo. 3, c. 121, s. 14; and 1 Rose, 204.

(i) See ante, 696 to 698.

(1) Lewis c. Owen, 4 B. & Ald. 654, (Ch. j. 1110); see Shallcross v. Dysart, 2 Glyn & Jam. 87. But an English certificate bars a Scotch debt, Bank of Scotland r. Cuthbert and others, 1 Rose, 462, (Eden, 397, con.), and a Scotch sequestration under 54 Geo. 3, c. 137, s. 61, bars an English debt, Sidaway r. Hay, 3 Bar. & Cres. 12; 4 Dowl. & Ry. 658, S. C., though the discharge of an insolvent in Scotland on making a cessio bonorum will not have that effect; Phillips v. Allan, 8 Barr. & Cres. 477; 2 Man. & Ry. 575, S. C. Quære as to the effect of a cessio bonorum in Guernsey; Whittingham r. De la Rieu, 2 Chit. Rep. 53, 54. See other cases cited in last note.

(m) Potter v. Brown, 5 East. 124, (Chit. 1 694).

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<sup>(</sup>k) Quin v. Keefe, 2 Hen. Bla. 553; Pedder v. Macmaster, 8 T. R. 609; Smith v. Buchanan, 1 East, 618; Phillips v. Allen, 8 Bar. & Cres. 477; 2 Man. & Ry. 575, S. C.; but see Burrows v. Jemino, 2 Stra. 783, (Chit. j. see Durrows v. Jennio, 2. Stra. 783, (Chit. J. 265); Odwin v. Forbes, Buck, 57; Philpotts v. Reed, 1 B. & B. 294; 3 Moore, 623, S. C.; Sidaway v. Hay, 3 Bar. & Cres. 12; 4 Dowl. & Ry. 638, S. C.; Edwards v. Ronald, 1 Knapp's Priv. Coun. Cases, 259; Quelin v. Moisson, id. 266.

land, and there obtained his certificate, and was afterwards proceeded against IV. Proof in this country upon the bill, the court ordered an exoneretur to be entered of Bills, on the bail-piece, on the ground, that as the debt was contracted in Ireland, &c. where the commission issued, it was discharged by the certificate(n). And ? Effect of if a person draw a bill in America, in favour of a firm in America, who have also a house in London, upon a person residing in London, and the bill be refused acceptance, and notice of refusal is given to the drawer in America, and the drawer \*afterwards become a bankrupt, and obtained his | \*738 ] certificate, in America, it is a bar in this country to any action against the The general rule of law is, that debitum et contractus sunt nullis loci, and that the payment of a debt, wherever it may have been contracted, may be enforced in any country; and, consequently, whenever a creditor might prove under a commission abroad, it should seem, on principle, that a certificate ought to be a bar to every debt, wherever it was con-But, on the other hand, great inconveniences might ensue from fraudulent certificates in remote countries being obtained before a creditor here could be apprised of the proceeding, and therefore unless the contract was made, or at least in some measure connected with the foreign country, he should not be prejudiced by such certificate. When a certificate abroad operates as a discharge in this country, it seems that the extent of the discharge will depend upon the law of the country where the certificate is obtained (p).

Where a bankrupt is discharged by his certificate from a debt in one form, he cannot be charged by the creditor with the same debt in another form of action; and therefore, in the case of Foster v. Surtees(q), where, by agreement between the plaintiffs, bankers at Carlisle, and the defendants, bankers at Newcastle, the plaintiffs were weekly to send to the defendants all their own notes and the notes of certain other banking-houses; and the defendants were in exchange to return the plaintiffs their own notes and the notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favour of the plaintiffs at a certain date; it was held, that the notes so sent by the plaintiffs to the defendants constituted a debt against them, which the defendants might pay by a return of notes according to the agreement; but if they made no such return, or a short return, and gave no bill for the balance, such balance, remained as a debt against them, which was proveable by the plaintiffs under a commission of bankrupt issued against the defendants, on the act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due and payable; and that the plaintiffs could not maintain an action to recover damages as for a breach of contract against the defendants, who had obtained their certificates. But in some cases a creditor has an election to shape his demand on the bankrupt either as a debt or as for a tort, and if he adopt the latter, the certificate will be no bar. Thus, if a bankrupt, to whom a bill has been delivered to obtain the payment when due, and to remit to his employer, discount it at a loss before it is due, and embezzle the money, if sued for this tort his certificate will be no bar(r). So if bills be deposited merely as a pledge, if the bankrupt pledge them as his own, he will continue liable to a special action for this tort(s).

j. 802).

<sup>(</sup>n) Ballantine v. Golding, Cooke, 115.
(o) Potter v. Brown, 5 East, 124; 1 Smith, 851, (Chit. j. 694). (p) Ex parte Burton, 1 Atk. 255; 1 Mont.

<sup>(</sup>r) Parket v. Norton, 6 T. R. 695, (Chit. j. 566). (s) Johnson r. Spiller, Dougl. 167; Cullen, 113, 891.

<sup>(</sup>q) Foster v. Surtees, 12 East, 605, (Chit.

New Con-

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tract or

Promise.

The illegality of a bill or note given in consideration of signing a bank-IV. Proof of Bills, rupt's certificate has already been considered (t). And it is a good answer &c. to a plea of bankruptcy that the certificate was obtained by fraud, notwith-7. Effect of standing the express enactment to that effect in 5 Geo. 2, c. 30, s. 7, is Certificate omitted in 6 Geo. 4, c. 16(u).

> \*The effect of the certificate as to a debt which might have been proved under the fiat, may be avoided by a fresh contract entered into with the bankrupt bona fide after an act of bankruptcy, even before or after he has obtained his certificate'x). All the debts of a bankrupt continue due in conscience, notwithstanding he has obtained his certificate; and though a security or a promise, as a consideration for signing his certificate is void(y), any security given bona fide without fraud or imposition on the bankrupt, is valid and binding upon him, though there be no new consideration(z). Thus in the case of Trueman v. Fenton(a), where the bankrupt, after the act of bankruptcy, and after the issuing of the commission, but before he had obtained his certificate, gave a promissory note in consideration of two former bills of the bankrupt being cancelled, and of an agreement not to accept a dividend under the commission, it was held that the certificate was no bar to an action on the note. And if a bankrupt, after obtaining his certificate, undertake to pay any creditor the residue of his debt, the undertaking, if made freely, and without fraud, is binding(b). However, a bankrupt having obtained his certificate, is not liable upon a promise to pay a former debt, unless it be express, distinct, and unequivocal(c). And now, by the 131st section of the 6 Geo. 4, c. 16, it is provided that no bankrupt shall be liable to pay any debt, &c. from which he shall have been discharged by his certificate, unless such promise, contract, or agreement is made in writing, signed by the bankrupt or by some person thereto lawfully authorized in writing by him(d).

# V. OF MUTUAL CREDIT AND SET-OFF.

V. Mutual WHEN at the time of the act of bankruptcy there are cross demands sub-Credit and sisting between the bankrupt and a creditor, the latter, by setting off his debt Set-off(e). against his demand, stands in a better situation than other creditors not having a right of set-off, who can only prove under the fiat, and receive divi-In equity, long anterior to the statutes permitting a set-off at law, a party might avail himself af any cross demand, and preclude his creditor from recovering more than the balance that might be due from him on a fair adjustment of accounts. And though the spirit of the bankrupt laws is to make an equal distribution amongst all the creditors, yet this must in justice be governed by the nature of the dealings between the

(t) Ante, 93, note (p).

(u) Horn v. Ion, 4 Bar. & Adol. 78; 1 Nev. & Man. 627, S. C. See Robson v. Calze, 1 Dougl. 228; Holland v. Palmer, 1 Bos. & Pul.

(x) Cullen, 386; 1 Mont. 586.

(y) Ante, 93, note (p).
(z) Trueman v. Fenton, Cowp. 544, (Chit. j. 359); Birch v. Sharland, 1 T. R. 715. Aliter in case of discharge under Insolvent Act, see 7 Geo. 4, c. 57, s. 61, post, Part Second.
(a) Trueman v. Fenton, Cowp. 544, (Chit.

j 359).

(b) Id. ibid. and the several cases collected in Cullen, 86 to 383, and in 1 Mont. 587, note (p), where see other points on this subject, &c.
 (c) Fleming v. Hayne, 1 Stark, 370.

(d) 6 Geo. 4, c. 16, s. 131; see Eden's Bank.

Law, 404.

(c) As to mutual debts and credits between a bankrupt and other persons, see Bayl. 5th edit. 457 to 461. And see Arch. Bank. Law, by Flather, 8th edit. p. 121 to 127.

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(f) Ti 16, s. 50, (g) The at law; se t. Jones, and he u c. 16, s. ; eech bank Do dittere meant to

is omitte suing of

parties; and as it may be fairly presumed that where mutual transactions V. Mutual have taken place between a bankrupt and another trader, they have re-Credit and spectively given greater credit to each other than would have taken place in Set-off. any separate ex parte dealings, it is but just, that in the case of bankruptcy, their mutual demands should be set off against each other. It was therefore Enactenacted by the statute 5 Geo. 2, c. 30, s. 28, "that where it shall appear ments relating to the commissioners, or the major part of them, that there hath been mutu- 5 Geo. 2, al credit given by the bankrupt and any other \*person, or mutual debts be- c. 80. s. 28. tween the bankrupt and any other person, at any time before any such person [ \*740] became a bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another, and what shall appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively." And by the statute 46 Geo. 3, c. 135, s. 3, it is enacted, "that in 46 Geo. 3, all cases in which, under commissions of bankrupt hereafter to be issued, it c. 135, s. shall appear that there has been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, one debt or demand may be set off against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit was given to or the debt was contracted by such bankrupt, in like manner as if no such prior act of bankruptcy had been committed, provided such credit was given to the bankrupt two calendar months (f) before the date and suing forth of such commission, and provided the person claiming the benefit of such set-off had not, at the time of giving such credit, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent or had stopped payment(f)."

The 50th section of the 6th Geo. 4, c. 16, has consolidated with amend- 6 Goo. 4, ments these provisions, and enacts, that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them (g), and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt, before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account, and no more. shall be claimed or paid on either side respectively, and every debt or demand hereby made proveable against the estate of the bankrupt(h), may also be set off in manner aforesaid against such estate; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice(i) of an act of bankruptcy by such bankrupt committed.

The alterations which this act effects are, 1st, That the proviso that the credit must have been given two months before the date of the commission is omitted, and consequently the account may now be taken down to the issuing of the fiat. 2dly, That the notice by which the party is to be affect-

(f) These words are omitted in 6 Geo. 4, c. 16, s. 50, see supra.

ruptcy, &c.; and see Bolland v. Nash, 8 Bar. & Cres. 195; 2 Man. & Ry. 189, (Chit. j.

1381); post, 747, note (n).
(h) The 47th section makes proveable all debts contracted before the issuing the commission, provided the creditor had not notice of a prior act of bankruptey.

(i) The words in the former act, "that he was insolvent or had stopped payment," were purposely omitted in this.

<sup>(</sup>g) The account is also to be taken on a trial at law; see 5 Geo. 2, c. 30, s. 28. In Collins v. Jones, 17th October, 1827, Lord Tenterden said he thought the omission in the 6 Geo. 4, c. 16, s. 50, of the words "at any time before such bankruptcy," which are in 5 Geo 2, made no difference in the right of set-off; it was only meant to provide against a secret act of bank-

set off.

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v. Mutual ed is confined only to notice of an act of bankruptcy; and Sdly, It declares Credit and that every debt or demand made proveable by the act may be set off against Set-off. the bankrupt's estate (k).

Upon these statutes it is observeable that the word credit is more comprehensive than the word debt, and Lord Mansfield said, in the case of French v. [ \*741 ] Fen(l), that the act of parliament was accurately \*drawn to avoid the injustice that would be done, if the words were only mutual debts, and it therefore provides for mutual credit. But the word *credit* means such credits as will terminate in cross debts(m). The subject of mutual credit, as far as it relates to bills of exchange and promissory notes, may be considered under the three following heads:-

- 1. The nature of the debt and consideration upon which it is founded.
- 2. In what right due, and the parties between whom the mutual credit may
- 3. The time when the debt or credit arose.

With respect to the debt or demand proposed to be set off, not only mutual 1. The Nature of the running accounts are within the statutes, but also other cross demands sub-Debt to be sisting at the time of issuing the fiat of bankruptcy, and which will end in a debt(n), and even such debts have been allowed to be set off as could not have been brought into any account in equity betwixt the parties, such as debts accruing to one party not by contract, but by reason of the fraud of the other, and therefore not strictly a mutual credit(o). Even a legacy, which cannot be considered as a demand arising from a contract, has, when assented to by the executor, been considered admissible as a set-off against a demand on the legatee (p). In one case it was held, that the illegality of the consideration would not, in case of bankruptcy, in all cases preclude a person from setting off what was equitably due; and that a party to a contract, on which he had taken usurious interest, might set off the sum really advanced on the contract(q). But that doctrine does not seem tenable(r). A transaction has been held to be a mutual credit, though its operation seemed contrary to an agreement of all the parties, for a vendor of several parcels of goods sold to the bankrupt, for which the latter gave his acceptances, payable at different times, having received of the bankrupt, at the time one of them became due before the bankruptcy, a bill of exchange for a greater amount, and given an undertaking to pay over the difference when received, was allowed, though contrary to the agreement to retain it for the debt due to him upon the other parcels, which were not paid for at the time of the bankruptcy; this constituting a mutual credit, on the one side to the bankrupt upon his acceptances, the obligation to pay which, at all events, at a future day, was not superseded by the agreement; and on the other, by giving the The same point was established in Ex parte Wagstaff (t), in which it was held, that an acceptance not due till after the bankruptcy of the drawer, the draw Lord Co dertaking be was a business bill of ex and B. a were enti having te remained mutual ci bankrupt of a set-( as where satisfaction as for go of sale b off (y). after not receipts(: bankrupt' debt due ment, and the bill w by sendin ker by ev may be co and proof the divide it might b some of v counted ( diate cree a balance running, hands 9, and A. in an acı fore his of the di But th only to (

> (u) Ex Sheldon r. 1012); an (z) Ke, Si, (Chi 36; and at Crea 747; ante, 211, j. 476); b

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to torts (

<sup>(</sup>k) Eden's Bank Law, 177.

<sup>(1)</sup> Ex parte Stevens, 11 Ves 27; Cooke, 554; 1 Mont. 529; Cullen, 192 to 197. (m) See Eden's Bank. Law, 193; Sampson

<sup>(</sup>m) See Eden's Bank. Law, 153; Sampson v. Burton, 2 B. & B. 89; 4 Moore, 515, S. C.; Easum v. Cato, 5 Bar. & Ald. 861; 1 Dowl. & Ry. 530, S. C.; Buchanan v. Findlay, 9 Bar. & Cres. 744; 4 Man. & Ry. 598, (Chit. j. 1441); ante, 211, note (n); Rose v. Sims, 1 B. & Adol. 521, (Chit. j. 1510); next note. (n) Rose v. Sims, 1 B. & Adol. 521, (Ch. j. 1510).

<sup>(</sup>o) Cullen, 196.

<sup>(</sup>p) Jeffs v. Wood, 2 P. W. 128.

<sup>(</sup>q) Ryall v. Rolls, 1 Ves. jun. 375; but this was contrary to the intent of the Statute of Usury; and See Roberts v. Goff, 4 B. & Ald. 92; Barnard v. Young, 17 Ves. 44; Chitty's Col. Stat. 1092, in notes; and see Ex parte Stone, 1 Glyn & Jam. 191, (Chit. j. 1133).

(r) Id. ibid.

<sup>(</sup>s) Atkinson v. Elliot, 7 T. R. 878, (Chit.

j. 592); Cooke, 559; but see Ex parte Flint, 1 Swanst. Rep. Ch. 30. (t) Ex parte Wagstaff, 13 Ves. 65, (Chit.) 782); see post, 745.

is capable of being set off against a present debt due from such acceptor to V. Mutual the drawer, within the clause of the act as to mutual credit. And where Credit and Set-off. Lord Cork gave the bankrupt his accommodation notes, upon a written undertaking to indemnify, and his lordship paid the notes after the bankruptcy, ture of the he was allowed \*to set off the payment against a demand of the bankrupt for Debt to be business done(u). But where A. previous to his bankruptcy deposited a set of. bill of exchange with B. for the specific purpose of raising money thereon, [\*742] and B. advanced money on the bill, it was held, that the assignees of A. were entitled to recover from B. the amount of the bill in an action of trover, having tendered to B. the money advanced by him, though a general balance remained due from the bankrupt to B., and that this did not form a case of mutual credit(x). If the assignees of a bankrupt affirm the acts of the bankrupt as a contract, by suing a party in assumpsit, he may have the benefit of a set-off, which he could not have had if he had been sued as for a tort: as where goods had been sold to a party by way of fraudulent preference in satisfaction of a debt due to him from the bankrupt, and the assignees sued him as for goods sold and delivered, thereby affirming the transaction as a contract of sale by the bankrupt, the purchaser was allowed to avail himself of a set-But if a banker receive and pay money on account of a bankrupt, after notice of his bankruptcy, he cannot set off the payments against the A creditor upon a bill of exchange or promissory note of the receipts(z). bankrupt's indorsed to him before the bankruptcy, may set it off against a debt due from himself to the bankrupt for goods bought after the indorsement, and also before the bankruptcy, though the bankrupt did not know that the bill was indorsed to and in the possession of the party at the time, for by sending a bill or note into the world credit is given to the acceptor or maker by every person who takes the bill(a). The case Ex parte Metcalf(b) may be considered as a case of mutual credit; A. and B. had become bankrupts, and proof in respect to a cash balance due from A. to B. was admitted, but the dividends were ordered to be retained to reimburse the estate of B. what it might be liable to pay on account of an advance of bills from A. to B. some of which were dishonoured. Where A. before his bankruptcy discounted certain bill with B. and Co. his bankers, and they gave him immediate credit for the value of the bills in his account minus the discount, and a balance was struck before the bankruptcy, and whilst the bills were yet running, in favour of A., when the bankers admitted that they had in their hands 9341. 8s. 8d. due to A., giving him credit for the bills then running, and A. became a bankrupt, and the bills were dishonoured, it was held, that in an action against the bankers for the balance admitted to be due to A. before his bankruptcy, they had a right to set off against such claim the amount of the dishonoured bills, it being a case of mutual credit(c).

But the clause in the 6 Geo. 4, c. 16, s. 50, as to mutual credits, applies only to debts or transactions which must end in debts, and does not extend to torts or breaches of contract for which unliquidated damages are recover-

(u) Ex parte Boyle, 1 Cooke, 561; and see Sheldon v. Rothschild, 8 Taunt. 156, (Chit. j. 1012); and post, 945.

(x) Key v. Flint, S Taunt. 21; 1 Moore, 451, (Chit. j. 1000); Ex parte Flint, 1 Swanst. 36; and see Buchanan v. Findlay, 9 Bar. & Cres. 747; 4 Man. & Ry. 593, (Chit. j. 1441); ante, 211, note (n).

ante, 211, note (n).
(y) Smith v. Hodgeon, 4 T. R. 211, (Chit. j. 476); but see Thomason v. Frere, 10 East.

418, (Chit. j. 761); Burt v. Moult, 1 C. & M. 525; ante, 55, note (z); Cooke, 557.

(z) Vernon v. Hankey, 2 T. R. 113, (Ch. j. 443).

(a) Hankey v. Smith, 8 T. R. 507.

(b) Ex parte Metcalf, 11 Ves. 444, (Chit. j. 719); Madden v. Kempeter, 1 Campb. 12, (Chit. j. 789).

(c) Arbouin v. Tritton, Holt's C. N. P. 408, (Chit. j. 976).

set-off a (

V. Mutual able (d); and, therefore, damages arising from a refusal to indorse a bill do Credit and not constitute a mutual credit(e). It has, \*however, been held, that a defendant may set off a debt due to him from a bankrupt for money lent, &c. 1. The against a claim by the bankrupt's assignees on the defendant for not acceptthe Debt to ing, pursuant to agreement, a bill of exchange by way of part payment for goods sold and delinered by the bankrupt to the defendant; the claim of the be set off. 1 \*743] bankrupt being one which would in its nature terminate in debt and nothing else; and no special damage being alleged in the declaration (f).

Mutual Debts.

By the act for the relief of insolvent debtors in India, 9 Geo. 4, c. 73, s. 36, it is enacted, "that when there has been mutual credit given by the insolvent or insolvents and any other person or persons, one debt or demand may be set against the other, and all such debts, dues, and claims as may be proved under a commission of bankruptcy, according to the provisions of 6 Geo. 4, c. 16, or may hereafter be proveable under such commission by virtue of any act hereafter to be passed (g), may also be proved upon any such hearing as is herein before mentioned in the same manner, and subject to the like deductions, conditions, and provisions as in the said last-mentioned act are set forth and prescribed." Under this statute the following important case has recently been decided by the Court of Privy Council: the facts were these-Palmer and Co. having borrowed a large sum of money of the Bank of Bengal, deposited company's paper with the bank to a great amount as a collateral security, accompanied with an agreement in writing, authorising the bank, in default of repayment of the loan by a given day, "to sell the company's paper for the reimbursement of the bank, rendering to P. and Co. any surplus;" before default was made in the repayment of the loan, P. and Co. were declared insolvents under the above statute. At the time of the adjudication of insolvency, the bank were also holders of two promissory notes of P. and Co. which they had discounted for them, before the transaction of the loan and the agreement as to the deposit of the company's pa-The time for repayment of the loan having expired, the bank sold the company's paper, the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus:-In an action by the assignees of P. and Co. against the bank, to recover the amount of the surplus, it was held, upon appeal to the privy council, that the bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the Bankrupt Act; there being no debt from, or credit given to the bank at the time of the insolvency of P. and Co.(h): but, otherwise, if the bank had actually sold the paper and received the surplus before the insolvency.

2. In what

To constitute mutuality of debts or of credits, it is in general necessary Right due. that the sum claimed was due to the bankrupt, and is due to the creditor in their own rights respectively (i). Thus a joint and separate debt cannot be set off against each other (j); and if two only of three partners become bankrupt, the defendant, in an action on the case by the assignees and solvent partner, to recover the proceeds of bills delivered for a special purpose, cannot pears to I the case l relief in indebted don, after petition, : upon which ces, it no dare not tice woul a person : to them, I another fi maker of action cor knowleda notice to between t vens/ol. a could be annuities tries, and promissor

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<sup>(</sup>d) Rose v. Sims, 1 B. & Adol. 521, (Chit. j. 1510); see ante, 741, note (m); and see the cases cited in Gibson r. Bell, 1 Bing. N. C. 743; post, 743, note (f).

(e) Id. ibid.

H. Stat. 560.

<sup>(</sup>h) Young v. Bank of Bengal, 1 Dea. Rep. 622, where see the several cases on the subject of mutual credit cited and commented upon.

<sup>(</sup>i) See Eden's Bank. Law. 187 to 191. (f) Gibson r. Bell, 1 Bing. N. C. 743; 1
(g) See the 4 & 5 Will. 4, c. 79, Chit. & 552; Chit. Col. Stat. tit. Set-off, in notes.

set-off a debt due from the three (k). \*The right of set-off in this respect ap- V. Motual pears to be governed by the same rules as prevail at common law (l). In Credit and pears to be governed by the same rules as provide the case Ex parte Twogood(m), under separate commissions of bankruptcy, 2 In what relief in the nature of set-off against a separate creditor of the bankrupt, Right due. indebted to the partnership to a greater amount, was refused, and Lord Eldon, after pointing out the inconveniences that might ensue if he allowed the petition, said, that there was a good deal of natural equity in the proposition upon which the petition stood, but that pursuing it through all its consequences, it would so disturb all the habitual arrangement in bankruptcy, that he dare not do it. But under particular circumstances, where great iniustice would otherwise prevail, exceptions to this rule are allowed; thus, if a person give a note to his bankers on account of a supposed balance due to them, but in which there is a mistake, and the bankers indorse the note to another firm, consisting of some of the partners in the banking-house; the maker of the note may set off the debt due to him from his bankers, to an action commenced against him on the note by the firm who hold it, the knowledge of one of the partners in such firm, being deemed equivalent to notice to all, and consequently they were affected by the state of accounts between the maker of the note and his bankers n). And in Ex parte Stevens(o), an equitable set-off, under circumstances, was allowed when there could be none at law; in that case bankers directed to lay out money in navy annuities, but not having done so, represented that they had, and made entries, and accounted for the dividends accordingly; and they took a joint promissory note from the party under that supposition, and her brother, to secure an advance from them to him, upon which the assignees, under their bankruptcy, sued him alone, an order was made for proof of the balance, setting off the debt due upon the note, and that the note should be delivered to her as if she had paid it.

A debt due to a party as trustee for another person cannot be set off(p). And if the drawer of a bill, accepted and dishonoured by the bankrupt, indorse it over to a third party in trust to purchase certain goods of the bankrupt, and hand them over to the drawer, the bill so indorsed cannot be setoff in an action by the assignees to recover the price of the goods (q).

Consistently with the rule by which, formerly, no creditor whose debt did 3. The not accrue before the act of bankruptcy could have been \*proved under the Mutual

Debt or Credit

[ \*745]

(k) Staniforth v. Fellows, 1 Marsh. 184.

(1) See Tidd's Prac. 9th edit. 662 to 668; 1 Chitty on Pleading, 599 to 608; Chitty's Col. Stat. tit. Set-off; Montagu on Set-off; and see the set-off of one judgment against another, Tidd's Prac. 895, 896.

(m) Ex parte Twogood, 11 Ves. 517, (Chit. 871); but see the cases at law in Tidd's Prac. 8th edit. 721, 9th edit. 991, where a joint demand has been set off, with the concurrence of the partners, against a separate demand, and vice versa. It appears equitable that where all the partners agree to set off their joint demand against the demand of a separate creditor of one of them, it should be allowed, so as to prevent his entire demand being recoverable. But in case of bankruptcy, creditors might be prejudiced by such an arrangement, and the difficulties in effecting it would be insurmountable.

(n) Puller r. Roe. Peake, 197. (Chit. j. 511).

(o) Ex parte Stevens, 11 Vcs. 24; and see arose.

Eden's Bank, Law, 193.

(p) Fair v. M'Iver, 16 Enst, 130, (Chit. j. 865); Ex parte Gordon, 2 Mont. & Ayr. 282; ante, 706, note (i); and see per Bosanquet, J. in Belcher v. Lloyd, 3 Moore & S. 822, 838; post, 748, note (p).

(q) Lackington v. Combes, 6 Bing. N. C. 71. To an action by assignees of a bankrupt for the price of a phaeton, for which defendant bad agreed to pay ready money, defendant pleaded a set-off in respect of a bill of exchange drawn by H. accepted by the bankrupt and indorsed by H. to the defendant. The plaintiff replied that, after the bill was dishonoured, H. indorsed it to defendant without consideration, in trust that defendant would purchase the phaeton of the bankrupt, band it over to H., and fraudulently attempt to set off the bill against the price of the phaeton: it was held a sufficient answer to a claim of set-off.

Set-off. Time when Debt or Credit arose.

V. Mutual a commission, and by the express words of 5 Geo. 2, c. 30, s. 28, and the 46 Geo. 3, c. 135, s. 3, relative to mutual debts and credits, no debt or credit could have been set against another by way of set-off, unless both respectively accrued or were given before the act of bankruptcy(r). But since the Mutual the 6 Geo. 4, c. 16, s. 50, it suffices if the set-off accrued before the issuing of the commission, where there has been a secret act of bankruptcy, and the party had no notice of it(s). Before this act, in a case where bankers accepted bills of exchange for the accommodation of a trader, and he, after committing an act of bankruptcy, lodged money in their hands to pay the bills, it was held, that as the money was deposited after an act of bankruptcy, the assignees might recover it, and the bills could not be set off(t); but such a case would now be decided otherwise under the 6 Geo. 4, which permits the account to be taken down to the commission, provided the party had no notice of the bankruptcy (u). It has been held, that to enable the holder of a bankrupt's acceptances to avail himself of them in an action by the assignees against himself on his own acceptances, by way either of setoff or of mutual credit, he must most distinctly prove, either that the obligation on himself to pay the bill so set off subsisted before the bankruptcy, or that there was a mutual credit created in the origin of the bills(x). Yet, if the ground of the proposed set-off constituted a credit, though not, strictly speaking, a debt, before the act of bankruptcy, it may be set off under the clause of mutual credit (y). A demand arising upon an instrument payable after the bankruptcy, may, if the instrument were made before, be set off, if it be payable unconditionally on a day certain(z). And a bill or note payable unconditionally, and given by a principal to a surety by way of indemnity, may be set off(a). And a person who lends notes of hand, and receives from the borrower a memorandum promising to indemnify him, may set off the amount of any of these notes, paid by him after the bankruptcy of the borrower, to a demand from the assignees for a sum due to the borrower(b). So a party who indorses a bill for the accommodation of the bankrupt before his bankruptcy, but does not pay the bill till after the bankruptcy, may set off the amount (c). But a debt contracted after notice of the act of bankruptcy cannot be set off(d).

A bill or note indorsed to the claimant for the first time after the act of bankruptcy, could not be set off, although we have seen it might be proved(e); and it was incumbent on an indorsee to shew that the indorsement was made before the bankruptcy; but the possession by the payee of a note, made before the bankruptcy, seems to have afforded reasonable presumptive [ \*746] evidence that it came into his \*possession at the time it bore date(f). Where to an action by the assignees of a bankrupt for a debt due to the

(r) Tamplin v. Diggins, 2 Campb. 313, (Ch. i. 780), cited in Kinder v. Butterworth, 6 Bar. & Cres. 47; 9 Dowl. & Ry. 47; Cullen, 197; Holt's C. N. P. 411, in notes; Oughterlony v.

Easterby, 4 Taunt. 888, (Chit. j. 890).
(s) Ante, 740; and see Hawkins v. Whitten, 10 Bar. & Cres. 217, (Chit. j. 1462); and Dickson v. Cass, 1 Bar. & Adol. 343, (Chit. j.

1502); ante, 206, notes (z) and (a).
(t) Tamplin v. Diggins, 2 Campb. 312, (Ch.

j. 780). (u) See Kinder and another v. Butterworth,

6 Bar. & Cres. 42; 9 Dowl. & Ry. 47, S. C. (x) Oughterlony v. Easterby, 4 Taunt. 888, (Chit. j. 890).

(y) Cullen, 199.

(z) Ex parte Prescott, 1 Atk. 231; Smith v. ante, 697, note (t).

Hodgson, 4 T. R. 211, (Chit. j. 476); Atkinson v. Elliott, 7 T. R. 371, (Chit. j. 592); Ex parte Lee, 13 Ves. 63.

(a) Dobson v. Lockart, 5 T. R. 133. (b) Ex parte Boyle, Cooke, 561; 1 Mont.

(c) Hulme v. Muggleston, 3 M. & W. 30; 6 Dowl. 112, S. C.

(d) Hawkins v. Penfold, 2 Ves. jun. 550, (Chit j. 335); Vernon v. Hankey, 2 T. R.

(c) March v. Chambers, Bull. N. P. 180; 2 Stra. 1234, (Chit. j. 316); Dickson v. Evans, 6 T. R. 57, (Chit. j. 531); Coeke, 552.
(f) Dickson v. Evans, 6 T. R. 57, (Chit.

j. 531); but see as to the date of a bill or note.

identify in as against same par proved by tion of a the estate ruptcy, bi to vary th by an act put himse case of T " It wou] to anothe murigue b as to dim poet facto same man varied hy 4, c. 16. It was | indorser h ed to and not be set was decid said, "P no object better sitt was a del but that d In the lat larger de and  $e_{\chi pl}$ payee ic  $\text{such}_{-100}$ the note it was es ruptev, t the act  $_{\text{O}}$ has again

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Marsh. 209 (h) Ex 574); Dici 581); and Eden, 191: (i) Anti (k) Exp ace also l Dickson t. bat see ob

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bankrupt's estate, the defendant set off notes in his possession issued by the V. Mutaal bankrupt before his bankruptcy, it was held, that proof that notes to the Credit and Set-off. amount of the set-off came into the defendant's hands three or four weeks 3. The before the bankruptcy, was sufficient evidence from which the jury might infer that he was in possession of them at the time of the bankruptcy, without the Mutual identifying them with the notes produced(g). Though in this case the debt, Debt or Credit as against the bankrupt, existed before the bankruptcy, yet it was not to the arose. same party, and though we have seen that such a debt is allowed to be proved by the statute 7 Geo. 1, c. 31, that is very different from the operation of a set-off; for by the former no new charge at least is brought upon the estate, which it would not have been liable to at the time of the bankruptcy, but which there is in the latter, and a creditor cannot be permitted to vary the relation in which he stood to the bankrupt's estate at that time by an act ex post facto, in a transaction with a third party, and thereby to put himself in a better condition than the rest of the creditors (h). In the case of Dickson v. Evans, Lord Kenyon, observing upon this rule, said, "It would be most unjust indeed if one person, who happens to be indebted to another at the time of the bankruptcy of the latter, were permitted, by any intrigue between himself and a third person, so to change his own situation, as to diminish or totally destroy the debt due to the bankrupt by an act ex In cases of this sort, the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change in the situation of one of the parties." But see 6 Geo. 4, c. 16, s. 50(i).

It was formerly held, that a bill of exchange bond fide in the hands of an indorser before an act of bankruptcy committed by the acceptor, and returned to and taken up and paid by such indorser after the bankruptcy, could not be set off by him under the commission against the acceptor; that point was decided in the case Ex parte Hale(k), and in that case the Chancellor said, "Pay the 901. that you owe the estate, and prove the 2001. I see no objection to that, but you cannot, by paying that bill, put yourself in a better situation than any other creditor; there was no mutual credit; there was a debt created upon the estate, and due at the time of the bankruptcy. but that debt was not due to you; therefore, in that respect the set-off fails. In the latter case cited(1) there was no prejudice to the estate; it made no But the case of Ex parte Hale was afterwards qualified larger demand." and explained, and it was held, that the maker of a note indorsed by the payee to a man who afterwards becomes a bankrupt, might set off against such note an acceptance of the bankrupt indorsed to him (such maker of the note) before, though taken up by him after, the bankruptcy(m). it was established, that where there was a \*mutual credit before the bank- [ \*747] ruptcy, the circumstance of an indorser not being the holder at the time of the act of bankruptcy will not deprive him of his right of set-off when he has again become the holder (n).

<sup>(</sup>g) Moore v. Wright, 6 Taunt. 517; 2 Marsh. 209, (Chit. j. 959).

<sup>(</sup>A) Ex parte Hale, 3 Ves. 304, (Chit. j. 574); Dickson v. Evans, 6 T. R. 57, (Chit. j. 581); and see Ex parte Burton, 1 Rose, 320; Eden, 191; 1 Mont. 253.

<sup>(</sup>i) Ante, 740. (k) Experte Hale, 3 Ves. 304, (Chit. j. 574); see also Hankey v. Smith, 3 T. R. 509; Dickson v. Evans, 6 T. R. 57, (Chit. j. 531);

<sup>2</sup> Man. & Ry. 189, (Chit. j. 1891), viz. that it did not appear Hale was the drawer of the bill; post, 747, note (a).

<sup>(1)</sup> Ex parte Seddon, 7 T. R. 565, 570.
(m) Decided in K. B. after argument and time taken to consider, in Collins v. Jones, E. T. A. D. 1830, 10 Bar. & Cres. 777, (Chit. j 1493), overruling Ex parte Hale, Bayl. 5th ed.

<sup>594,</sup> note 5. Dickson v. Evans, 6 T. R. 57, (Chit. j. 531); (n) Ante, 746, note (m); Bolland, assignees, but see observation on that case by Lord Tenterden, in Bolland v. Nash, 8 Bar. & Cres. 105; 2 Man. & Ry. terden, in Bolland v. Nash, 8 Bar. & Cres. 105; 39, (Chit. j. 1881); Bayl. 460, note 91; and

V. Mutual Set-off.

3. The Time when the Mutual Debt or Credit arose.

\*The statute 6 Geo. 4, c. 16, s. 50, has provided, that mutual debts and Credit and credits contracted or given after a secret and unknown act of bankruptcy, up to the date of the commission, may be set off. But in the case of several partners, if the party attempting to set off knew of an act of bankrupter com-

> see Collins v. Jones, E T. A. D. 1830, Bayl. 5th edit, 594, note 5. A kept cash with M. and Co bankers, and accepted a bill drawn by one of the partners in the house of M. and Co., and indorsed by that partner to M. and Co., who discounted it, and afterwards indorsed for value to S. Before the bill became due, M. and Co, became bankrupts, having funds in the hands of S. more than sufficient to pay the bill, and having in their hands money belonging to A. When the bill became due, S. presented it for payment to A., who having refused payment to S., paid himself the amount out of the funds of M. and Co. remaining in his hands, and delivered the bill to their assignees: held, in an action brought by the assignees against A. as acceptor of the bill, that there had been before the bankruptcy a mutual credit between the bankrupt and A., and that the latter was entitled to set off against the sums due to the bankrupts on the bill, the debt due to him from M. and Co. at the time of their bankruptcy.

Lord Tenterden, C. J. "I am of opinion that the defendant is entitled to set off against the sum due to the plaintiffs on the bills the sum of 23511. 8s. 6d, on the ground that there was before the bankruptcy a mutual credit between the bankrupts and the defendant, within the meaning of the statute 5 Geo. 2, c. 30. The 28th section of that statute enacts, ' that where it shall appear to the commissioners that there hath been mutual credit given by the bankrupt or any other person at any time before such person became bankrupt, the commissioners or the assignces may state the account between them, and one debt may be set-off against another, and the balance only shall be paid.' The question therefore is, whether in this case there was a mutual credit between Nash and Marsh and Co. before the bankruptcy of the latter? The bills were drawn by one of the partners in the house of Marsh and Co., and accepted by Nash. They were drawn for the the convenience of the latter. Marsh & Co. gave him credit as the acceptor of the bills. He had money in their hands; he therefore gave them credit. There was a mutual credit originally constituted. If there was once a mutual credit constituted between these parties, was it in the power of Marsh and Co., by any act of their own, to put an end to that mutual credit so as to deprive the defendant of his right to set off any debt due from them to him against the sum claimed by them or their assignees from him as acceptor of those bills? It cannot be denied that if Marsh and Co. had always kept the bills in their own hands, there would have been a continuing mutual credit between them and the defendant, and that the latter therefore would have been entitled to deduct the sum due to him from Marsh and Co. at the time of their bankruptcy, from the sum claimed by their assignees from him as the acceptor of the bills. I think that Marsh and Co., the holders of the bills, could not by their own act put an end to

the mutual credit originally constituted between them and the defendant, so as to deprive the latter of his right to set off any debt due from them to him against the sums claimed by them or (in the event of their bankruptcy) by their assignees from him as the acceptor of those bills. This case is distinguishable from the two cases cited. In Exparte Hale, 3 Ves. 304, (Chit.) 574), it does not appear that Hale was the drawer of the bill; no credit therefore was originally constituted between him and the bankrupt. In Ex parte Burton, 1 Rose, 320, the bill was drawn by Burton and accepted by De Franco and Corea. Burton was one of the petitioners, and he was the person who ought to have paid that bill as between him and De Franco and Corea. But here Nash was the person who ought to have paid the bills. Upon the whole I am of opinion that the defendant was entitled to set off the sum of 2351l. against the amount of the bills. The judgment of the Court must therefore be for the defendant."

Bayley, J. "This is a clear case of mutual credit. Was Nash a debtor to Marsh and Co. before their bankruptcy, or had they given him credit before that time? Nash wants money on his bills, Marsh and Co. advance him money. The relation of lender and borrower was thereby constituted between them. March and Co. might have maintained an action for money had and received to their use. Nash gives credit to Marsh and Co for the money in their hands. Here therefore there was a mutual credit between the bankrupts and the defendant, without the intervention of any third person. In Ex parte Hale, 3 Ves. 304, there was no immediate connection between the indorser of the bill and the bankrupt. There was no credit given by the acceptor to the indorser. At no period, as between them, was there a debitum in prasenti solvendum infuturo. In Ex parte Burton, I Rose, 320, it was impossible to come to any other conclusion than that which was come to, on the principle of set-off. Who were the debtors on the bill in that case? De Franco and Corea; they were acceptors of the bill, Burton was the drawer, and having money in Kensington and Co.'s house when they failed, endeavored by the petition to transfer his right against Kensington and Co. to De Franco and Corea. That case

therefore is distinguishable from the present."

Littledale, J. "There was a mutual credit originally constituted between the defendant and the bankrupt They afterwards pay the bills away, but they are returned to them by Martin, Stone and Co. If they had never parted with the possession of the bills, there would have been a continuing mutual credit. There may have been a temporary suspension of the mutual credit, but it revived when the bills again came into the hands of the bankrupts or their assignces." Judgment for de-

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mitted even by one of them before he obtained possession of the bill or note, V. Matual that would preclude him from setting off the same (o). And where the de-Credit and fendants were the holders of a bill of exchange accepted by one Maberly for 7601., which was indersed to them by the Commercial Bank of Scotland, Time and they were also the acceptors of a bill for 1000l. drawn by the Commer-when the cial Bank in favour of M.; and the former bill became due on the 6th Jan-Mutual uary and was dishonoured, M. having stopped payment; and on the 7th the Credit defendants debited the Commercial Bank in their accounts with them with the arose. 760l., and wrote a receipt on the back of the bill, and returned it protested to the Commercial Bank; and the latter hearing of his failure on the 6th wrote to the defendants requesting them to keep the 760l. bill and set off the amount against the 1000l., their acceptance, which would become due on the 12th; it was held, in an action by the assignces of M. (who afterwards became bankrupt) against the defendants as acceptors of the 1000l. bill, that they were not entitled to set off the 760l. bill, that bill having been legally satisfied as to them(p).

Since the act 6 Geo. 4, c. 16, s. 50, has made all debts which it has declared to be proveable also liable to be set off, debts depending on a contingency may be set off (q).

A clear right of set-off cannot be destroyed by the conduct of the assignces in obtaining payment from a party ignorant of the bankruptcy(r).

#### VI. GENERAL EFFECT OF BANKRUPTCY ON THE PROPERTY OF THE BANKRUPT AND OF OTHERS.

VI. General Effect of Bank-

In considering who may indorse a bill(s), and by and to whom payment may be made(t), several of the points relating to bankruptcy have necessarily been considered. A few others remain to be stated, which may be arranged under the following heads, as they relate to

- 1. The property of the bankrupt, and contracts entered into by him.
- 2. The property of others.

The uniform principle laid down by the courts upon this subject is, that 1. As to assignees take a bankrupt's property in the same situation, and subject to the the Properassignees take a bankrupt's property in the same situation, and subject to the same burthens as the bankrupt himself had it, and they "stand in his place, Bankrupt, and are bound by all acts fairly done by him in relation to his property, and and Conthat this remains in their hands subject to all equitable liens by which it was tracte en-

tered into by him. \*749]

(o) Ante, 206, 207; Hawkins v. Whitten, 10 Bar. & Cres. 217, (Chit. j. 1467); Dickson

v. Cass, 1 Bar. & Adol. 343, (Chit. j. 1502).
(p) Belcher v. Lloyd, 3 Moore & S. 822;
10 Bind. 310, S. C. The defendants were in fact mere trustees of the 760l. bill for the benefit of the Commercial Bank, as to which see cases ante, 744, note (p).

What not such a debiting an account as to operate as a payment, see Ryder r. Willett, 7 C. & P. 608; ante, 666, note (r).

(q) See Eden, 192.

(r) Edmeads v. Newman, 1 Bar. & Cres. 418; 2 Dowl. & Ry. 568, (Chit. j. 1172). A. and Co and B. and Co. respectively carried

on the business of bankers at Maidstone. B. and Co. became bankrupts; and at the time of their act of bankruptcy the two banks held notes and other securities of each other to nearly the same amount. The provisional assignee of B. & Co. knowing that fact, presented and obtained payment of the notes of A. & Co. partly at their bank and partly at the house of their agents in London, who were ignorant of the situation in which the parties stood: Held, that A. & Co. might recover the amount so received, in an action for money had and received against the provisional assignee.

(s) Ante, 202 to 212.

(t) Ante, 392 to 393

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ruptcy.

1. As to the Property of the Bankrupt, and Contracts entered into by him.

VI. Gene- affected in the hands of the bankrupt  $\limsup_{n \to \infty} u(n)$ . And though a chose in action cannot strictly be assigned at law, yet if a bankrupt, before his bankruptcy, for a valuable consideration, and without fraud, assign to a creditor a debt or bill of exchange or note, it will be binding on the assignees(x). And if a bill or note be not capable of delivery at the time, a transfer of it, without delivery, will be binding upon the assignees, provided notice of the assignment be given to the debtor(y). But as soon as the security is capable of being delivered, it must be handed over; for if it remain in the hands of the bankrupt, the assignees will be entitled to it(z). Where a trader delivered a bill for a valuable consideration to another, previously to an act of bankruptcy, and forgot to indorse it, it was held that he might indorse it after his bankruptcy(a). And if his assignees refuse, we have seen they may be compelled to do so(b). And if the bankrupt has no beneficial interest or valuable property in a bill, as where it is accepted by another for his accommodation, he may, after an act of bankruptcy, indorse it, so as to convey a right of action thereon to a third person against the accommodation ac-And in Willis v. Freeman(d), where the bill was drawn by the bankrupt partly for value and partly for accommodation, and he indorsed it after his act of bankruptcy to a creditor, it was held that the latter might recover on the bill the difference between the real debt, and the whole sum for which the bill was drawn. And assignees cannot, any more than the bankrupt himself could, hold property obtained by his fraud or crime(e); and therefore they have been held liable to restore money received by them upon bills, which he had got in return for one, of which he knew the acceptance was a forgery (f).

OF BANKRUPTCY.

So bills of exchange or promissory notes, indorsed by the bankrupt after he had dishonoured bills, and been otherwise irregular in his payments, may be retained by the indorsee, unless it were known to him at the time that be had committed an act of bankruptcy(g). So if a trader, after he has committed a secret act of bankruptcy, indorse a bill of exchange to a creditor, who receives the money due on the bill before a fiat issues against the trader, such payment is protected(h). And by the 6 Geo. 4, c. 16, s. 82, it is enacted, "that all payments really and bona fide made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of f \*750 1 bankruptcy by \*such bankrupt committed; and all payments really and bona fide made, or which shall hereafter be made to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed;

(u) Parke v. Elliason, 1 East, 544, (Chit. j. 641); Dobson v. Lockhart, 5 T. R. 133; Sturdy v. Arnaud, 3 T. R. 599; Cullen, 185, 186. See Hutchinson v. Hayworth, 1 Perry & Dav. 266; 9 Ad. & El. 375, S. C.

(x) Rowe v. Dawson, 1 Ves. jun. 331; Graff v. Greffulke, 1 Campb. 89.

(y) Brown v. Heathcote, 1 Atk. 160; Lempriere v. Pasley, 2 T. R. 485; Cullen, 189, 190, 308; 1 Mont. 342 to 344.

(z) Jones v. Gibbons, 9 Ves. 410; Cooke, 319 to 323.

(a) Smith v. Pickering, Peake's Rep. 50, (Chit. j. 479, 481); Rolleston v. Hibbert, 3 T. R. 411; ante, 203, note (f). (b) Ante, 203, 204.

(c) Arden v. Watkins, 3 East, 317, (Chit. j. 667); Wallace v. Hardacre, 1 Campb. 46, 47, (Chit. j. 740); but qualified in notes, 1 Campb. 179; and Smith v. De Witts, 6 Dow. & Ry.

120, (Chit. j. 1253).
(d) Willis v. Freeman, 12 East, 656, (Chit. j. 802).

(e) Ante, 71, note (s); Buchanan v. Findlay, 9 Bar. & Cres. 738; 4 Man. & Ry. 593, S. C, (Chit. j. 1441); ante, 211, note(n)

(f) Harrison v. Walker, Peake's R. 111, (Chit. j. 498).

(g) Anon. 1 Campb. 491, in notes. (h) Hawkins v. Penfold, 2 Ves. 550, (Chit. j. 335); ante, 207, note (g).

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and such creditor shall not be liable to refund the same to the assignees of VI. Genesuch bankrupt, provided the persons dealing with the said bankrupt had not, ral Effect at the time of such payment by or to such bankrupt, notice of any act of ruptcy. bankruptcy by such bankrupt committed(i). Which statute, we have seen, 1. As to has since been extended to all contracts, &c. bona fide made by and with the Proany bankrupt previous to the date and issuing of the fiat, if without notice perty of of a prior act of bankruptcy (i).

We have already considered how far payments of bills by bankrupts are Contracts protected, and that the class of cases as to their being made in the course of entered trade are no longer of any consequence, as the 6 Geo. 4 does not mention him.

those words(k).

Where the bankrupt has accepted bills for goods which he has purchased, this does not divest the right of the vendor to stop the goods in transitu upon the bankruptcy of the vendee (l).

But bills or notes delivered by a bankrupt by way of fraudulent preference remain the property of the assignces, and the delivery constitutes an act of bankruptcy(m).

With respect to the property of others in the hands of a bankrupt, it is 2. As to frequently affected by his bankruptcy, either in the case of liens, or of his the Probeing reputed owner. A banker has a lien for the general balance due to others. him upon bills or notes in his hands paid in generally (n). So a person has a lien upon all property placed in his possession as a consideration for his acceptance of a bill, which he is liable to pay after the bankruptcy of the owner, who made the deposit(o).

Property in the possession of a bankrupt, though he be not the real owner, Bills paid will sometimes pass to his assignees, on the ground of his being reputed into a Bankers owner, under the 6 Geo. 4, c. 16, s. 72; though property in the hands generally, of an agent is not in the reputed ownership of the principal(p). Bills of ex- and enterchange are within the statute (q). In the case of the bankruptcy of a factor  $\frac{ed}{continue}$ banker, bills remitted to them, and entered short while unpaid, and bills the Propaid in generally, to be received and not discounted or treated as cash, and perty of bills sent for a particular purpose are not affected by the bankruptcy of the tomer. factor or banker, and the property in them is not altered, and they or the proceeds received by the assignees must be returned by them to the principal, subject to such lien as the factor or banker may have thereon(r). And \*where [\*751]

(i) Ante, 207, 208.

(j) Ante, 206. (k) Ante, 892.

(1) Lickbarrow v. Mason, 2 T. R. 63; Solomons v. Nissen, 2 T. R. 674; Hodgson v. Loy, 7 T. R. 440; Kinlock v. Craig, 3 T. R. 119; 4 Bro. P. C. 47, S. C.; Vertue v. Jewell, 4 Campb. 31; Davis r. Reynolds, 1 Stark. R. 115, (Chit. j. 945); 3 Chit. Com. Law, 341; Cullen, 266; 1 Mont. 265.

(m) Cumming v. Bailv, 6 Bing. 363; 4 Moore & P. 36, (Chit. j 1485); ante 208 to

210, 695, note (1).

(n) Jordan v. Le Fevre, 1 Esp. Rep. 66; Davis v. Boucher, 5 T. R. 488, (Chit. j. 517). (o) Hammonds r. Barclay, 2 East, 227,

(Chit. j. 646).

(p) Ex parte Taylor, Mont. Rep. 240, and

see Greening v. Clark, 4 B. & C. 316.
(q) Hernblower v. Prowd, 2 Bar. & Ald. 327, (Chit. j. 1049).

(r) Ante, 211, 212; Zinck v. Walker, 2 Bla. Rep. 1154, (Chit. j. 396); Brown r. Kewley, 2 Bos. & Pul. 523; Bolton v. Richard, 6 T. R. 139, (Chit. j. 538); Took v. Hollingworth, 5 T. R. 215, (Chit. j. 505); Bent v. Puller, 5 T. R. 494, (Chit. j. 519); Parke r. Elliason, 1 East, 547, 550, (Chit. j. 641), Paley, Prin. & Agent, 71; Ex parte Waring and others. 19 Ves. 345, (Chit. j. 928); Buchanan v. Findlav, 9 Bar. & Cress. 738; 4 M. & R. 593, (Chit. j. 1441); ante, 211, note (n)

Ex parte Sargeant, 1 Rose, 135; Ex parte Sollers, 18 Ves 229, S. P. The proceeds of short bills were ordered to be returned, unless, upon inquiry, it should appear, that with the knowledge of the party depositing them, or from the habits of dealing between the parties, they were to be considered as cash; the onus of proving which lies in the assignees of the bankrupt banker. Per the Lord Chancellor. "It is quite clear that short bills in the possession of

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VI. General Effect of Bankruptcy.

2. As to

ty of others. [ \*752]

a foreign merchant remitted bills to his factor in London, with directions to sell them, and advising him of his intention to draw for the proceeds, and the factor sold the bills, but before the receipt of the purchase money became bankrupt, and dishonoured the merchant's drafts for the amount; it was the Proper- held, that the merchant, and not the factor's assignees, was entitled to the proceeds of the bills, notwithstanding the bills had been indorsed both by the principal and factor, \*and were sold by the factor in his own name(s). And if a merchant abroad send drafts from time to time to his London correspondent for acceptance, under an authority for that purpose, and upon an understanding that the liabilities of the latter in respect of all such acceptances shall be covered by means of bills payable in London to be remitted to him

> bankers are to be considered as still remaining in the possession of the parties by their agents to be specifically returned; and if these bills were written short, the petitioner could have compelled Kensington and Co. so to settle with Burrough as not to break in upon his claim. That they were not written short amounts to nothing, unless there be a concurrence manifested at the time, or to be inferred from the habits of dealing between the parties, that they were to be considered as cash; if they were there with the petitioner's knowledge as cash, and the drawing or entitled to draw upon them as having that credit in cash, he would thereby be precluded from recurring to them specifically; but it is upon them to prove that to be the case, and petitioner is therefore entitled, unless they have been carried to his credit as cash with

his knowledge or consent."

Ex parte Peas and others, in the matter of Boldero, 1 Rose, 232; 19 Ves. 25. Bills remitted by a country bank to their banker in London, remaining at his bankruptcy in his hands undue or unapplied, according to the authority given, or afterwards coming to the hands of the assignees, and the proceeds received, restored, and paid to the remitters, taking up the acceptance on their account, and subject to the banker's lien for any balance by the contract, remaining the property of the remitters, in the hands of the banker, as agent for a particular purpose, namely, to hold until due, and receive the proceeds then first forming an item in the cash account. The circumstance of the bill being written short is only evidence of a trust, proved in this instance by express declaration, or other evidence equivalent. Entries in bankers' books not proved to have been communicated to the customer, not evidence against, but may be for him. The statute 21 Jac. 1, c. 19, s. 11, not applicable to bills in the hands of a banker written short or sent for a particular purpose, the trust accounting for the possession being considered as goods in the hands of a factor, with the single distinction that he cannot pledge; but if the bills were dealt with before bankruptcy, the money cannot be followed,—as, if dealt with afterwards, may; S. P. Ex parte Waring and others, 19 Ves. 345; 2 Rose, 182, (Chit. j. 928).

Ex parte Rowton, 17 Ves. 426: 1 Rose, 15, (Chit. j. 808). Short bills remitted by a country bank to their banker in London, standing at the bankruptcy of the latter entered short in the usual way, not being due. Ordered on petition in the bankruptcy, to be delivered up by the as-

signees to the country bank, who not being creditors when the petition was presented, the cash balance being against them, had since become so, turning it in their favour by taking up the bankrupt's acceptances on their account. The order was made without requiring the petition to be amended by stating that fact; but upon consent of the crown holding an extent for acceptances of the bankrupt, on account of duties reserved and remitted specifically by the coun-

Ex parte Buchanan, in the matter of Kensington, I Rose, 280. An order was made upon the provisional assignes to deliver up short bills in the hands of bankers at the time of their bankruptcy, the estate being indemnified against their outstanding acceptances on account of the petitioner.

Ex parte The Burton Bank, &c., 2 Rose, These were petitions presented in the bankruptcy of Messrs. Whitehead, Howard, and Co, bankers in London, by their correspondents in the country, for the purpose of having certain short bills of the petitioners, which were in the possession of the bankrupts at the time of the bankruptcy, delivered up, indemnifying the bankrupts estate against in liability for the petitioners. The right was considered so indisputable that the following

orders were taken by consent.

Ex parte Harford. The provisional assignee to retain the cash balances and the cash received, and on the short bills paid, and also a sufficient number of short bills unpaid to cover the amount of Whitehead & Co.'s acceptances, and he is to deliver over to Harford and Co. the residue of the said bills, notes, and securities. It is further understood, that the cash and notes retained are to be given up as Harford and Co. produce the acceptances cancelled.

Ex parte The Burton Bank. The provisional assignee consents that all bills, &c. shall be delivered up upon the petitioner leaving such sum as together with the cash balance equals

the acceptances outstanding. Note.—An extent had been issued on the part of the crown; but there was enough to satisfy it without resorting to the short bills, nor were they scheduled among the property seized under it. See Ex parte Rowton, 1 Rose, 15, (Chit. j. 808).

Ex parte Waring and others, 19 Ves. 345, (Chit. j. 928).

(s) Ex parte Pauli, 3 Deacon, 169. See Scott v. Surman, Willes, 400.

none of s bankrupto property ( an Amer. send them amount, i indorsees shares are a trust, vi tain bills and accou ular credit A., a mer apply the his assign so held, n as cash in to run, pro cy be in fa B. to mak ply the rec sent notice notice to a and before B., who t such proci but that A If a cu practice it ed, as cash from the t cash accor rupter; at they are received. man who as in the banker di the case; tanto for 1

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from time to time, the presumption is, until an agreement to the contrary is VI. Geneshewn, that the London correspondent is not intended or entitled to treat the ral Effect bills so remitted as cash, or to discount them before maturity: and, therefore, ruptcy. none of such bills which are existing in specie in his hands at the time of his 2. As to bankruptcy, and are not then due, will pass to his assignees, but remain the the Proproperty of the party who remitted them (t). So on an agreement between perty of an American and English house to purchase American bank shares, and others. send them to England for sale, and draw bills on the English house for the amount, if the English house become bankrupt before the shares arrive, the indorsees are entitled to have the produce applied to retire the bills, and the shares are not in the reputed ownership of the bankrupts, being clothed with a trust, viz. to retire the bills (u). And the assignees of an agent cannot retain bills sent to the agent before his bankruptcy, but received afterwards, and accompained by a letter directing the bill to be appropriated to a particular creditor, who received notice thereof (x). And we have seen, that if A., a merchant, remit a bill to B., another merchant, to get discounted, and apply the proceeds, the property in the bill and proceeds remain in A. or his assignees, and B. cannot set off a debt due to him(u); and this has been so held, notwithstanding that the banker, according to custom, enters the bill as cash in his customer's accounts, charging interest for the time they have to run, provided the balance of the cash account at the time of the bankruptcy be in favour of the customer(z). And where A. accepted bills to enable B. to make shipments to Sydney, on an agreement known at Sydney to apply the return proceeds in payment of the bills; and on the last shipment, B. sent notice to Sydney to send the proceeds direct to A., and gave the same notice to a partner of the Sydney house, who happened to be in London; and before the notice arrived at Sydney the return proceeds were sent off to B., who became bankrupt, and his assignees received them, it was held, that such proceeds were not to be considered as in the reputed ownership of B., but that A. was entitled thereto(a).

If a customer pay hills not due into his bankers in the country, whose practice it is to credit their customers for the amount of such bills, if approved, as cash (charging interest), he is entitled to recover back such bills in specie from the bankers on their becoming bankrupt, provided the balance of his cash account, independent of such bills, be in his favour at the time of the bankruptcy; and if payment be afterwards received upon such bills by the assignees, they are \*liable to refund it to the customer in an action for money had and [ \*753] received(b). And in that case Lord Ellenborough observed, that "every man who pays bills not due into the hands of the banker, places them there as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill, or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it pro tanto for his advance. The only difference between the practice stated of

<sup>(</sup>t) Jombart r. Woollett, 2 Mylne & Craig, 389.

<sup>(</sup>u) Ex parte Brown and Co., 3 Mont. & Ayr. 471; 3 Deacon, 91, S. C. As to right of indorsee to have property in hands of acceptor to be applied in discharge of bills, see cases, ante,

<sup>(</sup>x) Ex parte Cotterill and others, 3 Mont. & Ayr. 376; 3 Descon, 12, S. C.

<sup>(</sup>y) Buchanan v. Findlay, 9 Bar. & Cres. 738; 4 Man. & Ry. 593, (Chit. j. 1441); ante, 211, note (n); and see Ex parte Frere, 1 Mont. & M. 263, (Chit. j. 1451); ante. 211,

<sup>212.</sup> But see observations on Buchanan v. Findlay in Thorpe r. Thorpe, 3 B. & Ad. 580; ante, 198, note (h).

<sup>(</sup>g) Giles v. Perkins, 9 East, 12, (Chit. j. 737); Paley, Prin. & Agent, 71; Ex parte Benson, 1 Mont. & B. 120; post, 753, n. (b).

<sup>(</sup>a) Ex parte Flower, 2 Mont. & Ayr. 224; 4 Dea. & Chit. 449, S. C.; and see Ex parte Copeland, 2 Mont. & Ayr. 177; 2 Dea & Chit. 199; S. C. ante, 264.

<sup>(</sup>b) Giles v. Perkins, 9 East, 12, (Chit. j. 737).

VI. General Effect of Bankruptcy.

2. As to the Property of others.

London and country bankers in this respect is, that the former, if overdrawn, has a lien on the bill deposited with him, though not indorsed; whereas the country banker, who always takes the bill indorsed, has not only a lien upon it if his account be overdrawn, but has also his legal remedy upon the bill by the indorsement; but neither of them can have any lien on such bills until their account he overdrawn: and here the balance of the cash account at the time of the bankruptcy was in favour of the plaintiffs(c)." Where, therefore, bills of exchange are paid by a customer into his bankers, and entered as cash, with a distinct interest account, and he has credit to the amount of the bills so entered, but in fact never overdraws his account, the bills not due at the date of the bankruptcy of the bankers, or the proceeds received by the assignees, belong to the customer(d). So the proprietor of short bills, who deposits them in the hands of his bankers, desiring them to be kept and presented for acceptance when due, is entitled to be paid in full out of the proceeds of such bills, or out of such property as may have been relieved by the application of the proceeds of those bills: and the fact of the [ \*754 ] bankers having placed \*the bills as cash to the credit of the proprietor, is not sufficient to raise a presumption that the ownership of the bills was transferred to the bankers: nor is proof under the fiat for the amount of one of the bills any waiver of his right to payment in full(e). In one case the proceeds of short bills were ordered to be returned, unless upon inquiry it should appear, that with the knowledge of the party depositing them, or from the habits of dealing between the parties, they were to be considered as cash, the onus of which was to be upon the banker (f); and in another case, where a

> (c) See also Ex parte Pease and others, 19 (c) See also Ex parte l'ease and others, 19 Ves. 25, 45; ante, 751, note (r); Ex parte Toogood, 19 Ves. 229, (Chit. j. 871); Ex parte Waring, 19 Ves. 349, (Chit. j. 928); Ex parte Buchanan, 19 Ves. 201; 1 Rose Bank. Ca. 232, 243, 254; Ex parte M'Gale, 19 Ves. 607; 2 Rose, 376, S. C.; Ex parte Hippins, 2 Glyn & Jam. 93, (Chit. j. 1307); Ex parte Armistead, 2 Glyn & Jam. 371, (Chit. j. 1390); Ex parte Part I Buck 191 cited Chit. j. 929. Ex parte Parr, 1 Buck, 191, cited Chit. j. 929; Jombart v. Woollett, 2 Mylne & Craig, 389; ante, 752, note (t).

(d) Ex parte Benson, 1 Mont. & Bl. 120, reversing an order of the Vice-Chancellor. There was evidence of a custom in the country to circulate short bills, but no express authority given by the customer to the banker to circulate the bills in question as cash.

Ex parte Ellis and others, In re Sir George Duckett and Co. Court of Review April 16, 1932, MS. When Bankers holding short bills, the property of a customer, become bankrupt, the customer may on petition obtain an order for the accountant-general delivering such bill to him to enable him to proceed thereon. Montagu said, that before the court entered upon its regular cause paper, he wished to make an application in a case of short bills, which were always rather pressing. The petition was against the official assignee and creditors, assignees of Sir George Duckett and Co., bankers. It stated, that a fiat having been issued against the bankrupts on the 22d of March last, the assignee, under an order of the court, dated the 24th of March, took possession of divers bills, exchequer bills, public securities, plate, jewels, and other effects, the private property of the customers of the bankrupts. The offi-

cial assignee detained in his custody all bills in the nature of short bills, in order that he might present them for payment and return the proceeds, subject to further order. Un the 5th of April, in pursuance of the order of the 24th of March, he presented for payment such bills as were due, retained the proceeds, and paid into the Bank of England all other monies, bills, and negotiable instruments belonging to the estate. Several of the last had become due, but bad not been paid, and remained in the hands of the accountant-general, who declined to return them to the petitioners without the order and authority of the court. The petitioners, therefore, prayed that the accountant-general might be directed to deliver to them, not only such bills as were already due and dishonoured, but such as might become so hereafter, so that they might enforce payment at law, and make over the proceeds to the parties entitled to them. The retention on the part of the accountantgeneral was rather hard, for by want of notice the value of the bills might not be recoverable from the different indorsers.

His honour the chief judge said that there ought to have been no difficulty in such a case, for there was a general order that upon the dis-honour of any bill it should be restored to the official assignee.

Mr. Montagu said that he had no doubt of a general rule being found necessary to regulate the matter, but he rather dwelt upon this, as it was the first cause of the kind. Prayer of petition granted. See the General Orders, post, Appendix.

(e) Ex parte Bond, In re Foster, Court of Review, Hil. T. 1840, 4 Jurist, 224.

customer due, whic the full an upon the I the custon bills were So in th in London ner and titl coin requir equal to th with direct being to In indorsed b becoming right to th expressing tance to b And on remittance ances rece to whom it ing as a lie If a Lo in London the branch and at tha the branch London ba for the pur don banke more than but the am cluding the bank to r  $b_{\text{ranch}}$   $b_{\text{lat}}$ Court of ; dice, the to  $i_{l, lo \, l |}$ that the br ceived Iroi bank pay 1 ees under from the  $_{\text{t}}$  $\text{am}_{\text{ount } s_0}$ National.

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customer was in the habit of indorsing and paying into his bankers bills not VI. Genedue, which, if approved, were immediately entered as bills to his credit to ral Effect the full amount, and he was at liberty to draw for that amount by checks ruptcy. upon the bank, and the bankers paid away such bills as they thought fit, and 2. As to the customer was credited and debited with interest; the court held that the the Probills were not within the statute(g).

perty of others.

So in the case Ex parte Sayers(h), where A. abroad, commissioned B. in London to send him foreign coin, with particular directions as to the manner and time of sending it, and remitted bills, which B. discounted; and the coin required not being procurable in England, B. sent two remittances, not equal to the amount of A.'s bills, to Lisbon for the purpose of procuring it, with directions, if it could not be had, to return the bills; and the coin not being to be had, bills nearly to the amount of the remittance to Lisbon, not indorsed by the correspondent there, were returned, and, B. in the interval becoming bankrupt, were received by his assignees; A. was held to have a right to those bills under the particular circumstances, the Lord Chancellor expressing much doubt whether such right would exist in the case of remittance to buy goods in the way of trade.

And on the same principle, in Hassall v. Smithers(i) it was held, that a remittance in bills and notes for a specific purpose, viz. to answer acceptances received by the administrator in consequence of the death of the party to whom it was remitted, was not general assets, the specific purpose operat-

ing as a lien, which would also be the effect upon a bankruptcy.

If a London banker, having a branch bank at Edenburgh, stop payment in London, and after the stoppage, but before notice, a customer pay into the branch bank at Edenburgh bank notes and cash to be remitted to London, and at that time the London banker is indebted to the branch bank; and the branch bank after notice, in pursuance of a special direction from the London banker, receive money from different agents of the London banker for the purpose of forwarding to London; and a fiat issue against the London banker, at which period the monies in the hands of the branch bank are more than sufficient to cover the amount due to it from the London banker, but the amount which it has at the time of the notice of the stoppage, including the bank notes, is insufficient, and the customer require the branch bank to return the bank notes, which it does not comply with; and the branch bank refuse to pay any part of the money to the assignees, and the Court of Session in Scotland order the branch bank to pay, without prejudice, the balance of monies, after deducting in the mean time the amount due to it, to the assignees, which it does: and afterwards, \*it appearing clear [ \*755] that the branch bank is not entitled to retain any part of the sum which it received from the different agents of the London banker after notice, the branch bank pay to the assignees the difference between the sum paid to the assignees under the order of the Court of Session, and the amount so received from the different agents, the assignees must refund to the customer the amount so paid in by him(k). And if such London banker and the Scotch National Bank have, through the branch bank of the London banker, mutually exchanged their notes at stated times, pursuant to established custom,

(i) Hassall v. Smithers, 12 Ves. 119, (Chit.

(k) Ex parte Cunningham, in the matter of Maberly, Mont. & B. 269; affirmed by Lord Chancellor on appeal; Ex parte Belcher and others, ib. 286; and see Ex parte Solomons, ib. 308; S. C. 3 Dea. & Chit. 58, 70, 71, 73, 87.

<sup>(</sup>f) Ex parte Serjeant, 1 Rose, 153; ante, j. 725). 751, note (r).

<sup>(</sup>g) Thompson r. Giles, 2 Bar. & Cress. 422; 3 Dow. & Ry. 733, (Chit. j. 1190).

<sup>(</sup>h) Ex parte Sayers, 5 Ves. 169, (Chit. j.

Bankruptcy. 2. As to

the Pro-

perty of others.

VI. Gene- and at the time of the London banker becoming bankrupt the branch bank ral Effect of has notes of the Scotch National Bank in its hands, and the assignees subsequently allow the branch bank to retain these notes in account with them, the branch bank having claims against the London banker, the Scotch National Bank may recover these notes against the assignees(1). In like manner, money transmitted to the branch bank for the purpose of withdrawing an acceptance, but which is not done in consequence of the London banker's bankruptcy, may be recovered back from the assignees if allowed by them in account with the branch bank(m). Where, however, according to a custom of exchanging acceptances which existed between the bankrupt and other houses. through the agency of the branch bank, notes were sent by a party to this branch bank, but never exchanged, as bankruptcy intervened, and they were stolen from the branch bank, and never formed any item in any settlement of accounts between the branch bank and the assignees; it was held that such party could not recover the value of the notes from the assignees (n).

But Bills delivered to be discounted

But if the holder of bills deliver them to a banker, expressly on the terms of discount, or if by the course of dealing between the customer and banker, bills received by the latter are understood by both parties as cash minus the pass to the discount, and the customer is at liberty to draw on account thereof, beyond the amount of cash in the hands of the banker, then in the event of the bankruptcy of the banker, the assignees are entitled to the bills(o). So where a [ \*756 ] person having three bills of exchange, \*applied to a country banker with whom he had no previous dealing to give for them a bill on London of the

(1) Ex parte The National Bank of Scotland, 1 Mont. & Ayr. 644; 4 Dea. & Chit 32, S. C.

(m) Ex parte Simpson, 2 Mont. & Ayr. 294; 1 Dea. & Chit. 47, S. C.

(n) Ex parte Watson, 1 Mont. & Ayr. 685; 4 Dea. & Chit. 45, S. C.

(o) Ex parte Rowton, 17 Ves. 426, 431; 1 Rose, 15, S. C.; Ex parte Sollers, 18 Ves. 229; Carstairs v. Bates, 3 Campb. 301, (Chit. j. 877); Ex parte Thompson, 1 Mont. & M. 102. Sed vide Thompson v. Giles, 2 Barn. & Cres. 422, ante, 754, note (g); and Ex parte Benson, 1 Mont. & B. 120, 133, ante, 753, note (d), over-ruling Ex parte Thompson.

Carstairs and others, Assignees of Kensington v. Bates, 3 Campb. 301, (Chit. j. 877). Where bankers discount a bill of exchange for a customer, giving him credit for the amount of the bill, and debiting him with the discount, the bill becomes the property of the bankers. and upon their bankruptcy their assignees 1: ay maintain an action upon it, although there be no balance due from them to the customer. Per Lord Ellenborough. "Is is meant seriously to contest the right of the assignees to re-cover in this action? The bankers were the purchasers of this bill. They did not receive it as the agents of Allport. The whole proper-ty and interest in the bill vested in themselves, and they stood all risks from the moment of the discount. If the bill had been afterwards stolen or burnt, theirs would have been the loss. In Giles v. Perkins, the bankers were mere depositaries, with a lien when the account was overdrawn. The customer there drew on the credit of the bills deposited. Here Allport might have drawn out the amount of the bill, deducting the discount as actual cash, in the same manner as if he had dishonoured the bill with

a third person, and then paid in the amount in bank notes. The discount makes the bankers complete purchasers of the bill. The transaction was completed;-they had no lien but the thing itself;—the bill was as much theirs as any chattel they possessed. This very distinction was taken in the case cited; for it was there said, if the banker discount the bill, or advance money on the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it pro tanto for his ad-

vance. Verdict for plaintiff.
So in Payley P. & A. 72, it is laid down thus:-- "But in order to prevent the effect of the bankrupt laws from attaching negotiable securities in the hands of a bankrupt agent, there must be a specific appropriation of them, as by lodging of bill for bill, or by the deposit of several in one entire transaction, to answer a particular purpose; for if they are paid in from time to time, upon a general running account, they become the effects of the person to whom they were so paid, and are not reclaimable. The doctrine is thus generally stated by Lord Hardwicke:- 'If bills are sent by a correspondent to a merchant here to be received, and the money to be applied to a particular use, and the merchant becomes bankrupt before the money is received on the bills, the correspondent has a special lien in respect of those bills, and the money shall not be divided amongst the creditors at large. But where bills are sent on a general account between the correspondent and the merchant, and as an item in the account, it is otherwise." Bent v. Puller, 5 T. R. 494; and see Thompson v. Giles, 2 B. & C. 422; 3 Dowl. & Ry. 733, (Chit. j. 1190); ante, 211, 212, 754.

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same amount, and the bill given by the banker was afterwards dishonoured; VI. Geneit was held that this was a complete exchange of securities, and that trover ral Effect would not lie for the three bills of exchange; and it was also held, that if the raptcy. exchange had not been complete, still that the banker having become a bankrupt, and the three bills having come to the possession of his assignees, must be considered as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy, within the statute 6 Geo. 4, c. 16, s. 72(p).

### PART SECOND.—OF DISCHARGE UNDER AN INSOLVENT ACT.

Provisions of 7 Geo. 4, c. 57, and 1 & 2 | What a sufficient Description of Debt Vict. c. 110 756 As to what Debts Insolvent discharged 759 Creditor must be named in Schedule ib.

Effect of new Contract
Bill or Note in Consideration of not op-

posing Insolvent's Discharge, illegal 761

Of Discharge un-759 der an In-760 solvent AcL

A party to a bill or note, who has afterwards become insolvent, may be Of Disdischarged from liability under the provisions of one of the statutes relating der an In-The last of these acts containing general provisions, solvent to insolvent debtors (q). is the 7 Geo. 4, c. 57, ss. 40, 46, 60, 61, (re-enacted 1 & 2 Vict. c. 110, Act, and ss. 69, 75, 90, 91). All the insolvent acts having been passed with the Geo. 4, c. same object, are to be construed with the same liberality, and in general the 57, and 1 decisions upon one act will be applicable to the other containing a similar & Vict. a. enactment; therefore it may be expedient shortly to consider the cases on particular. the former acts(q). In a case where after the 1st July, 1809, mentioned in the Insolvent Debtors' Act, 49 Geo. 3, c. 115, a promissory note was given for an antecedent debt, it was decided, that as against the payee, the maker would have been discharged under this act, but that he was not as against a person to whom the note was subsequently bona fide indersed (r). And where the creditor of an insolvent debtor, who had petitioned under the Insolvent Debtor's Act, obtained from his debtor whilst in prison a bill of exchange for his debt, and indorsed it to an innocent holder for valuable consideration, it was held, that though this might be a \*fraudulent [ \*757] preference of the creditor, the insolvent's discharge was no bar to an action upon the bill by the innocent indorsee(s).

By the Insolvent Act, 1 Geo. 4, c. 19, s. 6, the insolvent was required to deliver in a schedule containing a full and true description of every person to whom he was indebted, or who to his knowledge or belief claimed to be his creditor, together with the nature and amount of such debts and claims; and it was held to be enough for him to give in his schedule a description of his debt, sufficient to notify to the creditor that he had applied to be discharged in respect of that debt; and therefore, where the insolvent had ordered coals of A. B., who resided at N. in Monmouthshire, and the invoices had been made out in the name of the Argood Coal Company, which in fact consisted of two partners only, one of whom had never been named to the

(p) Hornblower v. Prowd, 2 Bar. & Ald. 327, (Chit. j. 1049). As to bills and notes in hands of surviving partners, see Ex parte Taylor, Mont. R. 240; ante, 56, note (i).

(q) Sharpe v. Iffgrave, 3 Bos. & Pul. 394; Lord Kinnard v. Barrow, S T. R. 49. In Rice v. Lee, 3 Law J. 4, C. P. Nov. 11, 1824, it was held, that forgery of an acceptance by a defendant on a bill of exchange given by

him to the plaintiff, was no ground for opposing a discharge under the Lords' Act, 32 Geo. 2, c.

(r) Lucas r. Winton, 2 Campb. 443, (Chit. j. 798). But see now 7 Geo. 4, c. 57, s. 46; Boydell v. Champneys, 2 M. & W. 433; post, **758, 759, note** (d).

(a) Simpson v. Pogson, 3 D. & R. 567. (Chit. j. 1192).

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Of Discharge under an Insolvent Act.

insolvent as having a share in the concern, and the insolvent in his schedule described a debt of 821. due to A. B., of N. in Monmouthshire, for coals, in respect of which it was stated that A. B. held a security which was the subject of the present action; and the debt due to the plaintiffs was 821. 24. 6d.: it was held that the schedule contained a sufficient description of the names of the persons to whom the insolvent was indebted, and the amount of the debt within the meaning of that statute(t). So under the same act, where the defendant being indebted to A. for goods sold, accepted a bill drawn by A. for the amount, which became due in October, 1823; and before that time the defendant became insolvent, and presented his petition to be discharged, and in his schedule stated that he was indebted to A. for goods, and that A. held his acceptance for the amount, which became due in October, 1223; and A. had indorsed the bill to B., but the insolvent was ignorant of that fact; and B. having brought an action against the insolvent upon the bill, the latter pleaded his discharge under the Insolvent Debtors' Act: it was held that the schedule contained a true description of the person to whom the insolvent was indebted, within the meaning of the act(u).

The Insolvent Act, 7 Geo. 4, c. 1 & 2 Vict. c. 110, ss.

The last Insolvent Act applicable to this subject is the 7 Geo. 4, c. 57, ss. 40, 46, 60, 61, (re-enacted 1 & 2 Vict. c. 110, ss. 69, 75, 90, 91). The 40th section enacts, "That every prisoner who shall apply for relief, 46, 60, 61, shall, within the time therein specified, deliver into the court a schedule containing a full and fair description of such prisoner, as to his name, trade, or profession, together with his last usual place of abode, and the place or 69, 75, 90, places where he resided during the time when his debts were contracted, and also a full and true description of all debts due or growing due from such prisoner at the time of filing such petition, and of all and every person and persons to whom such prisoner shall be indebted, or who to his or her knowledge or belief shall claim to be his creditors, together with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted from such as shall be disputed; and the said schedule is to be [ \*758] \*subscribed by the prisoner, and filed in the said court, together with all books, papers, deeds, and writings in any way relating to such prisoner's

Sect. 46. The court is then to adjudge that such prisoner shall be discharged from custody and entitled to the benefit of the act, at such time as the said court or commissioner or justices shall direct, in pursuance of the provisions thereinafter contained in that behalf, as to the several debts and sums of money(x) due or claimed to be due at the time of filing such prisoner's petition from such prisoner to the several persons named in his or her schedule as creditors, or claiming to be creditors for the same respectively, or for which such person shall have given credit to such prisoner before the time of filing such petition, and which were not then payable, and as to the claims of all other persons not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid.

(t) Forman v. Drew, 4 B. & C. 15; 6 D.

(1) Forman v. 27cw, 4 D. & C. 15; 6 D. & R. 75, (Chit. j. 1246).
(u) Reeves v. Lambert, 4 Barn. & Cress.
214, (Chit. j. 1249). See Boydell v. Champneys, 2 M. & W. 438; Nias v. Nicholson, 2
Car. & P. 120; Ry. & Mood. 322, (Chit. j. Car. & F. 120; hy. and see Eastwood v. Brown, Ry. & Mood. 312; and Cox v. Reid, id. 202; 1 Car. & P. 602, S. C. Misdescrip tion of defendant in schedule; Pascall v.

Brown, 8 Stark. Rep. 54. As to a total omir sion of the creditor or debt in schedule, with Beave of the creditor, see Carpenter v. White, 8 Moore. 281, 284; Tabram v. Freeman, 4 Tyr. 180; 4 B. & Ad. 887, note, S. C.; Semble, overruling Howard v. Bartolozzi, 4 B. & Ad. 887 Ad. 555.

(x) See Boydell v. Champneys, 2 M. & W. 438, post, 759, note (d).

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Sect. 60. That no person who shall have become entitled to the benefit Of Disof this act by any such adjudication as aforesaid, shall thereafter be imprison- charge uned by reason of the judgment entered up according to the act, or for any solvent debt or sum of money, or costs, with respect to which such persons shall Act. have become so entitled, or for or by reason of any judgment, decree, or The Insolorder for payment of the same, but that upon every arrest or detainer in vent Act. prison upon any such judgment so entered up as aforesaid, or for or by reason 7 Geo. 4. of any such debt or sum of money, or costs, or judgment, decree, or order 1 & 2 Vict. for payment of the same, it shall be lawful for any judge of the court from c. 110. which any process shall have issued in respect thereof, and he is required, upon proof made to his satisfaction that the cause of such arrest or detainer is such as hereinbefore mentioned, to release such prisoner from custody, unless it shall appear to such judge, upon inquiry, that such adjudication as aforesaid was made without due notice(y): where notice is by that act required, being given to or acknowledged by the plaintiff, or such process, or being by him or her dispensed with by the acceptance of a dividend under this act, or otherwise; and at the same time, if such judge shall in his discretion think fit, it shall and may be lawful for him to order such plaintiff, or any person or persons suing out such process, to pay such prisoner the costs which he or she shall have incurred on such occasion, or so much thereof as to such judge shall seem just and reasonable, such prisoner causing a common appearance to be entered for him or her in such action or suit.

Sect. 61. That after any person shall have become entitled to the benefit of this act, by any such adjudication as aforesaid, no writ of fieri facias or elegit shall issue, or any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have become so entitled, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to this act, and that if any suit or action shall be brought, or any scire facias be issued against any such person, his or her heirs, executors, or administrators, for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against any statute or recognizance acknowledged by such person for the same, except as aforesaid, it shall and may be lawful for such person, \*his or her heirs, ex- [ \*759 ] ecutors, or administrators, to plead generally that such person was duly discharged according to this act, by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially; whereto the plaintiff or plaintiffs shall or may reply generally, and deny the matter pleaded as aforesaid, or reply any other matter or thing which may shew the defendant or defendants not to be entitled to the benefit of this act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied in case the defendant or defendants had pleaded this act and a

discharge by virtue thereof specially.

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Upon this last act it seems clear, that with reference to the decisions above As to what referred to, and to the following, that a person is only discharged where the Debta inschedule names the creditor or the debt as distinctly as the debtor can do, discharged. or has leave to omit it(z). It also seems, that the discharge of an insolvent

(y) See Read v. Croft, 6 Scott, 770; 5 Bing. N. C. 587; 7 Dowl. 122; S. C. post, (2) Ante, 757, note (u); see also Baker v. Sydee, 7 Taunt. 179; Taylor v. Buchanan, 4 760, n. (h). Bar. & Cres. 419.

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With respect to the necessity of naming the creditor in the schedule, it is

under this act applies only to the debts named in the schedule, and not to all charge unthe debts due to the creditors named(a).

der an Insolvent Act.

Creditor's name in Schedule.

Insertion of observeable, that the 40th and 46th sections require that the name of the creditor be named if possible, but suppose the difficulty of stating such creditor in the case of a negotiable security; and as the only object in naming the creditor is to identify the debt, if the insolvent, not knowing who is the holder

What a sufficient of Debt.

of a bill or note, give a correct description of the instrument itself, it will And where an insolvent stated a bill in his schedule as drawn by himself on M., whereas it was drawn by M. on him, it was held, that if the jury description were satisfied that the same bill was meant, and that the misdescription was by mistake, it was sufficient (b). So where in an action by the payee against one of the makers of a joint and several promissory note, to which the defendant pleaded his discharge under the Insolvent Act, and it appeared that no notice of the defendant's intention to apply for his discharge was given to the plaintiff, but that the note was drawn by the other maker, and signed by the defendant for his accommodation, it would be for the jury to say whether the defendant knew to whom the note was made payable; for if he did, notice would be necessary, but otherwise not(c). And if an insolvent debtor who inserts in his schedule the name of the holder of a bill of exchange on which he is liable, or gives such other description of it as satisfies the statute, he is discharged as to all the parties to the bill (although they are not named in the schedule) and also as to the original debt for which it was a security(d). [ \*760 ] But if an insolvent debtor knows at the time of \*filing his schedule that a bill of exchange has been indorsed to a particular person some time before, he is bound to give notice to that person, although he cannot tell whether he comtinues to be the holder at the time of filing the schedule(e). And where A., an insolvent debtor, in his schedule stated that he had given his acceptance to B., who was the drawer of a bill, but A. did not mention the name of the

indorsee in the schedule; it was held, that if he did not know the bill to have

(a) Bishop v. Polhill, I Mood. & Rob. 363; and see Boydell v. Champneys, 2 M. & W.

433; infra, note (d).
(b) Nias v. Nicholson, 2 Car. & P. 120; Ryan & Mood. 322, (Chit. j. 1274).

(c) Sharpe v. Gye, 4 Car. & P. 311, (Chit.

j. 1499).

(d) Boydell v. Champneys, 2 Mee. & Wels.
13. Per Parke, B. "The case of Macdonald v. Bovington (3 M. & Sel. 91) turned on the provisions of the Lords' Act, the intention of which was not to discharge the defendant from the debt, but only his person from imprisonment. The scope and provisions of the Insolvent Debtors' Act are very different: when the insolvent has inserted the debt fairly and properly in his schedule, he is discharged as to the debt itself, and not merely as to the particular creditors named in the schedule. I think this conclusion necessarily follows from a comparison of the 46th and 61st sections. Section 46 empowers the court to adjudge that the prisoner shall be discharged from custody, and entitled to the benefit of the act, 'as to the several debts or sums of money,'-not as to the several creditors- due or claimed to be due at the time of filing such prisoner's petition from such prisoner to the several persons named in his schedule as creditors, and as to the claims of all other per-

sons not known to such prisoner at the time of such adjudication, who may be indersees or holders of any negotiable security set forth in such schedule.' The object of the latter part of the clause is, that where the prisoner is indebted on a negotiable security, and where he could not be reasonably expected to know the name of the holder, he may be discharged without stating the name, provided the instrument itself be sufficiently described in the schedule, so as to satisfy the court that he has given a true description of it. That appears to me the rational and plain construction of the 46th section, and it is confirmed by the 61st, which provides that after the party shall have become entitled to the benefit of the act, no writ of fi. fa. or clegit shall issue on any judgment obtained against him for any debt or sum of money with respect to which he shall have so become entitled, nor in any action on any new contract or security for payment thereof. This view agrees with the construction put by the court on former insolvent acts, not containing a similar clause to that at the end of section 46, expressly enabling the insolvent to describe negotiable securities without stating the holders' names.' And see Bishop v. Polhill, 1 Mood. & Rob. 368; ante, 759, note (a)

(e) Pugh r. Hookham, 5 Car. & P. 876.

been indo the insolv insolvent what he held the schedule ( change, s **dele**ndant some evid beld, that bolder(g) With 1 ing the in 42d secti it is for such not

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 $(k_j)$ (1) 1 been indorsed, this would be a bar to an action by the indorsee: but that if Of Disthe insolvent had been told that the bill was in the hands of the indorsee, the charge uninsolvent would be still liable, although the jury might think he had forgotten solvent what he had been told, and that his attorney had made inquiries as to who Act held the bill, with a view of putting such holder's name into the insolvent's The Insolschedule(f). So where in an action against the acceptor of a bill of ex-vent Act, change, who pleaded his discharge under the Insolvent Debtors' Act, the 7 Geo. 4, change, who pleaded his discharge under the Insolvent Debtors' Act, the 7 Geo. 4, and defendant having misdescribed the holder in his schedule, and there being 1 & 2 Vict. some evidence tending to shew that he knew the holder at the time, it was c. 110. beld, that the true question for the jury was, whether he did so know the holder(g).

With respect, however, to the notice to be given to the creditors after filing the insolvent's petition and schedule, it is to be observed, that under the 42d section of 7 Geo. 4, c. 57, (re-enacted in 1 & 2 Vict. c. 110, s. 71), it is for the court to cause such notice to be given, and that the giving of such notice is not a condition precedent to the insolvent's discharge; and, therefore, in an action on a bill of exchange, a replication that the plaintiff had received no notice of the filing of the defendant's petition, though he was resident in England, and might have been served with such notice, is no an-

swer to a plea of the defendant's discharge under this act(h).

We have seen that the 60th section of the 7 Geo. 4, c. 57, enables a Effect of judge to discharge a person from arrest for a preceding debt, and that the 61st new Consection provides, that no fieri facias or elegit shall issue in respect of any new tract. contract or security for payment of a debt from which the insolvent has been discharged under the act. And, \*therefore, where the defendant and [ \*761] a third party as his surety signed a promissory note, and the defendant was afterwards discharged under the insolvent act, and the payee applied to the surety for payment, whereupon the defendant, to prevent the surety being sued, joined him in a new note, it was held, in an action by the payee, that he could not recover on this note against the defendant, as it was a new contract for the old debt, though the new consideration of forbearance to the surety was added(i). So where an insolvent debtor was remanded for six months at the suit of G., and, during his imprisonment, A., the attorney of G., agreed with him that he should be discharged on giving A. a bill of exchange for a part of G.'s debt, and an I. O. U. for A.'s bill of costs in the action, which he gave, and was liberated accordingly; it was held that the insolvent could not be sued either on the bill of exchange or on the I. O. U. for although the remission of the remaining portion of the insolvent's imprisonment might form a new consideration, it was, notwithstanding, a new contract for the old debt within the 61st section; and as to the costs, they constituted a debt due to the plaintiff's clients, and, consequently, were equally barred by the discharge (k). But according to the decisions upon the prior acts (l), and upon this act, a bona fide holder of a note given after the dis-

(f) Lewis v. Mason, 4 Car. & P. 322, (Ch. j. 1519).

(g) Levy r. Dolbell, 1 Mood. & M. 202,

(Chit. j. 1410).

the 60th section, ante, 758.

(i) Evans v. Williams, 1 Croin. & M. 30; 3 Tyrw. 226, S. C

(1) Lucas r. Winton, 2 Campb. 448, (Chit.

j 798); and Simpson v. Pogson, 3 Dowl. & Ry. 567, (Chit. j. 1199).

In Best c. Barber, 3 Dougl. 198; S.C. nom. Best v Barker, 8 Price, 533, where a debtor was discharged under the insolvent act of 1781, and afterwards gave a promissory note for a debt due before, it was held, that there was a good consideration for such note, and that he might be sued thereon by the payee. But note, this was an application to set saide execution. See Philpot v. Aslett, 1 C. M. & R. 85, infra. note (m)

<sup>(</sup>h) Read v. Croft, 6 Scott, 770; 5 Bing. N. C. 58; 7 Dowl. 122, S. C. Note, it was not averred in the replication that the plaintiff did not know of the defendant's discharge; and see

<sup>(</sup>k) Ashley v. Killick, 5 Mee. & W. 509.

Of Disder an Insolvent

charge in payment of a preceding debt, may recover the amount if he receivcharge un- ed it without collusion and without notice; though it is incumbent on such holder to prove that he gave full value before the note was due, and without collusion(m). And a party who seeks to avail \*himself of a discharge un-[ \*762] der the insolvent act, as a defence to an action on a bill or note given for an antecedent debt, is bound to do so in the first instance; and if instead of pleading his discharge he give a warrant of attorney to secure the payment, the court will not set it aside(n).

Bill or Note ration of not opposing Insolvent's disgal.

If a bill or note be given in consideration of not opposing the insolvent's in conside- discharge, it is illegal and void in the hands of the party who knew of the illegality when he received it(o).

(m) In Northam v. Latouche, 4 Car. & P. charge ille- 140, it was held, that to justify the jury in giving a verdict for the plaintiff in an action against an insolvent debtor by the indorsee of a bill of exchange, accepted by such debtor as a security for a debt due to the indorser, and from which he had been discharged under the Insolvent Debtor's Act, they must be satisfied not only that the plaintiff gave value for the bill, but that he took it bond fide for his own purposes, without any concert with the indorser, and without any knowledge of the defect in the indorser's title. It was further held, that the provision in the 76th section of the 7 Geo. 4, c. 57, that a certified copy of the petition, schedule, order of adjudication, &c. 44 shall at all times be admitted in all courts whatever, as adflicient evidence of the same, does not take away the right of producing in evidence the original order of adjudication procared from the court.

Tindal, C. J. (in summing up) said, "There are only two questions for your consideration, first, whether this bill of exchange was given to satisfy an old debt which had been barred by a discharge under the Insolvent Debtors' Act; and, secondly, whether, if it were so, it was taken by Northam for a valuable consideration bona fide, and for his own purposes, without any concert with Hudson the drawer. any concert with Hudson the drawer. As to the first point the evidence is quite clear. In point of principle, if the statute only had the effect of protecting persons who have been discharged under its provisions from being sued by the individual to whom a new security for an old debt was given, it would but ill provide for its intention; for a third person might stand by and see the security given, and then take it and sue upon it. Therefore such a security remains as it were with a mark upon it, unless it is taken by a third person innocently, and in the ordinary exercise of the concerns of business. The question for you on this part of the case is, whether Mr. Northam and Mr. Hudson are distinct persons, or acting in concert in this transaction. With respect to the state of intoxication in which the defendant is said to have been when he accepted the bill, I do not think that

is for you to consider, because I think it would be no answer, unless the plaintiff were shewn in some way or other to be conusant of such airuation. In order to entitle the plaintiff to recover, you must be satisfied that he gave value for the bill, and that it was not intended that it should be handed back in the event of the action's not succeeding: you must be satisfied that he took it bona fide for his own purposes, without being conscious of any defect in the transaction—as a common discount—as man would deal with man in the ordinary transactions of life. It appears that Hudson being asked, whether he told Northam who Latouche was, made this reply, that Northam knew that before. Taking all the facts of the case together, you will ask yourselves whether this bill was taken by the plaintiff (he having paid full value for it) with a knowledge of the latent defect in the title, or the contrary, and according as your opinion is upon that point, you will find your ver-dict for the plaintiff or the defendant." Verdict for the defendant.

(n) Philpot v. Aslett, 2 Dowl. P. C. 669; 4 Tyrw. 729; 1 C., M. & R. 85, S. C. See Best v. Barker, 8 Price, 533; supra, note (k).

(o) Murray v. Reeves, 8 Bar. & Cres. 421; ante, 93, note (p); and Rogers v. Kingston, 10
Moore, 97; 2 Bing. 441, S. C. An insolvent debtor applied for his discharge under the statute 1 Geo. 4, c. 119, and gave a creditor who threatened to oppose him a promissory note for the amount of his debt; and he accordingly withdrew his opposition; and the insolvent after his discharge was arrested on the note, but settled the action by giving a warrant of attorney for the debt and costs, payable by instalments. The court set aside the warrant of attorney, and ordered an instalment paid by the insolvent to be returned to him, on the ground that the note and warrant of attorney were contrary to the policy of the statute, and operated as a fraud on the other creditors. And the same point was decided under the present Insolvent Act, 7 Geo. 4, c. 57; ante, 93. And see Horn v. lon, 4 Ad. & El. 78; 1 Nev. & Man. 627, S. C.; ante, 788, note (u).

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## PART THIRD.

### OF THE CRIMINAL LAW

RELATING TO BILLS OF EXCHANGE, PROMISSORY NOTES, BANK NOTES, AND CHECKS.

IT is proposed in this division to take a concise view of the CRIMINAL LAW respecting Bills, Notes, and Checks. First, as relates to the Forgery of Bills, &c.; and Secondly, as relates to obtaining Bills, &c. by Larceny, Embezzlement, and False Pretences.

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### \*CHAPTER I.

# OF THE FORGERY OF BILLS, NOTES, AND CHECKS, AND OFFENCES OF THAT NATURE.

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### I. OF THE ENACTMENTS AGAINST FORGERY.

Enactments against Forgery.

THE existing statutes relating to the forgery of bank notes, bills of exchangepromissory notes, and checks, or orders for payment of money, are the 9 Geo. 4, c. 32, s. 2, (which enables the party attempted to be defrauded to be a witness in support of an indictment for forgery,) and the 11 Geo. 4 and 1 Will. 4, c. 66, which in section 31 repeals, after the 1st July, 1930, the prior acts 8 & 9 Will. 3, c. 20, s. 36, relating to bank notes; the 2 Geo. 2, c. 25, relating to notes and other securities for money (except section 2, relating to perjury); the 7 Geo. 2, c. 22, relating to acceptances of bills; the 15 Geo. 2, c. 13, s. 11, relating to bank notes; the 13 Geo. 3, c. 79, relating to bank notes; the 18 Geo. 3, c. 18, relating to acceptances; the 41 Geo. 3, c. 49, relating to the forgery of bank notes, bank bills, and bank post bills; the 31 Geo. 3, c. 57, relating to banker's notes and bills; the 43 Geo. 3, c. 139, ss. 1 and 2, relating to foreign bills, notes, and orders for payment of money; the 45 Geo. 3, c. 89, relating to the punishment of forgery of bank notes, bills, and other securities; the 48 Geo. 3, c. 1, s. 9, relating to Exchequer bills; and the 52 Geo. 3, c. 138, relating to bank

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notes and bills. Before this repealing act, the principal statutes in force re- I. Enactlating to bills of exchange and notes, were the 2 Geo. 2, c. 25, s, 1, (made ments perpetual by 9 Geo. 2, \*c. 18); the 31 Geo. 2, c. 22, s. 78, extending the Forgery. 2 Geo. 2, to forgery, with intent to defraud any corporation; the 7 Geo. 2, c. [ \*765] 22, and 18 Geo. 3, c. 18, and the consolidating Act, 45 Geo. 3, c. 89, s. 1.

The above act, 11 Geo. 4 and 1 Will. 4, c. 66, is intituled, "An act 11 Geo. 4. for reducing into one act all such forgeries as shall henceforth be punished and I Will.

4, c. 66. with death, and for otherwise amending the laws relative to forgery." The first section enacts, that no forgeries or other offences of that nature, which were then capital, shall continue so unless expressly made capital by that act, and that all forgeries theretofore capital, and not declared so by that act, shall be punished only with transportation or less punishment, with a reservation of offences relating to the coin. This statute, however, so far as regards the punishment of death, has since been altered by the 2 & 3 Will. 4, c. 123, and 7 Will. 4 and 1 Vict. c. 84, the former taking away capital punishment in all cases of forgery, except the forgery of wills and certain powers of attorney, and substituting transportation for life; and the latter altogether abolishing capital punishment in such cases, without any exception, and substituting transportation for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years.

The third section of 11 Geo. 4 and 1 Will. 4, c. 66, enacts, "That if Forging an any person shall forge or alter, or shall offer, utter, dispose of, or put off, Bill, Eaknowing the same to be forged or altered, any exchequer bill or exchequer chequer debenture, or any indorsement on or assignment of any exchequer bill or Debenexchequer debenture, or any bond under the common seal of the United India Company of Merchants of England trading to the East Indies, commonly Bond, called an East India bond, or any indorsement on or assignment of any Bank Note, Will, Bill East India bond, or any note or bill of exchange of the Governor and Com- of Expany of the Bank of England, commonly called a bank note, a bank bill change, of exchange, or a bank post bill, or any indorsement on or assignment Note, or of any bank note, bank bill of exchange, or bank post bill, or any will, tes- Warrant or tament, codicil, or testamentary writing, or any bill of exchange, or any Order for promissory note for the payment of money, or any indorsement on or assign- Payment ment of any bill of exchange or promissory note for the payment of money, capital. or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, with intent, in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death(a) as a felon."

Sect. 4 enacts, "That where by any act now in force any person is made If any inliable to the punishment of death for forging or altering, or for offering, ut-however tering, disposing of, or putting off, knowing the same to be forged or altered, designatany instrument or writing designated in such act by any special name or de- ed, is in Law a Bill scription, and such instrument or writing, however designated, is in law, a of Exwill, testament, codicil, or testamentary writing, or bill of exchange or a change, promissory note for the payment of money, or an indorsement on or assignment of a bill of exchange or promissory note for the payment of money, or such Inan acceptance of a bill of exchange, or an undertaking, warrant, or order for strument the payment of money, within the true intent and meaning of this act, in eve- may be in-

dicted under this AcL

(a) But see now 2 & 3 Will. 4, c. 123, and 7 Will. 4 and 1 Vict. c. 84, supra.

I. Enactments against Forgery.

11 Geo. 4 and 1 Will. 4, c. 66. Forging a Deed, Bond, Receipt for Money or Goods, or an accountable an Order for Delivery of Goods, Note, or Bill; Transpor-

session, forged Bank Notes; Transportation for Fourteen Years.

tation for

Life, &c.

Making or having, without Authority, any Mould for making the Words " Bank of England" ni eldiaiv the Substance, or Lines, &c., or selling such Psper; Transportation for Fourteen Years. [ \*767]

ry such case the person forging or altering such instrument or writing, or \*offering, uttering, disposing of, or putting off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this act, and punished with death (b) accordingly."

Sect. 10 enacts, "That if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, bond, or writing obligatory, or any court-roll or copy of any courtroll relating to any copyhold or customary estate, or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for payment of money, or any warrant, order, or request for the delivery or transfer of goods, or for Receipt, or the delivery of any note, bill, or other security for the payment of money, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years or less than two years."

Sect. 12 enacts, "That if any person shall, without lawful excuse, the Knowingly proof whereof shall lie upon the party accused, purchase or receive from any purchasing other person, or have in his custody or possession, any forged bank note, bank or receiving, or have bill of exchange; or bank post bill, or blank bank note, blank bank bill of exing in Pos- change, or blank bank post bill, knowing the same respectively to be forged, every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years."

Sect. 13 enacts, "That if any person shall, without the authority of the Governor and Company of the Bank of England, to be proved by the party accused, make or use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, any frame, mould, or instrument for the making of paper with the words 'Bank of England' visible in the substance of the paper or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount, expressed in a word or words Paper with in Roman letters, visible in the substance of the paper; or if any person shall, without such authority, to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession, any paper whatsoever with the words 'Bank of England' visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire for making per, or any paper with curved or waving bar lines, or with the laying wave Paper with lines thereof in a waving or curved shape, or with any number, sum, or curved bar amount, expressed in a word or words in Roman letters, appearing visible in the substance of the paper; or if any person, without such authority, to be proved as aforesaid, shall, by any art or contrivance, cause the words 'Bank of England' to appear visible in the substance of any paper, or cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed; every such offender shall be guilty of felony, and, being \*convicted thereof, shall be transported beyond the seas for the term of fourteen years."

(b) But see now 2 & 8 Will. 4, c. 123, and 7 Will. 4 and 1 Vict. c. 84, ante, 765.

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Sect. 14 provides, "That nothing herein contained shall prevent any per- I. Enactson from issuing any bill of exchange or promissory note having the amount ments thereof expressed in guineas, or in a numerical figure or figures denoting the Forgery. amount thereof in pounds sterling appearing visible in the substance of the Proviso as paper upon which the same shall be written or printed, nor shall prevent any to Paper paper upon which the same shall be written of printed, not shall proven us, person from making, using, or selling any paper having waiving or curved used for lines, or any other devices in the nature of water-marks, visible in the sub-Exchange, stance of the paper, not being bar lines or laying wire lines, provided the &c. same are not so centrived as to form the ground-work or texture of the paper, or to resemble the waiving or curved laying wire lines or bar lines, or the water-marks of the paper used by the Governor and Company of the Bank of England."

Sect. 15 enacts, "That if any person shall engrave or in anywise make Engraving upon any plate whatever or upon any wood, stone, or other material, any on any promissory note or bill of exchange, or blank promissory note or blank bill any Bank of exchange, or part of a promissory note or bill of exchange, purporting to Note, be a bank note, bank bill of exchange, or bank post bill, or blank bank note, Blank Bank blank bank bill of exchange, or blank bank post bill, or part of a bank note, Note, &c., bank bill of exchange, or bank post bill, without the authority of the Gover- or maing or nor and Company of the Bank of England, to be proved by the party accus-ed; or if any person shall use such plate, wood, stone, or other material, or &c., or utany other instrument or device, for the making or printing any bank note, tering or bank bill of exchange, or bank post bill, or blank bank note, blank bank bill having Paof exchange, or blank bank post bill, or part of a bank note, bank bill of ex- which a change, or bank post bill, without such authority, to be proved as aforesaid; Blank or if any person shall, without lawful excuse, the proof whereof shall lie on Bank the party accused, knowingly have in his custody or possession any such shall be plate, wood, stone, or other material, or any such instrument or device; or printed, if any person shall, without such authority, to be proved as aforesaid, know- without ingly offer, utter, dispose of, or put off any paper upon which any blank bank Transpornote, blank bank bill of exchange, or blank bank post bill, or part of a bank tation for note, bank bill of exchange, or bank post bill, shall be made or printed; or Fourteen if any person shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any such paper; every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years."

Sect. 16 enacts, "That if any person shall engrave or in anywise make Engraving on any upon any plate whatever, or upon any wood, stone, or other material, any Plate, &c., word, number, figure, character, or ornament, the impression taken from any Word, which shall resemble, or apparently be intended to resemble, any part of a or Ornabank note, bank bill of exchange, or bank post bill, without the authority of ment rethe Governor and Company of the Bank of England, to be proved by the sembling party accused; or if any person shall use any such plate, wood, stone, or a Bank other material, or any other instrument or device, for the making upon any Note, &c., paper or other material the impression of any word, number, figure, character, or using or having any or ornament, which shall resemble, or apparently be intended to resemble, such Plate, any part of a bank note, bank bill of exchange, or bank post bill, without &c., or utsuch \*authority, to be proved as aforesaid; or if any person shall, without tering or lawful excuse, the proof whereof shall lie on the party accused, know-paper on ingly have in his custody or possession any such plate, wood, stone, which or other material, or any such instrument or device; or if any person there shall shall, without such authority, to be proved as aforesaid, knowingly, [\*768]

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offer, utter, dispose of, or put off any paper or other material upon which there shall be an impression of any such matter as aforesaid; or if any person shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper or other material upon pression of which there shall be an impression of any such matter as aforesaid; every any Word, such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years."

Sect. 17 enacts, "That if any person shall make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any person or persons, body corporate, or company carrying on the business of bankers, (other than and except the Bank of Englands) appearing visible in the substance of the paper, without the authority of such person or persons, body corporate, or company, the proof of which authority shall lie on the party accused; or if any person shall, without lawful excuse, the proof whereof shall lie on the the party accused, knowingly have in his custody or possession any such frame, mould, or instrument; or if any person shall, without such authority, to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession, any paper in the substance of which the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers shall appear visible; or if any person shall, without such authority, to be proved as aforesaid, cause the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers to appear visible in the substance causing the of the paper upon which the same shall be written or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term any Paper; not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years, nor less than one year."

Sect. 18 enacts, "That if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange or promissory note for the payment of money, or any part of any bill of exchange or promissory note for the payment of money, purporting to be the bill or note, or part of the bill or note, of any person or persons, body corporate, or company carrying on the business of bankers, (other than and except the Bank of England,) without the authority of such person or persons, body corporate, or company, the proof of which authority shall lie on the party accused; or if any person shall engrave or make upon any plate whatever, or upon any wood, stone, or other material, any word or words resembling, or apparently intended to resemble, any subscription subjoined to any bill of exchange or promissory note for the payment of money issued by any such person or persons, body corporate, or \*company carrying on the business of bankers, without such authority, to be proved as aforesaid; or if any person shall, without such authority, to be proved as aforesaid, use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, any plate, wood, stone, or other material upon which any such bill or note, or part thereof, or any word or words resembling, or apparently intended to resemble, such subscription, shall be engraved or made; or if any person shall, without such such Bill or authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off, or shall, without lawful excuse, to be proved as aforesaid, knowing ly have in his custody or possession any paper upon which any part of such

ments against Forgery. be an Im-Number, & c.: Transportation for Fourteen Years. Making or having in Possession any Mould for manufacturing Paper, with the Name of any Bankers appearing in the substance; manufac. turing or having such Pa-

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Transportation for Fourteen Years, Engraving on any Plate, &c. any Bill of Exchange or Promissory Note of any Bankers, or any Words resembling the Subscription subjoined thereto, or using any such Plate, or uttering or having any Paper

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bill or note, or any word or words resembling, or apparently intended to resem- I. Enactble, any such subscription, shall be made or printed; every such offender against shall be guilty of felony, and, being convicted thereof, shall be liable, at the Forgery. discretion of the court, to be transported beyond the seas for any term not be printed; exceeding fourteen years nor less than seven years, or be imprisoned for any Transporterm not exceeding three years nor less than one year."

Sect. 19 enacts, "That if any person shall engrave or in anywise make &c.(c). upon any plate whatever, or upon any wood, stone, or other material, any Engraving bill of exchange, promissory note, undertaking, or order for payment of Plates, &c. money, or any part of any bill of exchange, promissory note, undertaking, for Foror order for payment of money, in whatever language or languages the same or Notes: may be expressed, and whether the same shall or shall not be or be intended to using or be under seal, purporting to be the bill, note, undertaking, or order, or part of having the bill, note, undertaking, or order, of any foreign prince or state, or of Plates; or any minister or officer in the service of any foreign prince or state, or of uttering any body corporate, or body of the like nature, constituted or recognized any Paper on which by any foreign prince or state, or of any person or company of persons any part of resident in any country, not under the dominion of his majesty, without the such forauthority of such foreign prince or state, minister or officer, body corporate eign Bill or or body of the like nature, person or company of persons, the proof of which be printed; authority shall lie on the party accused; or if any person shall, without such Transporauthority, to be proved as aforesaid, use, or shall, without lawful excuse, to tation for Fourteen be proved by the party accused, knowingly have in his custody or possession, Years, &c. any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking, or order, or any part thereof, shall be engraved or made; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession, any paper upon which any part of such foreign bill, note, undertaking, or order, shall be made or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year."

Sect. 23, after reciting, "That whereas by an act passed in the fifth year The Punof the reign of Queen Elizabeth, intituled, 'An act against forgers of salse 5 Eliz. c. deeds and writings,' it is, amongst other things, provided, that every person 14, so far convicted of any of the offences first enumerated in that act, shall pay to have been have been the party grieved his double costs and damages, and shall forfeit to the crown adopted by the whole issues of his lands and tenements \*during his life, and shall also other Acts, suffer imprisonment during his life: And whereas there are certain acts by shall be rewhich persons convicted of certain offences mentioned in those acts, are and other subjected to the same pains and penalties as are imposed by the said act of Punish-Queen Elizabeth for the offences first enumerated in that act: And whereas ments subthe said act of Elizabeth is hereinafter repealed, and it is expedient to substitute other punishments in lieu of the punishments of that act, so far as the same have been adopted by any other act," enacts, "That every person who shall, after the commencement of this act, be convicted of any offence which is now subjected, by any act or acts, to the same pains and penalties as are imposed by the said act of Queen Elizabeth for any of the offences

Fourteen Years,

(c) This section applies to bills and notes of British colonies; Reg. v. Hannon, 9 C. & P. bankers carrying on business as such in the 11, post, 779, note (y).

I. Enactments against Forgery.

first enumerated in that act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year."

All Forgers and Utterwhere they are apprehended or tody.

Sect. 24 enacts, "That if any person shall commit any offence against ers may be this act, or shall commit any offence of forging or altering any matter whattried in the soever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law or by virtue of any statute or statutes made, or to be made, the offence of every such offender may be are in Cus- dealt with, indicted, tried, and punished, and laid and charged to have been committed, in any county or place in which he shall be apprehended or bein custody, as if his offence had been actually committed in that county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried."

As to Principals in the second Degree sories.

Sect. 25 enacts, "That in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the and Acces- principal in the first degree is by this act punishable(c), and every accessory after the fact to any felony punishable under this act, shall, on conviction be liable to be imprisoned for any term not exceeding two years."

The Court may order hard Labor or solitary Confinement for Offences Act.

Sect. 26 enacts, "That where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole against this or any portion or portions of such imprisonment, as to the court in its discretion shall seem meet."

As to Offences committed at Sea.

Sect. 27 enacts, "That where any offence punishable under this act shall be committed within the jurisdiction of the admiralty, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other offence committed within that jurisdiction."

Rule of Interpretation as to criminal Possession. and as to Parties intended to be defrauded. r \*771 ]

\*Sect. 28 enacts, "That where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act; and where the committing any offence with intent to defraud any person whatsoever is made punishable by

(c) But see now 2 & 3 Will. 4, c. 123; 7 Will. 4, & 1 Vict. c. 84; ante, 65.

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this act, in every such case the word 'person' shall throughout this act be I. Enactdeemed to include his Majesty or any foreign prince or state, or any body ments corporate, or any company or society of persons not incorporated, or any rorganist person or number of persons whatsoever who may be intended to be defrauded by such offence, whether such body corporate, company, society, person, or number of persons shall reside or carry on business in England or elsewhere, in any place or country, whether under the dominion of his Majesty or not; and it shall be sufficient in any indictment to name one person only of such company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person so named, and another or others, as the case may be."

Sect. 29 enacts, "That this act shall not extend to any offence commit- Act not to ted in Scotland or Ireland."

Scotland or

Sect. 30 enacts, " That where the forging or altering any writing or mat- But to apter whatsoever, or the offering, uttering, disposing of, or putting off any writ-ing or matter whatsoever, knowing the same to be forged or altered, is in Uttering in this act expressed to be an offence, if any person shall, in that part of the England United Kingdom called England, forge or alter, or offer, utter, dispose of, Documents or put off, knowing the same to be forged or altered, any such writing or purporting to be made matter, in whatsoever place or county out of England, whether under the do- or actually minion of his Majesty or not, such writing or matter may purport to be made made out or may have been made, and in whatever language or languages the same or of England, any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made or had been made in England; and if any person shall in England forge or alter, or offer, utter, Forging or dispose of, or put off, knowing the same to be forged or altered, any bill of Uttering in exchange or any promissory note for the payment of money, or any indorseEngland ment on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, or any deed, bond, or Notes, writing obligatory for the payment of money, (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for to be paythe payment of money together with some other purpose), in whatever able out of place or country out of England, whether under the dominion of his Maj- England. esty or not, the money payable or secured by such bill, note, undertaking, warrant, order, deed, bond, or writing obligatory may be or may purport to be payable, and in whatever language or languages the same respectively or any part thereof may be expressed, and whether such bill, note, \*undertaking, warrant, or order be or be not under seal, every such [ \*772] person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England."

Sect. 31, after repealing several enumerated acts, provides, "That if any Province person, who shall, before or upon the said 20th day of July, have committed any offence against any of the several acts hereby repealed as aforesaid, shall, after the commencement of this act, be convicted of the same, and such offence shall have been made punishable with death by any of the said several acts, but shall not be made punishable with death by this act, in every such case

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4, c. 66.

the person convicted of such offence shall not suffer the punishment of death, but shall, in lieu thereof, be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding and I Will. four years nor less than two years."

2 & 3 Will. 4, c. 123, Not necesforth Copy or Facsimile of forged Instrument in Indictment (d).

2 & 3 Will. 4, c. 123, sect. 3, "And in order to prevent justice from being defeated by clerical or verbal inaccuracies, be it enacted, that in all informations or indictments for forging or in any manner uttering any insary to set strument or writing, it shall not be necessary to set forth any copy or facsimile thereof, but it shall be sufficient to describe the same in such manner as would sustain an indictment for stealing the same; any law or custom to the contrary notwithstanding."

Language in what respect asme as before, or otheravise.

It will be observed, that the offence of forging or knowingly uttering, &c. a forged instrument, is described in the present act by nearly and substan-Observa-tions on 11 tially the same words as in the former acts, and consequently the decisions Geo. 4 & 1 upon those acts will in general be applicable to the present, and it might Will. 4, c. suffice to refer to the former criminal works on the subject(e). It must, however, be kept in view, that the terms of the former acts were, "shall of this Act falsely make, forge, counterfeit, or alter, or shall offer, dispose of or put away any false, forged, counterfeited, or altered bill of exchange, or shall utter or publish as true any false, &c.(f)," whereas in the present act the words are. "shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any," &c. omitting the words "falsely make," and "counterfeit;" consequently those words should be omitted in an indictment founded on the last act, and the words "put off," are to be used instead of "put away," in describing the uttering any forged instrument. The 4th section also of the present act declares, "that if any instrument, however designated, is in law a bill of exchange, &c. the person forging or uttering such instrument may be indicted under this act."

As to the Instrument forged. J \*773]

The description in the statute 11 Geo. 4 and 1 Will. 4, c. 56, s. 3, of the instrument or act forged is "any note or bill of exchange of the governor and company of the Bank of England, commonly called \*a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, bank bill of exchange, or bank post bill," or "any bill of exchange, or any promissory note, for the payment of money, or any indorsement on an assignment of any bill of exchange or promissory note for the payment of money," "or any acceptance of any bill of exchange," "or any undertaking, warrant, or order for the payment of money," with intent, &c.; and the 4th section provides, "that if any instrument, however design nated, is in law a bill of exchange or promissory note for the payment of money, or an indorsement on or assignment of a bill or note, or an acceptance or an order for the payment of money, within the true intent and meaning of this act, he may be indicted accordingly."

Decisions upon or applicable to 11 Geo. 4. and 1 Will. 4, c. 66.

A bill upon the commissioners of the navy for pay was held a bill of ex-

(d) See Rex v. Balls, 7 Car. & P. 426, 427; and ib. 430, 431, note (b), that this act is confined to English bills and notes, post, 791,

(e) See Russell's Crim. Law; Chitty's Crim. Law, 2d edit. 1022 to 1080, the whole of which. as relates to bills, notes, and checks, is still applicable, except as to the punishment.

(f) The words in the 2 Geo. 2, c. 25, s. 1, and 7 Geo. 2, c. 22, and 45 Geo. 3, c. 89, were. "shall falsely make and counterfeit," which are omitted in the present.

change within 2 Geo. 2, c. 25, although it was not such an instrument as I. Enactthe 35 Geo. 3, c. 94, warranted(g); and though uttering a forged note of a menta Scotch corporation, such as the British Linen Company, was held not an Forgery. offence within the meaning of the 2 Geo. 2, c. 25, it has been considered Decisions that it might be within the 45 Geo. 3, c. 89, s. 8(h). The forging or ut- upon or aptering in England of bills and notes, in whatever language, payable out of plicable to England, and the aiding, abetting, or counselling such crime, is declared as and I Will. criminal and punishable as if the instrument were payable in England(i).

Under the former acts it was held (and such decision appears to be applicable to the present) that the instrument forged must be seemingly genuine, and (with the exception of the stamp) have been so framed, as if genuine, to be valid, and operate against and bind the supposed parties, as a bill, note, &c. and that where the false instrument does not carry on the face of it the semblance of a legal instrument, for which it was counterfeited, or where it is illegal in its very frame, the offence will not be a forgery (k); as if the forged bill or note be on the face of it payable on a contingency (l), or out of a particular fund(m), or for the performance of any other act than the payment of money, as a promissory note engaging "to take this note as 11. 10s. on demand in part of a 21. note,"(n) or in the alternative for the payment of money, or delivering bank notes or bonds(0), or for the payment of less than 51., and not made pursuant to the statute 17 Geo. 3, c. 30, regulating the form of small bills and notes(p). So the false making or uttering a note without any maker's name subscribed is not forgery (q). So where a man was indicted for forging an instrument, which was in one count treated as a bank note and in another as a promissory note, in the following form, "I promise to pay J. W. Esq. or bearer ten pounds, London, March 4, 1776. For Self and Company, of my bank in England 101., entered, John Jones," Lord Mansfield held that this offence was not forgery; and it will be observed, that here no person appeared to subscribe the note as maker, John Jones' name being \*merely stated as the party entering the note(r). So where [\*774] the prisoner was convicted of a misdemeanor, as for an offence at common law for disposing of a forged promissory note as follows, "Blackburn Bank, I promise to take this as thirty shillings on demand in part of a two-pound note, value received, for C. B. and Co., R. C.;" the judges held the conviction wrong, for this instrument could not in any legal sense be denominated a promissory note, for it was not for the payment of money, but a promise to take that note in payment, and as the consideration was not expressed, it was nudum pactum(s).

So omissions in a forged bill or note, in other respects legal and sufficient, have been fatal to indictments for forgery; as where the prisoner drew a bill upon the treasurer of the navy, payable to ---, or order, and signed it in the name of a navy surgeon, it was held, that, to constitute an order for the payment of money, there must be a payee, and that a direction to pay -

M'Kay, Russ. & Ry. 71.

<sup>(</sup>g) Rex v. Chisholm, Russ. & Ry. 297.
(h) Rex v. M'Kay, Russ. & Ry. 71.
(i) 11 Geo. 4, & 1 Will. 4, c. 66, s. 30; ante, 771; Rex v. Kirkwood, 1 Mood. C. C. 311; post, 778, note (r). See the former doubts in Rex v. Dick, 1 Leach, 68; Rex v.

<sup>(</sup>k) 2 Russ. Crim. Law, 345, 2d edit. (1) Ante, 184. But evidence of a parol contract contrary to the terms of the bill will not be admissible in a civil case; and semble that the same rule would apply to criminal cases; Mosely r. Hanford, 10 Bar. & Cres.

<sup>(</sup>m) Ante, 137.

<sup>(</sup>n) Rex v. Burke, Russ. : Ry. 496. (o) Rex v. Wilcox, 2 Russ. Crim. Law, 456,

<sup>2</sup>d edit. (Chit. j. 626); Russ. & Ry. 50, S. C.
(p) Moffat's Case, 1 Leach, 431; 2 East's
P. C. 954, (Chit. j. 505); Kex r. Burke, Russ. & Ry. 496.

<sup>(9)</sup> Rex r. Pateman, Easter, 1821; Russ. & Ry. 455; Rex r. Jones, Dougl. 390, 4th edit. (Chit. j. 405).

<sup>(</sup>r) Rex v. Jones, Dougl. 390, 4th edit.; ante, 773, note (q).

<sup>(</sup>s) Rez r. Burke, Russ. & Ry 496.

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I. Enectments aga inst Forgery. Decisions plicable to 11 Geo. 4 and 1 Will. 4. c. 66.

or order, was not sufficient, and the instrument invalid, though we have seen that for civil purposes any bonû fide holder might insert his own name as payee(t). This case appears to proceed on the same ground that forging a will of lands, with only two witnesses, is not an offence, because without three witnesses it was inoperative as respects land(u). But it has been held, that it is not necessary that the forged instrument should exactly resemble and have the appearance of a real one, perfect in all formal respects, provided it be substantially correct x). It is sufficient, to subject a prisoner to an indictment for forgery, that the instrument was calculated to impose on mankind in general, though an individual skilled in that kind of writing would Thus, if it appear that several persons have probably detect its fallacy. taken forged bank notes as good ones, the offender will be deemed guilty of forging them, though a person from the bank should swear that they would never have imposed on him, being in several respects out of the usual form(y); and it has been holden, that a bank note may be counterfeited, though the paper do not contain the usual water-mark(z); for in forgery there need not be an exact resemblance, but it is sufficient if the instrument counterfeited be prima facie fitted to pass for the writing which it represents, and deceives persons using ordinary observation(a); and therefore where a forged bank note was in this form-" I promise to pay Mr. I. C. or bearer, on demand, the sum of fifty," omitting the word pounds, but in the margin was inserted "£fifty," the prisoner being convicted of this forgery, a majority of the twelve judges held the conviction right, and that it was a matter to be left to the jury, whether the instrument purported to be a note for fifty pounds, or any other sum(b). And in order to constitute forgery on a promissory note, it is not necessary that it should contain the words "or order," rendering it negotiable (c); and the forging a bill payable to the prisoner's own order, and uttering it without indorsement and without its appearing to have been accepted, is a complete offence (d); and uttering a forged bill, importing to be payable to the drawer's order, with intent to defraud, is a complete offence, though there be no \*indorsement upon it purporting to be the So an instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum at a certain time "without acceptance" is a bill of exchange, and may be so described in an indictment for forgery (f). But it seems if the prisoner write another person's name across a blank stamp, on which, after he is gone, a third person who is in league with him, writes a bill of exchange, this is not a forgery of the acceptance of a bill of exchange by the prisoner(g).

What a Warrant or Order

for Pay-

ment of

Money,

&c.

As to what constituted "a warrant or order for payment of money, or delivery of goods," within the meaning of the 7 Geo. 2, c. 22, (and which will be still applicable to the 3d and 10th sections of the present act) it has been holden, that a draft or check upon a banker is a warrant or order for the payment of money within the statute(h); and even a bill of exchange

(1) Rex v. Richards, Russ. & Ry. 193, (u) Wall's case, 2 East's P. C. 953.

(x) Collicott's case, 2 Leach, 1048. (y) Rex v. Hoost, 2 East's P. C. 950.

(z) Rex v. Elliot, 1 Leach, 175; 2 East's P. C. 951, (Chit. j 501). (a) Id. Ibid.; Rex v. Collicott, 2 Leach,

(b) Id. Ibid.

(c) Rex r. Box, Russ. & Ry. 300; 6 Taunt 325, (Chit. j. 941).

(d) Rex v. Birkett, Russ. & Ry. 86, (Chit. j. 894,) Bayley, j. dissentiente.
(e) Rex v. Wicks, Russ. & Ry. 149, Bayley,

J. dissentiente.

(f) Reg. v. Kinnear, 2 Mood. & Rob. 117. g) Reg. v. Cooke, 8 Car. & P. 582.

(h) Rex v. Willoughby, 2 East's P. C. 944.

<sup>1048; 4</sup> Taunt. 300; Russ. & Ry. 212, 229, S. C.; Rex v. Jones, 2 Leach, 204, (Chit. j. 405); 3 Chitty's Crim. Law, 2d edit. 1085,

has been so holden(i); so an order to pay "all my prize money due to me I. Enactfor my services on board his Majesty's ship Leander," without specifying ments any particular sum, was holden to be within the same act(k). A letter of Forgery. credit, on which the correspondents of the writer of it, having funds in his Decisions or their possession, apply them to the use of the party in whose favour it is upon or apgiven, is a warrant for the payment of money within the meaning of the stat-plicable to ute 1 Will. 4, c. 66, s. 3(1). The order must appear to have been signed 11 Geo. 4 by some person who might command the payment of the money, and to call 4, c. 66. on a person who is compellable to obey it(m). And therefore an order to a tradesman, to let the bearer have certain goods, which it was optional with Warrant the tradesman to obey or not, was holden not to be within the act(n). or Order But a forged draft on a banker, in a fictitious name, or in the name of a per- for Pay-But a lorged draft on a banker, in a jicilious name, or in the name of a person who never kept cash with the banker, is a warrant or order within the Money, meaning of the act, for it imports upon the face of it to be an order by a per- &c. son having authority to make it(o). Though where a party obtains goods upon his own draft on a banker with whom he does not keep cash, he can only be indicted for obtaining goods by false pretences, or (where several have been concerned) for a conspiracy(p). It was formerly considered necessary that the order should be addressed to the person having possession of the money or goods(q), but recent decisions have established that such address is unnecessary (r).

Before the 11 Geo. 4 and 1 Will. 4, c. 66, it was held, that the document forged must seem or appear to give to the bearer a disposing power \*over the property which he demands; that it must assume to transfer the right at least of the custody of the money or goods to the offender, and not be a mere request to a third person to deliver the articles, which he might refuse if he pleased(s). But the 10th section of that statute expressly uses the word "request," and it has been held that a forged paper addressed to a tradesman, and purporting to be signed by one of his customers in the following form-" Please to let bearer, William Gof, have spillshoul and grafting tool for me," is a forged request for the delivery of goods within that act(t). So a forged paper in the following form,—"Mr. T.—Please to let the lad have a hat about 9s., and I will answer for the money. C. B.," is a forged request for the delivery of goods, and is not the less so be-

(i) Rex v. Shepherd, 1 Leach, 226, (Chit. j. 505).

(k) Rex v. M'Intosh, 2 East's P. C. 942; 2 Leach, 883, (Chit. j. 628); post, 777, note (e); and see Jones's case, post, 777, note (d). And see an order for payment of seaman's wages after ship's departure, Rex v. Bamfield, 1 Mood. C. C. 416.

(1) Reg. v. Raake, 8 Car. & P. 626. The elerk to whom this letter was presented in his evidence said, "When such a paper as this is brought to us from a correspondent who has money in our hands, we pay the person bringing it whatever he claims on it, to the extent named in it; if he does not require the whole we write on the letter whatever we pay; we consider a document of this sort exactly the same as a bill drawn on us by a correspondent; we consider it equally obligatory on us to pay it."

(m) See Rex v. Clinch, 2 East's P. C. 938;

1 Leach, 540, S. C.

(n) Rex v. Williams, 1 Loach, 114; Rex v. Mitchell, Fost. 119; and see Rex v. Ellor, 1 Leach, 323, (Chit. j. 565); Rex v. Baker, 1 Mood. C. C. 231, (Chit. j. 1476). The party

should now be indicted under 7 & 8 Geo. 4. c. 29, s. 53. The pretended order of a magistrate must have the appearance of having been legally framed; Rex v. Rushworth, Russ. & Ry. 317; Rex v. Froud, Russ. & Ry. 389; post, 777.

(o) Rex r. Lockett, I Leach, 94, (Chit. i. 500); Rex v. Abraham, 2 East's P. C. 941.
(p) Rex r. Jackson, 3 Campb. 370, (Chit.

i. 845).

(q) Ref v. Clinch, 2 East's P. C. 938.

(r) Reg. v. Rogers, 9 Car. & P. 41; and cases, post, 776, note (t).

(s) See Mary Mitchell's case, Fost. 119; 1 Chitty's Crim. Law, 150, and id. note (f). But the 10th section of 11 Geo. 4 & 1 Will. 4, c. 66, uses the word "request;" ante, 766. Before this statute, counterfeiting a request did not amount to felony, but was a mere obtaining money or goods under false pretences; Rex v. Williams, 1 Leach, 114; 2 East's P. C. 937, S C.: Rex v. Ellor, 1 Leach, 328; 2 East's P. C. 938, (Chit. j. 565).

(1) Reg. r. James, S Car. & P. 292; and see Reg. v. Pulbrook, 9 Car. & P. 37.

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I. Enactments ngain**st** Forgery. Decisions upon or anplicable to 11 Gen. 4 and I Will. 4, c. 66. What a Warrant or Order for Payment of

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cause it may also be a forged undertaking for the payment of money within the third section of the act(u). Nor is it necessary that the instrument should be addressed to any particular person by name in order to constitute a request within that statute(v). The instrument, however, must import on the face of it to be a request; and if the words have not necessarily that effect, but are so understood in trade, there must, when the instrument is set out(w), be an innuendo to explain them(x). And although when an order is so drawn as to induce a belief in the person to whom it is uttered that it will be complied with, the offence is within the act, though it could no deceive the party on whom it was drawn; yet if it seems to leave the compliance optional, and applies rather to the favour than the justice of the person to whom it is addressed, it is not within the meaning of the statute, because the individual taking ought not to have placed any reliance on its credit(y). Thus a note as from an overseer of the poor to a tradesman, desiring him to deliver goods to the prisoner, is not an object of forgery within So where the prisoner drew a bill, " Please to pay on demand the act(z). 151.," and signed it with his own name, but it was not addressed to any one, and there were forged upon this instrument, when uttered, the words and signature, " Payable at Messrs. Masterman and Co., White Hart Court, William M'Inerheney;" and it appeared that M'Inerhenev kept cash at Masterman and Co.'s, who were bankers, the judges held this was not an order for payment of money, there being no special averments in the indictment that this was intended for an order, or that Masterman and Co. were bankers (a). Though we have seen, that to utter a foreign order on a banker with whom the person whose name is used has no cash, as a valid draft, is felony (b). constitute an order it must not merely be imperative in its terms, but it must be counterfeited in the name of one who assumes to have the disposing power over the things to be transferred, and not of a son or servant, unless expressly averred to have the control over the property in question(c). But it is not necessary that the goods should be specified in the order, [ \*777 ] \*so that to forge a paper in the name of a silversmith, for the redelivery of plate from Goldsmiths' Hall, in the words "Please to deliver my work to the bearer," is felony (d). Nor is it requisite that the order should be such a one as a particular statute requires, for to counterfeit a paper in the name of a seaman, for the payment of prize money, by a seaman, which is invalid as not being framed according to the directions of 32 Geo. 3, c. 34, s. 2, is Neither is it necessary that the instrument should be such as is commonly termed a warrant or order for the payment of money, but it will suffice if that be in reality its effect, so that a bill of exchange may be laid in these terms, though to call it by its usual denomination seems more accurate(f). By the 48 Geo. 3, c. 75, a justice of the peace may order the

treasurer of the county to pay every churchwarden, overseer, headborough,

or constable, the expenses he has incurred in burying any dead body that has

(u) Reg. v. White, 9 C. & P. 282. (v) Rex v. Carney, 1 Mood, C. C. 351; and see Rex v. Cullen, id. 300; Reg. v. Pulbrook, 9 Car. & P. 37.

w) But otherwise it will be mere matter of evidence, Reg. v. Rogers, 9 Car & P. 41; see post, 788, 790.

(x) Rex r. Cullen, 1 Mood. C. C. 300. (y) Rex v. Lockett, 1 Leach, 95, in notis,

(Chit. j. 500).

(z) Mary Mitchell's case, Fost. 119.

(a) Rex v. Ravenscroft, Russ. & Ry. 161; and see Rex v. Richards, id. 193; 2 Chit. Crim.

Law, 2d edit. 1032.

(b) Rex v. Lockett, 1 Leach, 94, (Chit. ) 500); ante, 775, note (o).

(c) Rex v. Clinch, 1 Leach, 540; 2 East's P. C. 938; and see Baker's case, 1 Mood. C. C. 231.

(d) Rex v. Jones, 1 Leach, 53, (Chit.) 405); and see M'Intosh's case, ants, 775, note (k).

(e) Rex v. Mackintosh, 2 Leach, 958, (Ch. j. **62**8).

(f) Rex v. Sheppard, 2 Leach, 883; 2 East's P. C. 942, 945, S. C.

been cast on shore; and where a justice's order was forged, stating that a I. Enactdead body had been cast on shore in the parish of A., that I. S. had ments made oath before the justice that he had laid out 31. 5s. in the burying him, Forgery. and requiring the treasurer to pay him the sum, it was held that this was a Decisions warrant or order for the payment of money within the 7 Geo. 2, though the upon or aporder did not state that I. S. was a churchwarden, &c.(g). But forging a plicable to magistrate's order to pay money will not be felony if the act of parliament and 1 Will. under which alone the magistrate had power to make it, required it to be 4, c. 66. under hand and seal, and it is under hand only, and if it is addressed to an individual on whom the magistrate has no power to make such order by the act(h). Nor is it any offence under the statute 1 Will. 4, c. 66, to forge an indorsement upon a warrant or order for the payment of money; neither if a party write on the back of a bill of exchange "Received for R. A." and sign his own name to it, is he guilty of forging a receipt within the provisions of that statute(i). It is clear, however, that the statute is not confined to orders made in the course of commercial transactions (j). many of the former objections as to the sufficiency of the warrant or order for the delivery of goods or money securities, will now be obviated by the 11 Geo. 4 and 1 Will. 4, c. 66, s. 10, which introduces the word "request(k)." With respect also to the warrant or order for the payment of money, it is to be observed, that the 3d section of that act uses the word "undertaking(1)." And it has been held that the forging of a paper by which What an the supposed writer promises to pay W. B. or order 100l. or such other Undertaksum not exceeding the same, as he may incur by reason of his becoming ing for Payment of one of the sureties to the sheriff of Y. for J. It. a sheriff's officer, is a Money. forging of an undertaking for the payment of money under the statute (m).

The 11 Geo. 4 and 1 Will. 4, c. 66, s. 10, makes it felony to forge a What a receipt for money or goods; and where a servant employed by her mistress Receipt for to pay tradesman's bills received from her a bill of a tradesman named Sad- Money. ler, together with the money to pay that and other bills, and she brought the bill again to her mistress with the words "paid \*Sadler" on it, the word [ \*778 ] Sadler being written with a small s, and there being no initial of the christian name of the tradesman; and the mistress stated that she believed the words to be a receipt, and that no application was made for the money afterwards: it was held, that the words "paid Sadler" imported a receipt or acquittance for the money, and were not merely a memorandum by the servant of her having paid the bill(n). So, although there be no such person as that whose receipt it purports to be(o). And if a high constable issue his precept for the payment of a county rate amounting to 31. 5s. 9d., and having received the moncy write a receipt at the bottom of the paper "Received the above rate, J. P.," and after that the sum 3l. 5s. 9d. in the precept be fraudulently altered to 3l. 15s. 9d., this is a forgery of a receipt within the statute, and may be laid with intent to defraud any rated inhabitant (by name) of the parish on which the rate is imposed "and others;" and the indictment need not set out the receipt, but may describe it under the stat-

(g) Rex v. Froud, Russ. & Ry. 389; 1 Brod. & B. 300; 3 Moore, 645, S. C.

(k) See ante, 766.

(1) Ante, 765.

<sup>(</sup>h) Rex v. Rushworth, Russ. & Ry. 317; 1 Stark. C. N. P. 896, S. C.; and see Donelly's case, 1 Mood. C. C. 438.

<sup>(</sup>i) Rex r. Arscott, 6 Car. & P. 408.

<sup>(</sup>j) Rex v. Mackintosh, 2 Leach, 883; 2 East's P. C. 942, 945, (Chit. j. 628).

<sup>(</sup>m) Reg. v. Reed, 8 Car. & P. 623. See Reg. v. White, 9 C. & P. 282; ante, 776, note (u); that a party may be indicted for forging a request, although the instrument be also an undertaking for the payment of inoney.
(n) Reg. v. Houseman, 8 Car. & P. 180.

<sup>(</sup>o) Rex v. Martin, 1 Mood. C. C. 483.

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against

Forgery.

Decisions

upon or applicable to

4, c. 66.

Foreign

Securities,

Bills, &c.

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CHAP. I.

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> a check o (:) See , (a) Rez Hall, 3 Star (6) Rex. 553): Teag ) 665): Hi 950; 1 T. F ce, tl.; ] Crim. Law. 1030 ln 167, Lord 1 The case of Tagas 97: Ald 589. a (e) H. ii (d) Cros

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ute 2 & 3 Will. 4, c. 123, s. 3, receipts being within the provisions of that statute, as well as instruments which are the subject of larceny; and the words "Received the above rate" sufficiently import a receipt without an innuendo to explain them (p).

As the prior acts appeared only to extend to inland bills of exchange, 11 Geo. 4 and 1 Will. the 43 Geo. 3, c. 139, made the counterfeiting or uttering any foreign bill, promissory note, or order for payment of money, a single felony, and punished it with transportation for fourteen years, sect. 1; and by the same act, engraving, or by any device making plates for the fabrication of any of the above instruments, for the first offence is made a misdemeanor, punishable with imprisonment for any time not exceeding six mouths, fine, or whipping; and for the second offence transportation for fourteen years, was directed, The forgery of a Prussian treasury note for one dollar was held to The 11 Geo. 4 and 1 Will. 4, c. 66, s. 30, now be within this act(q). provides for forgeries and uttering in England of any instrument to represent foreign securities, and subjects the offender to the same punishment as if the money had been payable or had purported to be payable in England(r).

When the Instrument may be treated as a Bill or Note.

We have seen that when it is doubtful whether the instrument be a bill of exchange or a promissory note, it may in a civil action be declared upon as But that where the forged instrument was in these words, "Neweither(s). port, Nov. 20, A. D. 1821, Two months after date, pay Mr. B. Hodday, or order, 281. 15s. value received, John Jones, At Messrs. Spooner and Co. bankers, London," five out of seven of the judges held, that a conviction of forging a promissory note could not be supported, and a pardon was recommended(t).

When the forged instrument is in any respect out of the usual form, it may be necessary to examine the authorities respecting the general requisites and forms of bills, notes, and checks (u), and of indorsements (v) and acceptances(w), which we have already very fully considered.

Forged Engrav-

With respect to the 18th section of 11 Geo. 4 and 1 Will. 4, c. 66, \*relating to engraving on any plate of any bill or promissory note of any bankers, it may be proper to observe, that it was held, under the prior act 41 Geo. 3, c. 57, that where a company carries on the business of bankers, although incorporated for a totally different purpose, that it was no offence under that act to have a plate for making bills of exchange in the name of such corporate company, unless it were averred and proved that it was with reference to the banking concern(x). It has been held, however, that the 18th section of the statute 11 Geo. 4 and 1 Will. 4, c. 66, is not confined to bankers in *England*, but applies to plates of promissory notes of persons carrying on the business of bankers in the British Colonies, &c. as in the province of Upper Canada(y).

(p) Reg. v. Vaughan, 8 Car. & P. 276. So the word "settled," with a name in full added, sufficiently denotes an acquaintance within the statute without further explanation; Rex v. Martin, 1 Mood. C. C. 483; post, 791, n. (d).

(q) Rex v. Goldstein, Brod. & B. 201; Russ.

& Ry. 478; 7 Moore, 1, (Chit. j. 1139).

(r) Ante, 771. Uttering in England a forged note payable in *Ireland* only, was within the forgery acts prior to this statute; Rex v. Kirkwood, 1 Mood. C. C 311.

(s) Ante, 131, 132.

(t) Rex v. Hunter, Russ & Ryan, 511; ante, 131, note (t).

(u) See ante, 126 to 194, and 511 to 532

(v) Ante, 224 to 237.

(w) Ante, 287 to 303. (x) Rex v. Catipodi, Russ. & Ry. 65.

(y) Reg. v. Hannon, 9 Car & P. 11.

In cases where a party has obtained goods, money, or bills of exchange for I. Enactpromissory notes, upon producing and delivering a forged instrument, which ments is so defective as to protect him from a prosecution for forgery, the party Forgery. defrauded may nevertheless indict him under the statute 7 & S Geo. 4, c. Decisions 29, for obtaining the goods, money, or bills, by false pretences(x), or for upon or apconspiracy, if several persons were concerned.

The total absence(a) of or defect(b) in the proper stamp which ought to 4, c. 66. have been impressed on a bill or note, affords no defence to an indictment How to for forging or uttering a bill, note, or check'c); for the enactments only inproceed if
tended that the instrument, when not properly stamped, shall not be receivindictment ed in evidence or be available for any civil purpose, and were not intended not sustain-to impede the criminal administration of justice(d). So the uttering a bill able. or note that has once been paid, and which has been re-issued without hav- Defect in ing a new stamp thereon, though such stamp ought to have been impressed, Stamp. is as much an offence as if the bill had never been paid, or as if it had had the additional stamp(e).

plicable to 11 Geo. 4

The 11 Geo. 4 and 1 Will. 4, c. 66, describes several distinct offences, What a viz. the "forging or altering," or the "offering, uttering, disposing of, or Forging or putting off, knowing the same to be forged or altered." The forging or alwithin Act. tering, with an intent to defraud, is of itself an offence, although the forged instrument has never been uttered (f).

With respect to what is a forging or altering within the meaning of this and the former acts, the term forgery has been defined to be making a false instrument with intent to deceive(g). It may be committed either by entirely false making, or by altering or adding to what has a genuine signature, or by subscribing or writing a false signature (h), or by misapplying a genuine signature, as by writing over it a bill or note for which it never was intended, so as to give it the appearance of the signature to such bill or note, and which is clearly a forgery (i), \*and the misapplying a genuine signature so as to give it the appearance of a true acceptance or indorsement of the instru- [ \*780] ment, as filled up, is also a forgery of the same (j). So if a person having the blank acceptance of another be authorised to write on it a bill of exchange for a certain limited amount, and he write on it a bill of exchange for a larger amount, with intent to defraud either the acceptor or any other person, this is forgery (k). The ordinary instances of forgery are the signing, without authority, the name of another person as drawer, acceptor, or indorser of a bill, or maker or indorser of a promissory note, or as the drawer of a check on his banker. And if A. put the name of B. on a bill of exchange

(2) See post, 808.

(a) Rex v. Reculist, 2 Leach, 703; Rex v.

Hall, 8 Stark. Rep. 67.

(b) Rex v. Reculist, 2 Leach, 703, (Chit. j. 553); Teague's case, 2 Fast's P. C. 979, (Chit. j. 665); Hawkeswood's case, 2 East's P. C. 955; 1 T. R. 450, (Chit. j. 423, 504); Merton's case, id.; Lee's case, 1 Leach, 258; 1 Chitty's Crim. Law, 2d edit. 556 to 627; 3 id. 1036 to 1038. In Whitwell v. Dunsdale, Peake's R. 167, Lord Kenyon objected to this law, even in the case of forgery. But see Rex v. Gillson, 1 Taunt. 97; Rex v. Castle Morton, 8 Bar. & Ald. 589; and Chitty's Stamp Law, 55.

(c) Id. ibid.

(d) Crossley v. Arkwright, 2 T. R. 609.
(e) Rex v. Teague, supra, note (b).

(f) Rex r. Elliot, I Leach, 173, (Chit. j. 501); and Rex v Crocker, 2 Leach, 987, (Ch. j. 721).

(g) Per Buller, J. in Coogan's case, Old Bailey, 1787, 1 Leach, 449; 2 East's P. C. 948, S. C.

(h) Bayl. 5th edit. 545.

(i) Rex v. Hales, 17 State Trials, 161, (Ch. j. 500); Bayl. 5th edit. 546, note 10.
(j) Rex v. Hales, 17 State Trials, 209, 229;

Bayl. 5th edit. 546, note 11, (Chit. j. 500). The genuine signature in each of these cases was intended for a frank.

(k) Rex v. Hart, 7 Car. & P. 652. But see as to larceny, Rex v. Hart, 6 Car. & P. 106;

post, 802, note(y).

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I Enactments against Forgery. Decisions upon or applicable to 11 Geo. 4 and 1 Will. 4, c. 66. What a

as acceptor, without B.'s authority, expecting to be able to meet it when due or expecting that B. will overlook it, this is forgery: but if A. either had authority from B., or from the course of their dealings bona fide considered that he had such authority, it is not forgery (1). And the fact that on three or four previous occasions when he had drawn bills in that way, the party whose name was used had paid even without remark or remonstrance, would afford fair ground for the belief that he had such authority (m). If a man assume to be another person of the same name, and in such assumed character indorse a bill, note, or check intended to be payable to such other per-Forging or son, it is forgery, and the circumstance of the prisoner's being of the same Altering within Act. name is immaterial(n); and a signature will be false, and amount to forgery, though in a man's own name, if he attach to it or adopt a description or addition of any other real person of the same name(o). But the drawer of a bill of exchange who signs only his christian names, as if he subscribe himself "Thomas Wilson," when his real name is "Thomas Wilson Richardson," is not to be deemed to have committed a forgery, unless it be proved that the omission of his surname was for purposes of fraud (p). a person falsely represents himself to be the indorser of a bill, and writes nothing falsely himself, his offence is not forgery, if there be such a person who really indorsed the bill, and the offence, at most, will then be obtaining money or goods by a false pretence (q). So as to any other genuine signature upon a bill or note, though it may be intended to be passed as for the signature of another person, and be passed and taken accordingly, yet if there be nothing upon the bill or note to apply it to that person, it is not a forgery(r).

Not necessary that whole Instrument should be fictitions.

[ \*781 ]

It is not requisite that the whole instrument-should be fictitious. Making a fraudulent insertion, alteration, or erasure, in any material part of a true document, by which another may be defrauded, the fraudulent application of a false signature to a true instrument, or a real signature to a false one, and the alteration of the date of a bill of exchange after acceptance, by which its payment may be accelerated \*or postponed, are forgeries. So a fraudulent alteration even of a letter in any material part of a true in strument, whereby a new operation is given to it, will amount to forgery; and this though it be afterwards executed by another person ignorant of the Altering a bill from a lower to a higher sum is forging it, and it was held, that a person might be indicted on the 7 Geo. 2, c. 22, for forging such an instrument, though the statute has the word alter as well as forge; and in the same case it was held no ground of defence that before the alteration it has been paid by the drawer and re-issued (u). indictment stated that a bill was drawn for 81., and that persons unknown feloniously did alter it, by falsely forging and adding a cipher to the 8l. and a y to the eight, and that the prisoner had in his possession the said false, forg-

(1) Rex v. Forbes, 7 Car. & P. 224; Reg. v.

Parish, S Car. & P. 94; Reg. v. Beard, id. 143.
(m) Reg. v. Beard, S Car. & P. 143.
(n) Mead v. Young, 4 T. R. 28, (Chit. j. 467); ante, 198, note (e); and see Rex v. Parkes and Brown, 2 Leach, 775; 2 East's P. C. 963; 2 Russ. Crim. Law, 321, 2d edit. (Chit. j. 571);

post, 783, note (u). (o) Rex v. Parkes and Brown, 2 Leach, 775; and see Reg. v. Rogers, 8 Car. & P. 629; post, 798, note (x).

(p) Schultz v. Astley, 2 Bing. N. C. 544; 2 Scott, S15; 7 Car. & P. 99; 1 Hodges, 525, S.

C.; and see ante, 157, 158.

(q) Hevey's case, 1 Leach, 229; 2 East's P. C. 556, 856; 2 Russ. Crim. Law, 324, 2d edit. (Chit. j. 418, 508).

(r) Bayl. 5th edit. 550, 551.

(\*) 1 Hale, 688 to 685; Master v. Miller, 4 T. R. 320, (Chit. j. 482, 490); Rex'r. Atkinson, 7 Car. & P. 669; infra, note (z).

(1) 2 East's P. C. 855; 2 Russ. Crim. Law. 318, 2d edit.

(u) Teague's case, Russ. & Ry. 33; 2 Fast's P. C. 979, (Chit. j. 665); Rex v. Post, Russ. & Ry. 101, (Chit. j. 726).

ed, altered, and counterfeited bill, and that he feloniously did utter as a true I. Enactbill the said false, forged, altered, and counterfeited bill, with intent, &c.; ments and it was moved in arrest of judgment, on the ground that the forgery was Forgery. stated to be by persons unknown, and the statement should have been that Decisions they feloniously forged, not that they feloniously altered (the statute 2 Geo. upon or 2, making it capital to forge, but saying nothing as to altering), it was an-applicable swered, that altering was forgery, and the judges were unanimous that the 4 and 1 conviction was right(x). So, altering a banker's one pound note, by sub-Will 4, c. stituting the word "ten" for the word "one(y)," or altering a bill of ex- 66. change from a bill at "three" months to a bill at "twelve" months(z), is a Not forgery. And where a note was originally made payable at a country bank-necessary er's or at their banker's in London, the substituting a new place for one of Instrument the places named, by introducing a piece of paper over the names of the should be London bankers, containing the names of another banking-house in London, fictitious. if with intent to defraud, is forgery (a). So a person who makes a copy of a receipt, interpolating the words "in full of all demands," and produces such false copy upon a suggestion of the loss of the original, is guilty of forgery (b). And where the prisoner procured a deed to be forged from J. M. and his son, conveying an estate for life to Mary K., and after the death of one of the supposed grantors he procured the false deed to be altered, by enlarging the grantee's estate to a fee, he was convicted of forging and uttering it in the state in which it was so altered, and it was held he was rightly so convicted, for it was no less a forgery after than before such alteration(c). So, expunging or discharging an indorsement on or even in the face of a bank note, with a liquor unknown, has been holden to be an erasure or razing an indorsement within 8 & 9 Will. \*3, s. 20(d). So discharging a spe- [ \*782] cial indorsement to A. B. and inserting instead another general indorsement, is an uttering and forging an indorsement(e). We have already seen what is a material alteration in a bill, or note, or acceptance (f).

We have seen that in some cases the signature of a fictitious name will Assuming amount to a forgery (g). The signature of a fictitious name or firm(h) will and signing in a ficticonstitute a forgery if done with a view to fraud(i); as where the prisoner tious Lockett was convicted of uttering a forged order for the payment of money, Name. signed " $R_t$ . Venest," there being no such person as  $R_t$ . Venest; it was held that this was a forgery of an order within the statute(k). So where Taft indorsed a lost bill in the name of "John Williams," he was held right-

(y) Rex v. Post, Russ. & Ry. 101, (Chit. j. 726); and see Elsworth's case, 2 East's P. C.

986, (Chit. j. 406). (z) Rex v. Atkinson, 7 Car. & P. 669. A. being in want of 1000l, applied to B. who drew a bill for that amount, which A. accepted, payable at three months after date. In a few days B. came to A and said that he could not get the 10001. bill discounted, as it was too large, and proposed that two bills for 500l. each should be substituted. One for 500l, was drawn by B. and accepted by A. B. upon this pre-tended to destroy the 1070l. in A.'s presence, but did not in fact destroy it; on the contrary, be altered it from a bill at three months to a bill at twelve moaths: it was held, that this was a forgery in B. with intend to defraud A.

(a) Rex r. Treble, Russ. & Ry. 164; 2

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(x) Rex v. Elsworth, E. T. 1751; 2 East's Taunt. 328; 2 Leach, 1040, (Chit. j. 791); P. C. 986; Bayl. 5th edit. 547, n. 12, (Chit. j. ante, 183, note (s), 151.

(b) Upfold v. Leit, 5 Esp. Rep. 100. (c) Kinder's case, 2 East's P. C. 856; Bayl.

5th edit. 584, note 14. (d) Rex v. Bigg, 3 P. W. 419, (Chit. j.

(e) Rex v. Birkett, Russ. & Ry. 251, (Chit.

j. 894); Bayl. 5th edit. 548, note 18. (f) Anle, 181 to 185, 816.

(g) Anie, 157, 158, note (c).
(h) Reg. v. Rogers, 8 C. & P. 629; poet, 783, note (x).

(i) Bayl. 5th edit. 551, note 19; Rex v. Marshall, A. D. 1804; Russ. & Ry. 75, (Chit. j. 706); Rex v. White, A. D. 1805; Rex v. Dunn, A. D. 1765; Rex r. Roft, A. D. 1777; Rex v. Peacock, A. D. 1814; Rum. & Ry. 278.

(k) Lockett's case, 1 Leach, 94; East's P.

C. 940, (Chit. j. 500).

I. Enactments against Forgery.

Assuming and signing tious Name.

fully convicted of forging such indorsement; for although it was proved that the fictitious signature was not necessary for his obtaining the money, and his intent in writing a false name was probably only to conceal the hands through which the bill had passed, yet it was a fraud as well on the owner of the bill as on the person who discounted it, as the one lost the chance of in a Ficti- tracing his property, and the other lost the benefit of a real indorser, if by accident the prior indorser should have failed (l). So where Francis was convicted of forging an order for the payment of money, signed "Jas. Cooke, jun.," and it appeared that on the 15th May he had taken lodgings under the name of Cooke, and on the 9th September following he wrote the forged draft, the judges held the conviction correct; for if the name was assumed for the purpose of fraud and of avoiding detection, it was as much a forgery as if the name assumed were that of any other person of known credit, though the case would have been different if the party had habitually used and become known by another name than his own(m). Where proof has been given of the prisoner's real name, it is incumbent on him to shew that he had before assumed the false name on other occasions, and for other excusable Making a mark, and suffering the assumed name to be written purposes(n). against the mark, is forging the name(o); and it makes no difference though it be proved that the bill or note would have been equally taken had the party used his own name (p). On an indictment for forging a check purporting to be drawn by G. A. upon Messrs. I. L. and Co., proof that no person named G. A. kept an account with or had any right to draw on I. L. and Co., is prima facie evidence that G. A. is a fictitious person(q).

Assuming a false Description or Addition, but using his proper Name.

The adopting a false description or addition, where a false name \*was not assumed, and where there was no person answering the description of the addition, has been holden by a majority of the judges not to the forgery(r). So where the name of a firm of no credit had been before used by persons in the same street, where another firm of high credit resided, it was held no forgery to pass a bill accepted in the name of such first-mentioned firm, [ \*783 ] though the prisoner represented it was the acceptance of the latter firm, and obtained credit accordingly(s); and we have seen, that the assuming even a

(l) Taft's case, I Leach, 172; East's P. C. 959, (Chit. j. 501); ante, 158, note (c).

(m) Francis's case, 2 Russ. Crim. Law, 336, 2d edit.; Russ. & Ry. 209, (Chit. j. 847); and see Shepherd's case, 1 Leach, 226; 2 East's P. C. 967, (Chit. j. 505); Whiley's case, Russ. R. Ry. 90, (Chit. j. 717); Rex v. Aicles, 2 East's P. C. 968, (Chit. j. 504, 505); Rex v. Boutier, Russ. & Ry. 260.

(n) Peacock's case, Russ. & Ry. 283; Bavl.

5th edit. 552, in notes.

(o) Rex v. Dunn, 1 Leach, 57; 2 East's P. C. 962, (Chit. j. 876); Buyl. 5th edit. 551, note 19.

(p) Rex v. Marshall, Rex v. Whiley, and Rex v. Francis, supra, note (b); and Rex v. Shepherd, A. D. 1781; Bayl. 5th edit. 553, note 21, (Chit. j. 505).

(q) Rex v. Backler, 5 Car. & P. 118, (Chit. j. 1563); and see Rex v. Brannan, 6 Car. & P. 326; post, 797, note (r).

(r) Rex v. Webb, Russ. & Ry. C. C. 405; 3 Brod. & B. 229, (Chit. j. 1069); and Rex v. Bayl. 5th edit. 549, note 16. But see Reg. r. Rogers, S Car. & P. 629; infra, note (z). In Rex v. Webb, Russ. & Ry. C.

C. 405, the bill was addressed to T. B., bizz manufacturer, Romford, Essex, and the prisoner uttered this bill with an acceptance thereon nade by T. B., who did not line at Romford, and was not a baize manufacturer; held, that the adopting a false description and addition, where a false name was not assumed, and where there was no person answering the description of the addition, was not a forgery.

(s) Rex v. Watts, Russ. & Ry. C. C. 486; and 3 Brod. & B. 197, (Chit. j 1127). In this case a bill was addressed to Williams and Co. bankers, Birchin Lane, London, and there might at that time have been a 3 on the lower left hand corner of the bill. The prisoner was asked at the time whether the acceptors were Williams, Burgess, and Co., and his answers imported that they were Williams, Burgess, and Co., living at 20, Birchin Lane, and it was not their acceptance, and there were no known bankers in London using the style of Williams and Co. but them; but at No. 3, Birchin Lane, the name of "Williams and Co." was on the door, and some bills addressed to Messrs. Williams and Co. bankers, Swansea, had been accepted, payable at No. 3. and had been paid there. There

**fictitions** or in the using a f amount of which with sor Thomas a promiss Captain ry right, a own made a party in Co.," 50 represent son [1].

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fictitious name must in that particular instance be for the purpose of fraud, I. Enactor in the course of a general system of fraud; and that the assuming and mente using a fictitious name, though for the purpose of concealment, would not Forgery. amount to forgery, if it were not for that very fraud or system of fraud Decisions of which the forgery constituted a part(t). But this must be understood upon or apwith some qualification; for where the prisoner, whose real name was plicable to Thomas Brown, but he was not nor had been in the army or navy, signed and I Will. a promissory note "Thomas Brown," and uttered the note as a note of 4, c. 66. Captain Brown, a fictitious person, the judges held the conviction of forgery right, and that the circumstance of the forged name being the same as his own made no difference (u). And in a late case it was held to be forgery if a party in accepting a bill of exchange add to his own name the words "and Co.," so as to represent a fictitious or non-existing firm; for if an acceptance represent a fictitious firm, it is the same as if it represent a fictitious person(x).

What an Uttering—The statute requires that the instrument should be ei- What a fether forged or uttered, or "offered, uttered, disposed of, or put off, knowing the same to be forged or altered." Upon the former acts it was decided that the instrument forged should be parted with, or tendered or offered, or used in some way to get money or credit upon it(y). Delivering a box, containing, among other things, forged stamps, to the party's own servant, to be forwarded by a carrier to a customer in the country, is an uttering (z). merely shewing a man an instrument, the uttering of which would be criminal, though with an intent of raising a false idea in him of the party's substance, is not an uttering \*or publishing within 13 Geo. 3, c. 79; nor will [ •784] the leaving it afterwards, sealed up, with the person to whom it was shewn, under cover, that he may take charge of it, as being too valuable to be carried about, be an uttering or publishing (a). So if an engraving of a forged note be given to a party as a pattern or specimen of skill, the party giving it not intending that the particular note should be put in circulation, this is not an uttering within the I1 Geo. 4 and 1 Will. 4, c. 66(b). And it has been held not to be sufficient to make a person a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn at which they had put up a little before he uttered it, joined him again in the street a short time after the uttering, and at some little distance from the place of uttering, and ran away when the utterer was apprehended(c). If, however, a person presents a bill of exchange for payment, with a forged indorsement upon it of a receipt by the payee, and the clerk to whom he presents it objects to a variance between the spelling of the payee's name in the bill and the indorsement, upon which the person alters the indorsement into a receipt by himself for the drawer, it seems that the act of presenting the bill to the clerk, previous to his objection, is suffi-

was no evidence who lived at No. 3; but another bill of the same tenor as that in question, drawn by the prisoner, had been accepted there: held, that on these facts the prisoner was improperly convicted of uttering a forged acceptance, knowing it to be forged; and see further, 3 Chit. Crim. Law, 2d edit. 1036.

(t) Rex v. Taft, Leach, C. C. 172, (Chit. j. 501); ante, 782, note (l); The King r. Burton on Trent, 3 M. & Sel. 528; and Rex r. Barton, Russ. & Ry. C. C. 260; ante, 158, note (c); and see Schultz v. Astley, 2 Bing. N. C. 544; ante, 780, note (p).

(u) Rex r. Parkes and Brown, 2 Leach. 775; 2 East's P. C. 963; 2 Russ C. L. 2d edit. 321, S. C.; and see Mead v. Young, 4 T. R. 28; ante, 198, note (e).

(x) Reg v. Rogers, 8 Car. & P. 629.

(y) Shukard's case, Russ. & Ry. C. C. 202. (2) Rex v. Collicott, Russ. & Ry. C. C. 212;

4 Taunt. 300; 2 Leach, 1048, S. C. (a) Shukard's case, Russ. & Ry. C. C.

(b) Rex v. Harris, 7 Car. & P. 428.

(c) Rex v. Davis and Hall, Russ. & Ry. C. C. 113.

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Decisions

4, c. 66.

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(o) Re (Chit.), (p) Re Rex r. St (9) Re

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(a) Re: 1461, 8 (1) Re Rom & (a) In

cient to constitute the offence of uttering the forged indorsement (d). And the offence of disposing and putting away forged bank notes, under 45 Geo. 3, c. 89, was holden complete, though the person to whom they were disposed of was an agent for the bank to detect utterers, and applied to the upon or ap- prisoner to purchase forged notes, and had them delivered to him as forged plicable to notes for the purpose of disposing of them; for if the prisoners put them off 11 Geo. 4 with intent to defraud, the intent was the essence of the crime, although and 1 Will. from circumstances which the prisoner was not aware of, the prosecutor could not have been defrauded by this act(e). And under the 15 Geo. 2, c. lonious Ut- 13, s. 11, it was held, that if a person knowingly delivered a forged instrument sering, &c. to another, who knowingly uttered it accordingly, the person who delivered such instrument to be put off might be convicted of having disposed of and

put away the same (f). It has been suggested, that to constitute an uttering, it probably would not be deemed necessary that the instrument should be uttered in payment, and that uttering under the false pretence that it had been given in change by the person to whom it is uttered, in order to obtain from him a good note in lieu thereof, would probably be deemed an uttering, it having been so held in the case of counterfeit coin(g). A conditional uttering of a forged instrument is as much a crime as any other uttering; and where a person gave a forged acceptance, knowing it to be so, to the manager of a banking company where he kept an account, saying that he hoped this bill would satisfy the bank as a security for the debt he owed, and the manager replied that would depend on the result of inquiries respecting the acceptors, this was held a sufficient uttering (h). The mere fact of uttering a counterfeit note as a genuine note, is tantamount to a representation that it is genuine(i). Upon [ •785 ] an indictment for uttering a forged note, evidence is admissible \*of the prisoner having at a prior time uttered another forged note of the same manufacture, and also that other notes of the same sabrication had been found on the files of the bank, with the prisoner's hand-writing on the back of them, in order to shew the prisoner's knowledge of the note mentioned in the indictment being a forgery (k). And it seems, that on an indictment for uttering a bill, knowing the acceptance to be forged, other forged bills, precisely similar, passed to the prosecutor by the prisoner, may be given in evidence to shew a guilty knowledge in the prisoner, though they were not passed till

What a Felonious having in

With respect to what may be considered as having in custody or possession a forged instrument, knowing it to be forged, within the meaning of the 45 Possession. Geo. 3, c. 89, s. 6, or of the 12th section of 11 Geo. 4 and 1 Will. 4, c. 66, it seems that the circumstance of the prisoner's having it in his control

about a month after the uttering for which the prisoner was tried (l); but not

so if there be a distinct prosecution pending for the subsequent felony (m).

Nor can evidence of what a prisoner said respecting other bills be received,

(d) Rex v. Arscott, 6 Car. & P. 408. (e) Holden's case, Russ. & Ry. C. C. 154; 2 Leach, 1033; 2 Taunt. 334, (Chit. j. 793); and see Rex r. Haywood, id. 16; Rex v. Eg-

unless such bills are produced and proved (n).

and see Rex r. Haywood, 1d. 16; Rex v. Eggington, 2 Bos. & Pul. 508; 1 Chitty's Crim. Law, 1; and see post, 785, note (s).

(f) Palmer's case, Russ. & Ry. C. C. 72; 1 New. Rep. 96; 2 Leach C. C. 978, S. C., (Chit. j. 698); Rex v. Morris, Russ. & Ry. C. C. 270; Rex v. Giles, 1 Mood. C. C. 166.

(g) Bayl. 5th edit. 554, 555; Rex v. Franks, Leach, 786.

(h) Reg. v. Cooke, 8 Car. & P. 582.

(i) Rex v. Freeth, Russ. & Ry. C. C. 127. (k) Rex v. Bull, Russ. & Ry. C. C. 132;1 Campb. 324, (Chit. j. 748); and see Rex r. Hough, Russ & Ry. C. C. 120; Rex v. Wylie,

1 New Rep. 92, (Chit. j 698). (1) Rex v. Smith, 4 Car. & P. 411. (m) See the cases, post, 793, as to the evidence to be adduced.

(n) Reg. r. Cooke, 8 Car. & P. 586. See Millard's case, Russ & Ry. 245; post, 797, is sufficient, so if the instrument be uttered by the prisoner(o). But it was I. Enactheld that the mere having counterfeit silver in possession, with intent to ut-ments ter it as good, was not any offence under the act, because there was no crim-against Forgery inal act done (p). However, the procuring base coin with intent to utter it as good, is misdemeanor (q).

The very essence of forgery is an intent to defraud, and therefore the mere With what imitation of another's writing, the assumption of a name, or the alteration of a Intent the written instrument, where no person can be injured, does not come within must have the definition of the offence. Most of the former statutes, and the present been comact, expressly make an intent to defraud a necessary ingredient in the crime; mitted(r). and whether it existed or not is a question for the jury to determine. it is in no case necessary that any actual injury should result from the offence(s). The jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him(t); and although the object was general to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument if genuine, did not enter into the prisoner's contemplation (u). And if on the trial of an indictment for uttering a forged bill of exchange, the jury are satisfied that the prisoner uttered the bill as a genuine bill, meaning it to be taken as such, and at that time knew it to be forged, they ought to find, as a necessary consequence of law, that the prisoner intended to defraud and may infer that the prisoner intended to defraud either the person to whom he paid the bill, or the person whose name was forged, as every thing which is the natural and inevitable consequence \*of the act must be taken to be the intention of the [ \*786] Uttering a forged stock receipt to a person who employed the prisoner to buy stock to that amount, and advanced the money, is sufficient evidence of an intent to defraud that person; and the oath of the person to whom the receipt was uttered, that he believes the prisoner had no such intent, will not repel the presumption of an intent to defraud(y). And where a forged bill of exchange, payable to the order of the defendant, was given as a pledge only, but to obtain credit, it was holden to be fraudulent within the meaning of the then statute(z). So the fact that the prisoner has given guarantees to his bankers, to whom he paid a forged note to a larger amount than the note, does not so completely negative an intent to defraud them as to withdraw the case from the consideration of the jury (a).

All the statutes respecting forgery make the aiders and procurers equally Accessoguilty with the principal offender. The 11 Geo. 4 and 1 Will. 4, c. 66, ss. rice, &c. how pan-3 and 25, are express upon this point(b); and the rule that when a statute ishable. creates a felony it includes accessories before and after, as at common law, seems to apply to this as to other offences. It was held under the former

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(Chit. j. 726).
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(o) Rex v. Post, Russ. & Ry. C. C. 104, 176, (Chit. j. 453); Rex v. Taylor, 1 Leach, 216, 217.

(x) Reg. v. Hill, 8 Car. & P. 274; Reg. v. Cooke, ib. 582, 586.

(y) Rex v. Sheppard, Russ. & Ry. C. C. 169

(z) Rex r. Birkett, Russ. & Ry. 86, (Chit. j. 894); and see Reg. v. Cooke, 8 Car. & P. 592; ante, 785, note (n).

(a) Rex v. James, 7 Car. & P. 553.

(b) Ante, 765, 770.

<sup>(</sup>p) Rex v. Heath, Russ. & Ry. C. C. 184; Rex v. Stewart, id. 288.

<sup>(</sup>q) Rex v. Faller, Russ. & Ry. 308.

<sup>(</sup>r) How to be stated in indictment, post,

<sup>(</sup>s) Rex v. Ward, 2 Stra. 747; 2 Ld. Raym. 1461, S. C.; and see ante, 784, note (e).

<sup>(</sup>t) Rex v. Mazagora, Easter Term, 1815, Russ. & Ry. C. C. 291. (u) Id. ibid.; Tatlock v. Harris, 8 T. R.

I. Enactments against Forgery.

Decisions upon or applicable to 11 Geo. 4 and 1 Will. 4, c. 66.

acts, that procuring a person to forge a bill or note was a capital offence, but that procuring to alter was only a common law offence(c). But it was held, that where the procurers are not present at the forging or the uttering, they must be indicted specifically as accessories, and not as principals (d). If several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are all nevertheless guilty as principals(e). But where three persons were jointly indicted for feloniously using plates containing impressions of forged notes, it was held that the jury must select one particular time after all three had become connected; and must be satisfied, in order to convict them, that at such time they were all either present together at one act of using, or assisted in such one act, as by two using and one watching at the door to prevent the others being disturbed, or the like; and that it was not sufficient to shew that the parties were general dealers in forged notes, and that at different times they had singly used the plates, and were individually in possession of forged notes taken from them f). So where several planned the uttering of a forged order for payment of money, and it was uttered accordingly by one in the absence of others, it was held that the actual utterer was alone the principal(g); and that persons privy to the uttering of a forged note by previous concert with the utterer, but who were not present at the uttering, or so near as to be able to afford any aid or assistance, were not principals, but accessories before the fact(h). And where the prisoners J. E. and S. E were indicted for uttering a bad shilling to M. B., and having another bad shilling in their possession at the time and the uttering was by the woman alone, in the absence of the man, it was held that the man was not liable to be convicted of the actual \*uttering, although proved to be the associate of the woman on the day of the uttering, and to have had other bad money for the purpose of uttering; it was also held that the woman could not be convicted of the second offence of having other bad money in her possession at the time, on the evidence of her associating with a man not present at the uttering, but having large quantities of bad money about him for the purpose of uttering (i). Where the wife, by her husband's order and procuration, but in his absence, knowingly uttered a forged order and cerufcate for the payment of prize money, it was held that the presumption of coercion at the time of uttering did not arise as the husband was absent, and that the wife was properly convicted of the uttering, and the husband of procuring(k).

II. OF THE INDICTMENT FOR FORGERY.

II. Of the for Forgerv.

THE venue in and trial of an indictment for forging or uttering a forged Indictment instrument, since 20th July, 1831, may, by the 11 Geo. 4 and 1 Will. 4, c.

Venue.

(c) Rex v. Morris, Easter Term, A. D. 1814, Russ & Ry. C C. 270; Bayl. 5th edit. 553, note 25.

(d) Rex v. Soares and others, Brighton case, 2 East's P. C. 974; Russ. & Ry. C. C. 25, S. Since the 7 Geo. 4, c. 64, s. 9, accessories before the fact may be indicted for a substantive felony.

(e) Rex v. Bingley, Russ. & Ry. C. C. 446; Rex v. Kirkwood, I Mood. C. C. 304; Rex v. Dade, id. 307.

(f) Rex v. Harris and others, 7 Car. & P. 416.

(g) Rex v. Badcock, Russ. & Ry. C C. 249. (h) Rex v. Soares and others, Russ & Ry. C. C. 25; 2 East's P. C. 974, S. C.

(i) Rex v. Else, Russ. & Ry. C. C. 142. (k) Rex v. Morris, Russ. & Ry. C. C. 270; and see Rex v. Soares and others, id. 25; Rex v. Davis, id. 113. See further, law and decis-

ions as to accessories, 1 Chitty's Crim. Law, 261 to 267.

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(a) Re Leach, 99 212 Re: (0) An (P) Re (9) As me ante, <sup>(r)</sup> A<sub>r</sub>

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leach,

66, s. 24, be either in the county where the offence was committed, or in II. Of the that where the principal offender was apprehended or in custody, which indictment for Forge-

enactment avoids the difficulties that previously existed (l).

Where the prisoner being indicted in the county of Wilts for having a Venue. forged note in his possession, it appeared that whilst he was in London his lodgings in Wiltshire were searched in the presence of his wife, and in a pocket-book (in which his name had been written by himself) the note in question was found, bearing date two months before, at which time he was in another county; it was considered by a majority of the judges, that this was not sufficient evidence of the commission of the offence within the coun-But on an indictment for uttering forged stamps, where there was a delivery of a box containing the stamps to the party's own servant, that he might carry them to an inn to be forwarded by a carrier to a customer in the country, and the delivery was in one country, and the inn to which the servant was to carry them in another; it was held that the party might be indicted in the former county (n). And the present act, 11 Geo. 4 and 1 Will. 4, c. 66, s. 24, contains an express provision for indicting the party in the county where he is apprehended or shall be in custody(o). And if under this act a prisoner be tried for forgery in the county where he is in custody, the forgery may be alleged to have been committed in that county, and there need not be any averment that the prisoner is in custody there (p).

The instrument forged must be correctly stated by name to have been Statement one of the instruments named in the statute, section 3(r); and as therein de- of the Inscribed(s), viz. as "a note," (or "a bill of exchange,") of the Governor arrument and Company of the Bank of England, commonly called "a bank note," (q). or "a bank bill of exchange," or "a bank post bill," or that it was "a bill of exchange," or "a promissory note for the payment of money," or "a warrant and order for the payment of money," or "a certain acceptance of the said bill of exchange," or "an indorsement on the said bill of exchange, &c." (which has been previously stated in the indictment). And the instrument to be produced on the trial must in legal operation constitute a bill of exchange, &c., as stated in the indictment, or the variance will be fatal; for instance, if a bill be described as a promissory note, the defendant will be acquitted, and vice  $vers\hat{a}(t)$ ; and a bank post bill cannot be described as a bill of exchange, but it may be described as a bank bill of exchange (u). And before the 2 & 3 Will. 4, c. 123, s. 3(x), where the forged instrument was actually within the meaning of the statute, but did not sufficiently appear to be so on the face of it, not only a literal copy of it must have been set forth, but averments must have been made of all extrinsic facts necessary to make it appear upon the face of the record that the forged instrument was one of those intended by and described in the statute (y). Therefore when by the usage of a public office the bare signature of a party upon a navy bill operated as a receipt, an indictment for forging such a receipt, setting forth the

(1) Rex r. Crocker, 2 New Rep. 87; 2 East's P. C. 992, (Chit. j. 721); Rex v. Parkes, 2 Leach, 787, 788, (Chit. j. 571).
(m) Rex r. Crocker, 2 Russ. C. C. 1500; 2 Leach, 998; 2 New Rep. 87, (Chit. j. 721).

(n) Rex v. Collicott, Russ. & Ry. C. C. 21Ž.

(o) Ante, 770.

(p) Rex v. James, 7 Car. & P. 553.

(q) As to the nature of the instrument forged, 200 ante, 773, et seq.

(r) Ante, 765.

(s) Rex v. Wilcox, Russ. & Ry. C. C. 50, (Chit. j. 626); ante, 765.

(t) Rex v. Hunter, Russ. & Ry. 511; Rex v. Birkett, id. 251, (Chit. j. 894).

(u) Rex v. Birkett, Russ. & Ry. 251, (Chit. j. 894).

(x) Ante, 772; and see post, 790. (y) Rex v. Ravenscroft, Russ. & Ry. 161; and see Rex v. Cullen, 1 Mood. C. C. 300; 5 Car. & P. 116, S. C.; ante, 776; Reg. v. Rogers, 9 Car. & P. 41, 42.

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CHAP.

for Forgery.

Statement of the Instrument.

II. Of the navy bill and indorsement, and charging the defendant with having forged "a Indictment certain receipt for money, to wit, the sum of 251. mentioned and contained in the said paper, called a navy bill, which forged receipt was as follows, that is to say, 'William Thornton, William Hunter," was holden bad, because it did not shew by proper averment that those signatures imported a So it was holden, that an indictment for forging the word "settled" at the bottom of a bill must shew by proper averments that it was meant for a receipt(a). Again, it was held, that an indictment for forging or uttering a receipt in the handwriting of H. H., as thus, "Received H. H." was bad, because there was nothing to shew what H. H. meant, or that he was a person to whom the money ought properly to have been paid(b). So where the defendant drew a bill, "Please to pay the bearer, on demand, fifteen pounds on account of your humble servt C. H. Ravenscroft," which was his name; and when the instrument was uttered, there was forged upon it "payable at M. & Co. Wm. Mc Inerheney," and it appeared that W. Me Inerheney kept cash at M. and Co.'s, who were bankers, it was held that this was not an order for the payment of money on the face of it, it not being addressed to any person, and that there being no special averment that it was intended for an order, or that M. & Co. were bankers, the prisoner could not on such an indictment be convicted(c). Although if the false signature contained an initial only for the christian name, it was not necessary to aver what christian name was meant(d); nor would a mere superfluous bond and writing obligatory, though the statute mentioned both in the dis-

1 \*789 | description vitiate, as if the defendant were charged \*with the forgery of a junctive(e).

Introductosy Averment.

It was also necessary, before the 2 & 3 Will. 4, c. 123, s. 3(f), to set forth a copy of the forged instrument, and to state that it was in these words (then setting out a copy) in order that the court might be able to judge from the record whether it were a document in respect of which forgery could be committed (g). The instrument was usually stated thus, "which said forged bill of exchange is as follows, that is to say, &c." (setting it forth(h)); but it might be stated "is to the tenor following," or "is in the words and figures following," or it might be "a certain forged paper-writing, purporting to be a bill of exchange(i)." But the words "purport" and "purport ing" import what appears on the face of the instrument(k). The adoption of that term was therefore sometimes dangerous; it was never necessary to state both the purport and the tenor, that is to say, that the instrument purported to be drawn so and so, and was of the tenor following; and if in this superfluity of statement a repugnance arose, the indictment was bad. For

(z) Rex v. Hunter, 2 Leach, 624; 2 East's 776. P. C. 928, S. C.

(a) Rex v. Thompson, 2 Leach, 910. See the form of such an averment, Cro. C. C. 218, 219; and 3 Chitty's Crim. Law, 1079, 1080. But see Rex v. Martin, 1 Mood. C. C. 483; 7 Car. & P. 549, S. C.; Reg. v. Houseman, S. C. & P. 180; Reg. v. Vaughan, ib. 276; ante, 778; and post, 790, overruling Rex v. Thomp-

(b) Rex v. Barton, 1 Mood. C. C. 141. But see Rex v. Martin, 1 Mood. C. C. 483, and other cases in last note.

(c) Rex v. Ravenscroft, Russ. & Ry. 161. Not necessary that a request should be addressed to any particular party; Rex v. Carney, 1 Mood. C. C. 851; Rex v. Cullen, ib. 300; ante,

(d) Rex v. Powell, 2 Bla. Rep. 787, (Chit. j. 500).

(e) Dunnett's case, 2 East's P. C. 985; 2 Leach, 581, S. C.; and see Dunn's case, 2 East, P. C. 976; post, 790, note (x).

(f) See post, 790.

(g) Rex v. Reeves, 2 Leach, 808; Rex r. Gibbs, 1 East's Rep. 180; Mason's case, 1 East's P. C. 975; 2 Russ. 359, (Chit. j. 499). (h) This sufficed, Powell's case, 2 Bla. Ref. 787, (Chit, j. 500).

(i) Powell's case, 2 Bla. Rep. 787, 790, (Chit. j. 500); Rex v. Gilchrist, 2 Leach, 660, (Chit. j. 543).

(k) Jones's case, 2 Russ. Crim. Law, 24 ed. 363, (Chit. j. 405).

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The in not mere onspi noi fac-sinute ments for so change literal va "ralue r & Co.19 wick." " out in the matter fo ment for fool of al March, 1 Without . holden su might be forked in: instrumen the instru

(I) The  $(C_{b\eta})_{1 \leq 50i}$ P (\*) Ret P.C. 954; 898, 814, 8 (#) Fort P. C. 990. (e) M206 Reg. Criss. ) 500). Rex (9) 2 P

instance, where a person was indicted for forging an acceptance on a certain II. Of the bill of exchange, purporting to be directed to one J. King, by the name and Indictment description of one J. Ring, Esq., after which the tenor of the bill was set ry. forth, from which it appeared that it really was directed as to J. Ring, and Introductothe forged acceptance was made in the name of J. King, the indictment was ry Averholden bad, on the ground that the name of one person or thing cannot pur-ments. port to be another, and that the forged bill did not, as alleged in the indictment, purport to be directed to John King(l). On the same principle,, an indictment for forging a bill of exchange directed to Ransom, Moreland and Hammersly, stating that it purported to be directed to George Lord Kinnaird, William Moreland, and Thomas Hammersley, by the name and description of Ransom, Morland, and Hammersley, was holden bad, because the tenor and purport as alleged were repugnant, and the purport signifies that alone which appears on the face of the instrument, and that therefore this averment was untrue(m). Though an allegation that a forged order for the payment of money was drawn on "Messrs. Drummond and Co. Charing Cross," by the name of "Mr. Drummond, Charing Cross," was held good(n). The safe way therefore to avoid all these difficulties, was to state that the defendant forged a bill of exchange, &c. and which was as follows, setting it forth.

The instrument must also have been set forth in words and figures, and How Innot merely according to the substance(o); and though in general figures strument to ought not to be used in an indictment, yet it was so necessary to set forth a forth. fac-simile of the instrument forged, that that rule did \*not apply to indict- [ \*790] ments for forgery(p); and if by addition, omission, or alteration, a word was so changed as to become another word, the variance was fatal(q). A mere literal variance, however, would not vitiate, as "value received" instead of "value reicevd," in the forged instrument itself (r). So Messis Masterman & Co." for Mes, Masterman & Co."(s) and "Jawick Park" for "Jawick," was no variance(t). And it seems not to have been necessary to set out in the indictment every part of a written document connected with the matter forged or referred to therein; and therefore, where upon an indictment for forging a receipt, it appeared that the receipt was written at the foot of an account, and the indictment merely set out the receipt thus "Sth March, 1773; Received the contents above, by me Stephen Withers," without setting out the account at the foot of which it was written, it was holden sufficient(u). So on the other hand, the mis-statement of surplusage might be rejected; and therefore where the indictment in setting out the forged instrument, also set out the attestation at the foot of it, as part of the instrument, but it appeared in evidence, that when the defendant subscribed the instrument, the attestation was not written on it, it was held to be no va-

(1) The King v. Reading, 2 Leach, 590, (Chit. j. 500).

(n) Lovell's case, 1 Leach, 248; 2 East's P. C. 990, (Chit. j. 503).

(o) Mason's case, 2 East's P. C. 975; 2 Russ. Crim. Law, 359, (Chit. j. 499).

(p) Rex v. Powell, 2 Bla. Rep. 787, (Chit. j. **5**00).

(q) 2 Rues. Crim. Law, 1482; Rex r.

Beach, Cowp. 229.

(r) Hart's case, 1 Leach, 145; and East's P. C. 977, S. C.

(s) Oldfield's case, 2 Russ. 2d edit. 360,

(Chit. j. 947).

1 East, 181, n. S. C.

<sup>(</sup>m) Rex v. Gilchrist, 2 Leach, 657; 2 East's P. C. 982, (Chit. j. 543); Edsall's case, 2 East's P. C. 984; and Reeves' case, id.; and 2 Leach, 808, 814, S. C.

<sup>(</sup>t) Rex v. Crooke, 2 Stra. 901); Fitzg. 57, 261; 2 East's P. C. 921, S. C. See also as to the number of a house in the address of a bill, Rex v. Watts, 6 Moore, 442; 3 Brod & Bing. 197; Russ. & Ry. 436, (Chit. j. 1127.) (u) Rex r. Testick, 2 East's P. C. 294, 295;

for Forgery.

How Instrument set forth.

II. Of the riance (x), and it was held, that the circumstance of the attestation of a wit-Indictment ness, and the words "Mary Wallis, her mark," being inserted as part of the tenor of the note forged, when in reality they were added immediately after the prisoner's signature, would not amount to a variance (y). er case where the prisoner was indicted for forging a navy bill, and at the bottom of the bill were printed certain words, "pay, &c. out of navy fund," &c. so as to be ready for acceptance at the navy office, Lord Ellenborough ruled, that it was not necessary to notice those words in the indictment, because until acceptance they were a nullity and inoperative; and he also ruled, that matter written after the bill was uttered should not be stated(2).

To obviate the difficulties so frequently arising from a mistake in setting

Description of Instrament nnder 2 & 8 Will. 4. c 123, s.

forth the instrument, and to prevent a failure of justice from mere clerical or verbal inaccuracies, the 2 & 3 Will. 4, c. 123, s. 3, enacts, that it shall not be necessary in any indictment for forgery to set forth a copy or facsimile of the instrument forged, but that it shall be sufficient to describe the instrument in such manner as would sustain an indictment for stealing the It is now, therefore, sufficient in an indictment for forgery to charge that the prisoner "did forge a certain promissory note for the pay-[ \*791 ] ment of 50l.(b)" without \*stating the date(c). Nor is the act confined to such instruments only as are strictly the subject of larceny, but extends equally to receipts (d). The act, however, does not extend to foreign instruments (e). And, therefore, in an indictment for forging an instrument in a foreign language, as a Prussian treasury note, a translation of the note must still be set forth, so that the verdict of guilty may include a finding as well of the sense and meaning of the instrument, as of the fact of forging the original, and for the omission the judgment will be arrested (f). And where foreign notes were set out in the indictment in the original language, but the translation omitted some words which were in a margin or border round the body of the note, and denoted the year in which the notes were issued, and it appeared that without these words the notes would not be capable of being circulated in the country to which they belonged; it was held, that the translation was imperfect, and the special counts setting out the notes consequently bad(g). It also seems that sewing to the parchment on which an indictment is written impressions of forged notes taken from engraved plates, is not a legal mode

(x) Rex v. Dunn, 2 East's P C. 976; 1 that an indictment for forgery must contain all Leach, 58, note, (Chit. j. 376); and see Dunnett's case, 2 East's P. C. 985; ante, 789, note (e).

(y) Id. itil.

(z) Rex v. Dolland, Maidstone, 1811, MS.

(a) See the act, ante, 772; where, since this act, the instrument is merely described and not set out, it is sufficient to prove that the instrument falls within the designation given of it in the indictment, without an averment to that effect; Reg. v. Rogers, 9 Car. & P. 41; and post, 802, 803, LARCENY.

(b) Rex v. James, 7 Car. & P. 553; Rex v. Burgiss, ib. 490. In the former case it was objected that the note was not stated to be for the payment of 50l. in money, and that in an indictment for larceny it would be necessary to state a value; but Patteson, J. Held, that the court must take judicial notice that a promissory note for 50l. meant 50l. of lawful money, and that the 2 & 3 Will. 4, c. 123, s. 3, merely intended that the description of the instrument should be the same as in larceny, and not

the requisites of an indictment for larceny.

(c) Rex v. Burgiss, 7 Car. & P. 490. (d) Rex v. Martin, 1 Mood. C. C. 483; Reg. r. Vaughun, 8 Car. & P. 276; Reg r. Houseman, id. 180; ante, 778. And sea Reg r. Sharpe, 8 Car. & P. 436, 438.

In Rex v. Martin, 1 Mood. C. C. 483; 7 Car-& P. 549, S. C., the indictment also contained a count setting out as an acquittance an invoice of goods sold with the word "settled" at the foot and signed with a name in full was held sufficient, without any averment of the meaning of the word settled. And see ante, 777, 778.

(e) Rex v. Balls and Rex v. Harris, 7 Csr. & P. 427, 429, 430, note (b).

(f) Rex v. Goldstein, 3 Brod. & B. 201;7 Moore, 1; Russ. & Ry. 473, (Chit. j. 1139). See Rex v. Szudurskie, 1 Mood. C. C. 429.

g) Rex v. Harris, Rex v. Moses, Rex s. Balls, 7 Car. & P. 429; Rex v. Warshaner, 1 Mood. C. C. 466.

(h) Id. ibid.

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> $\{i\}_{C_{\theta H e}}$ 361, 2d ed. (k) Rex  $(l)\,R^{\epsilon_{1,l}}$ Ł Ry. 33, 1 m) Rex (a) Ret

gery of the

of setting out the notes in the indictment(h). In case of a forged signature, II. Of the it must not be averred that he whose signature it was intended to resemble Indictment signed it, for that would be inconsistent with the charge of forgery (i).

The criminal act of the prisoner should be described in the terms of the Criminal statute on which the prosecution is founded. Since the 11 Geo. 4 and 1 Will. 4, c. 66, the technical description should be, that the defendant felo-bow stated. niously "did forge," or that he feloniously "did alter," or that he feloniously "did offer," or "utter," or "dispose of," or "put off," knowing the same to be forged (or altered) a certain, &c. This act does not, as the former repealed acts, contain the words "falsely make," or "counterfeit," or "cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false making, forging, or counterfeiting," nor the words "publish as true;" and therefore in an indictment for an offence committed since the 20th July, 1830, neither of those terms should in general be introduced; though their introduction will not vitiate(k). The word "forged," alone seems sufficient, whether the defendant is indicted for forging the whole false instrument, or for only altering a part of a genuine instrument; and in all indictments for the alteration of a written instrument (and which alteration in a material part, we have seen, amounts as much to forgery as the false making of an entire instrument(l)), and where the act did not provide for altering, it was held that the offence should be charged as a forging in the words which the legislature had employed (m); but where the statute like the present act provided for altering as well as forging, it was considered advisable in one count \*to describe the offence as a felonious altering, where only a part of [ \*742] an instrument, otherwise genuine, had been altered(n), though an indictment for forging the whole would suffice (o); and the offence of discharging one indorsement and inserting another may be described as altering an indorse-An indictment on 2 Geo. 2, c. 25, which charged the prisoner with having feloniously altered a bill of exchange by falsely making, forging, and adding a cypher "O" to the letter and figure £8 in the bill, and also falsely making, forging, and adding the letter "y", to the word "eight" whereby the letter and figure £8 in the same bill became £80, and the word "eight," before written eight in the said bill became eighty, by reason and means of which said forgeries and additions the said bill of exchange, so drawn as aforesaid for eight pounds, became and purported to be a bill of exchange for eighty pounds, was held good, though the words of the statute are, "if any person shall falsely make, forge, and counterfeit," because the second count charged, that certain persons unknown altered the bill, and the defendant feloniously uttered and published it as true, knowing it to be forged. which was clearly within the statute (q). But the first count was at least informal.

Where the forging is of a mere addition to the instrument, and which does not alter the legal effect of it, but is merely collateral to it, as, for instance, a forged acceptance or indorsement to a genuine bill of exchange, proof of the forgery of the addition will not support an indictment charging the forgery of the entire instrument, and the forgery of such addition must be spe-

<sup>(</sup>i) Carter's case, 2 East's P. C. 985; 2 Russ. 361, 2d edit. S. C.

<sup>(</sup>k) Rex v. Brewer, 6 Car. & P. 363 (l) Rex v. Teague, 2 East's P. C. 979; Russ.

<sup>&</sup>amp; Ry. 88, (Chit. j. 665).

<sup>(</sup>m) Rex v. Dawson, 1 Stra. 19.

<sup>(</sup>n) Rex v. Elsworth, 2 East's P C 968,

<sup>988, (</sup>Chit. j. 406). (a) Rex r. Tengue, 2 East's P. C. 979; Russ. & Ry. 33, (Chit. j. 665).

<sup>(</sup>p) Rex v. Birkett, Russ. & Ry. 251, (Chit, j. 994).

<sup>(</sup>g) Elsworth's case, 2 East's P. C 986.

for Forgery. Criminal gery.

II. Of the cially alleged and proved as laid(r). In these cases the indictment should Indictment commence by stating the defendant's possession of the genuine instrument, setting it out verbatim, and then state the forgery only of the acceptance or indorsement, setting it out(s). However, forgery of the signature of a Act of For- drawer of a bill or maker of a note may be stated as the forgery of the whole bill or note, although the body of the bill or note were genuine, or written by the prosecutor, because the signature in that case gives effect to the whole (t).

Where a count is inserted for feloniously altering an instrument, it first states the defendant's possession of the genuine instrument, setting it out verbatim, and then states that the defendant feloniously did alter the same by then and there falsely obliterating and defacing, &c. setting forth all the alterations verbatim et literatim, and then stating what was the consequent appearance of the instrument in its altered form, and then setting out, in words and letters, a copy of the altered instrument, and concluding with intent to defraud(u).

It is always prudent, for fear that the prisoner's own false making or alter-

False Uttering.

ing may not be proved, to insert a count charging that the defendant feloniously did "offer," or "utter," "dispose of," and "put off," the forged or altered instrument previously set forth in the indictment, knowing the same to have been and to be so forged or altered (x), and if the defendant merely atempted to put off the instrument, then only the word "offer" should be insert-The observations, however, \*just made with respect to the forging of a mere addition to the instrument, apply also to the case of uttering; and, therefore, a count charging a prisoner with uttering a forged bill with intent to defraud A. B., and setting out the bill and the acceptance upon it, is not supported by proving that the prisoner uttered the bill, and that the acceptance on it was a forgery (z). So a count stating that the prisoner had a bill in his possession (which was set out) with a forged acceptance on it (which was also set out), and that he, knowing the acceptance to be forged, uttered the bill with intent to defraud A. B., is bad(a).

It was held, that in an indictment upon the 45 Geo. 3, c. 89, s. 1, for putting away and disposing of a forged bank note, it need not be stated to whom the note was disposed of, and that it was sufficient to allege that the prisoner disposed of the note with intent to defraud the bank, he knowing it at the time to be forged (b). It should seem from this case, and on principle, that it is necessary to aver, as usual, that the defendant, at the time of his uttering, knew that the instrument was forged, for subsequent knowledge would not render his act thus highly criminal.

Offence not

ed in the

The offence must not be charged in the disjunctive; thus it is improper to to be chargcharge the defendant with having forged or caused to be forged the instru-At common law it would suffice to say forged and counterfeited, disjunctive. ment(c). without adding falsely, because the term forge sufficiently implies that the

> (r) Rex v. Birkett, Russ. & Ry. 251, (Chit. j. 894); Rex v. Horwell, 6 Car. & P. 148, infra, note (z).

(8) See forms, 3 Chit. Crim. Law, 1071.

(x) Ante, 765.

(y) Ante, 765.

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<sup>(</sup>t) Rex v. Dann, 1 Leach, 57, (Ch. j. 376). (u) See forms for altering a bank note, 3 Chitty's Crim. Law, 1050; Rex v. Elsworth, 2 East's P. C. 986; Rex v. Post, Russ. & Ry.

<sup>(2)</sup> Rex v. Horwell, 6 Car. & P. 148

<sup>(</sup>a) Id. ibid. (b) Rex v. Holden, 2 Taunt. 334; 2 Leach.

<sup>1019;</sup> Russ. & Ry. 154, (Chit. j. 798). (c) Rex v. Stocker, 1 Salk. 842, 371; 5 Mod. 137, S. C.; 1 Chitty's Crim. Law, 236

act was false(d); nor is it necessary to add the term unlawfully, since the 11. Of the offence is manifestly illegal(e).

for Forgery.

The very words of the statute 11 Geo. 4 and 1 Will. 4, c. 66, s. 3, Statement make it of the essence of the offence that it was committed "with intent in of Intent any of the cases aforesaid to defraud any person whatsoever;" and the 28th to defraud section of the act declares the meaning of the word "person," and extends (f). it to corporations and partners, and to his majesty, or any foreign prince, and declares, that it shall suffice, in an indictment for forgery, "to name one person only of such company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person so named, and another or others, as the case may be." This enactment gets rid of difficulties that heretofore arose(g). It was held, that in an indictment on 41 Geo. 3, c. 57, s. 2, for having in possession a plate for making bills of exchange in the name of a company of bankers, it should be stated that the company carried on the business of bankers(h).

The Bank Act, 7 Geo. 4, c. 46, s. 9, is not imperative on joint stock banks to prosecute in the name of their public officer; and, therefore, an indictment for forgery, with intent to defraud a joint stock bank, may lay the intent to be to defraud "A. B. [one of the shareholders] and others(i)." And if the intent be laid to defraud the public officer of a joint stock bank, it is not necessary to aver that he was "" nominated" under that statute(k). [ \*794] It should seem, however, that a prisoner who is a shareholder in a joint stock bank, and who knowingly utters a forged acceptance to that bank, cannot be convicted on counts laying an intent to defraud "R. B." (another of the shareholders) "and others(l)." It is not necessary to set forth the manner in which the party was to have been defrauded(m); nor need it appear that the party to be defrauded was a party to the bill, or that the bill was uttered or tendered to him, for that is matter of evidence (n). this act it was held, that certainty to a common intent was sufficient in this part of the indictment; and therefore an indictment stating the intention to have been to defraud "Messrs. Drummond and Co." without naming the parties in the firm, was considered sufficient; and it was even said, that when the forgery was upon "Mr. Drummond, Charing Cross," it would be good to lay the intent to injure him though several persons must have been intend-

The words "with intent," in an indictment for forgery, apply to the verb to which the prisoner's name is the nominative; therefore a count which states that the prisoner "did forge" a promissory note for 501., "on which said promissory note is an indorsement as follows, 'C. J.,' with intent to defraud W. R. S." sufficiently charges that the forged note, and not the indorsement, was the thing by which the prisoner intended to defraud W. R. S.(p).

<sup>(</sup>d) Thomas's case, 2 East's P. C. 935.

<sup>(</sup>e) 2 Rol. Abr. 82. (f) See ante, 785.

<sup>(</sup>g) Rex v. Lovell, 1 Leach, 248, (Chit. j 503); 45 Geo. 8, c. 88, and see 6 Geo. 4, c. 56; 7 Geo. 4, c. 46, s. 9.

<sup>(</sup>h) Rex r. Catapodi, Russ. & Ry. 65.

<sup>(</sup>i) Reg. v Beard, 8 Car. & P. 143. It is not at all essential that the shareholders in a joint stock bank should all reside in England: or, semble, that any six of them should, id. ib. The return made to the Stamp Office under

<sup>7</sup> Geo. 4, c. 46, s. 8, is not the only mode of proving that a person is a public officer of a joint stock bank, id. ib.; and see Rex v. James, 7 Car. & P. 553; Rex v. Burgiss, id. 490.

<sup>(</sup>k) Ante, 793, note (i). (1) Reg. v. Cooke, 8 Car. & P. 586.

<sup>(</sup>m) Powell's case, 1 Lench, 77; East's P. C. 989; 2 Bla. Rep. 787, (Chit. j. 500).
(n) Elsworth's case, 2 East's P. C. 989.

<sup>(</sup>o) Rex r. Lovell, 1 Leach, 248, (Chit. j.

<sup>(</sup>p) Rex v. James, 7 Car. & P. 553.

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II. Of the for Forgery. Conclusion.

The indictment must conclude against the form of the statute, and this Indication was, formerly, essential in order to deprive the offender of his clergy (q). By the 7 Geo. 4, c. 64, s. 20, however, the insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," is cured after verdict. The omission of the words "against the peace" is also cured by that statute. And it has been held, that a bad conclusion of contra pacem is as no contra pacem, and therefore cured(r). But the act is confined to objections taken after verdict, and an informal conclusion is, consequently, still open to demurrer(s).

Courts in which to presecute.

It has been held, that the sessions have no jurisdiction to try forgery, and that they cannot take cognizance of it as a cheat, though there seems to be no principle on which that exception and that of perjury at common law are founded(t).

III. Of the Evidence.

#### III. OF THE EVIDENCE.

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Production of forged Instrument. Notice to produce.

What is or is not a false making of a bill of exchange or other instrument, is a question of law(u). In general, the forged instrument must be produced on the trial, and if the prisoner has possession of it, it is advisable to serve him with a notice to produce the same, and after proof of the service of such notice, if the defendant do not produce the instrument, parol [ \*795] evidence of the contents may be given (v). But it \*has been decided, that in an indictment for stealing or forging a note which it was proved the defendant swallowed or destroyed, no notice to produce need be given, and after proof of the defendant's destruction of the instrument, parol evidence of its contents is admissible (w). And it has been held, that if on an indictment for forgery being presented to the grand jury it appear that the forged instrument cannot be produced, either from its being in the hands of the prisoner or from any other sufficient cause, they may receive secondary evidence of its contents (x); and it was further held, that if upon presentment of an indictment for forgery to the grand jury, a witness decline to produce certain deeds before them, and they form part of his title to his own estate, he is not compellable to produce them, but that if they do not, the grand jury may compel their production (y).

Proof of Forgery. ty whose Name forged as a Witness.

In all cases of forgery it is essential to prove that the instrument forged is not the writing of the person in whose name it professes to have been cy of Par- made(z). In other offences, as we have seen, the party injured is generally a competent witness against the prisoner, and that there are many cases in which parties are admitted to give evidence who are to derive an immediate advantage from the conviction. The objection affected at most the credit,

(q) 1 Chitty's Crim. Law, 280. Benefit of Law, 578, 579.

clergy abolished by 7 & 8 Geo. 4, c. 28, s. 6.
(r) Rex r. Chalmers, 1 Mood. C. C. 352; 5 Car. & P. 331, S. C.

(s) Reg. v. Smith, 2 Mood. & Rob. 109. (t) Rex v. Gibbs, 1 East, 173; see 1 Chitty's Crim. Law, 139, 140; and 5 Chitty's Burn's Justice, 28th edit. p. 607.

(u) Rex v. Hart, 7 Car. & P. 652.

(v) Ante, 626, note (x); 1 Chitty's Crim.

(w) How r. Hall, 14 East, 274; ante, 626, note (z); 1 Chitty's Crim. Law, 567, 578, 579; 1 Leach, 294; 2 East's P. C. 675; Phil. on Evid. 6th edit. 441, 442

(x) Rex v. Hunter, 3 Car. & P. 591.

(y) Id. ibid.

(z) Rex v. Smith, 4 Car. & P. 411; Rex r. Buckler, 5 Car. P. 118; Rex v. King, id. 128; Solita v. Yarrow, 2 Mood. & M 184.

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> ia) Rex r,  $R_{0.5 \rm higg}$ tow, id. 1. (b) Re3 125e, 2 | p. (Chit. ) 7: Rose & 1 Chitth, a C. (c) Res Rex t. La tos. 14. 95 (d)  $R_{e_1}$  $\mathbf{0}_{\mathrm{odd},\ i,j}$ & P. 98, 1 278: Rex (e) Rei Beyl 5th

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but it did not take away the competence(a). But it was established, that in III. Of the case of forgery the party whose writing was alleged to be forged, could not Evidence. be examined to prove that the documents were forged, if he could be sued Proof of on it if genuine, or would derive any advantage from its being proved a for- Forgery. And where the party was manifestly interested in the event, though called not to prove the hand-writing, but the fact of forgery by other means, his testimony was formerly rejected(c). By these decisions the testimony of the person best able to prove the falsity was excluded, and the course used to be to release the party, in order that he might become a witness'd). But now by the 9 Geo. 4, c. 32, ss. 1 and 2, it is declared, that in any indictment for forging or uttering, no person shall be deemed an incompetent witness in support of such prosecution by reason of any interest he may be supposed to have in respect of the instrument forged. And as the party whose hand-writing has been forged must necessarily be best able to disprove the hand-writing to be his, he ought in prudence in all cases to be called as a witness; but this is not absolutely necessary, for on an indictment for forg- Not absoing the indorsement of a payee described as a cheesemonger at Liverpool, it lutely necwas held not to be necessary to prove (by the drawer or maker) who was he should intended as the payee, and that it sufficed to prove by the supposed payee, be a Witwho was a cheesemonger at Liverpool, that he did not indorse, especially ness. as the prisoner had admitted guilt generally in the transaction (e). So on an indictment for forging a bank note it is not necessary that the signing clerk at the bank should be produced, and \*it suffices if other witnesses, acquaint- [ \*796] ed with his hand-writing, state that the signature to the note is not Li<sub>2</sub>(f).

Where the name forged is that of an existing person, evidence must be given to shew that the person mentioned in the indictment and in the bill or note are the same (g), and that the signature is not the hand-writing of that person, upon proof of which, although there be another person of the same name residing near, it will not be necessary to disprove his hand-writing (h). Since the statute 9 Geo. 4, c. 32, s. 2, has made the party whose name has been forged a competent witness to disprove his hand-writing, it might be supposed that he is the best witness to prove the forgery, and that he ought to be called; but it has been held that this is not legally necessary, and that the writing on the instrument may be disproved by any person acquainted with his hand-writing (i); though it must be obvious that the party whose hand-writing was forged must be better able to swear that he was party to no If it be necessary to prove the hand-writing of the prissuch transaction. oner to the false signature, it should be proved by a person who has seen him write at Last once, or who has corresponded with him(k); but not by mere

(a) Rex v. Boston, 4 East, 581, 577; Smith v. Rummens, 1 Campb. 9; Hathaway v. Barrow, id. 151.

(b) Rex v. Russel, 1 Leach, 8: Thornton's case, 2 Leach, 634; Rex v. Crocker, id. 987, (Chit. j. 721); Rex v. Boston, 4 East, 582; Russ & Ry. 97; 2 New Rep. 87, S. C.; 1 Chitty's Crim. Law, 597

(c) Rex r. Bunting, 2 East's P. C. 696; Rex v. Bayley, I Car. & P. 435; Rex v. Pig-

eon, id. 98.

(d) Rex r. Alford, 1 Leach, 150; Rex v. Dodd, id. 155; Rex v. Taylor, id. 214; I Car. & P. 98, 435; Rex v. Peacock, Russ. & Ry. 278; Rex v. Mott, id. 435.

(e) Rex v. Downs, 1 Leach, 884, in notis; Bayl. 5th edit. 564, note 55, (Chit. j. 505).

(f) Bank Prosecutions, Russ. & Ry. C. C. 374.

(g) Parr's case, 1 Leach, 434; 2 East's P. C. 9.17, S. C; Downe's case, 2 East's P. C. 997; 2 Russ. Crim. Law, 1382, 2d edit. S. C.; Rex v. Sponsonby, 2 East's P. C. 996.

(h) Rex v. Hampton, 1 Mood. C. C. 255,

(Chit. j 1499).

(i) Rex v. Hughes, 2 East's P. C. 1002; Rex v. M'Guire, id.; Russ. & Ry. 378. When trial will be postponed if party whose name is forged do not appear in consequence of an offer of compromise; Rex v. Parish, 7 Car. & P. 782.

(k) Ante, 629 to 634; and see 1 Chitty's Crim. Law, 579 to 581.

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(e) Re: 696); Re:

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748).

III. Of the comparison with other documents admitted or proved to be of the prisoner's hand-writing (l), when not already in evidence for other purposes.

Proof of Fogery.

In all cases the best possible evidence should be adduced; for otherwise, although the evidence might be legally sufficient to justify a verdict of guilty, yet the jury, who are frequently anxious to acquit, will do so; and therefore where a bill was accepted in the name of "Samuel Knight, Market Place, Birmingham," though the judge, after conferring with the other judges present, held, on an indictment for the forgery of this acceptance, that the result of inquiries made at Birmingham by the prosecutor, who was not acquainted with the place, was evidence for the jury, though neither the best nor the usual evidence given, to prove the non-existence of the pretended acceptor, yet the jury acquitted the prisoner (m).

When the prisoner is indicted for forgery by subscribing a fictitious name assumed by him, some evidence must be given by the prosecutor that it is not the prisoner's real name (n). But upon an indictment for forging a check drawn on the name of G. Andrews upon Messrs. Jones, Lloyd, and Co., it was held, that proof that no person named G. Andrews kept an account with or had any right to draw on such bankers, was print facie evidence that G. Andrews was a fictitious name(o), that the prisoner's name is different, and that prima facic he has assumed for the first time or continued the false name for the purposes of deception or fraud in that particular transaction in making undue use of the instrument'p); though it is said, that after proving that he assumed a fictitious name in the transaction and what his real [ \*797] name is, it is incumbent on him to shew that he did not in that \*instance sign the false name for the purpose of fraud (q). And where on an indictment for uttering a forged check in the name of J. W. on Messrs. C. G. and Co., who were army agents and bankers, it was proved by a clerk in the former department that he did not know of any customer named J. W., and that he had been told by the other clerks that there was not any such customer in the banking department, it was held, that this was sufficient proof on the part of the prosecution to call upon the prisoner to shew that there was in fact such a person as J. W. having an account with Messrs. C. G. and Co., and in the absence of such proof was sufficient by itself for the consideration of Where a prisoner in custody on a charge of forgery wrote to a friend "to ask Mr. G. or some other solicitor, whether the punishment was the same whether the names forged were those of real or of fictitious persons," and Mr. G. was not his attorney, it was held that this was not a privileged communication(s).

Proof of Uttering. Evidence Uttering admissible.

In support of an indictment for uttering forged notes, evidence that the prisoner has previously uttered other forged notes may be given for the purof previous pose of shewing his knowledge of the forgery (t); but such notes must be produced and proved to have been forgeries(u); or if the prisoner had such other notes in his possession, that fact must be proved, and also the service upon him of a notice to produce the same, after which parol evidence of the contents will be admissible in evidence (x). If the defendant has destroyed

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<sup>(1)</sup> Rex v. Morgan, 1831, in note to Solita v. Yarrow, 1 Mood. & Rob. 134 to 135; and ante, 631 to 633; Gurney v. Langlands, 5 Bar. & Ald. 330. See other cases in 1 Chitty's Crim. Law, 580, 581.

<sup>(</sup>n) Rex v. King, 5 Car. & P. 123. (n) Rex v. Pencock, ante, 782, note (n). (o) Rex v. Backler, 5 Car. & P. 118, (Chit. j. 1563).

<sup>(</sup>p) Id. ibid.; ante, 782, note (q).

<sup>(</sup>q) Ante, 796, note (o).

<sup>(</sup>r) Rex v. Brannan, 6 Car. & P. 326.

<sup>(</sup>s) Rex v. Brewer, 6 Car. & P. 363. (t) Wylie's case, 1 New R. 92; Hough's case, Russ. & Ry. 120.

<sup>(</sup>u) Millard's case, Russ. & Ry. 245; see Rex v. Forbes. 7 Car. & P. 224, infra, note(z).

<sup>(</sup>x) Id. Ibid.

the forged instrument, then no notice to produce the same will be necessa- III. Of the ry(y). In a case of forging and uttering a forged bill, a letter written by the Evidence. prisoner to a third person, saying that that person's name is on another bill, Evidence and desiring him not to say that that bill is a forgery, is receivable in evidence of previous to shew guilty knowledge; but the jury ought not to consider it as evidence that that other bill is forged, unless such bill is produced, and the forgery of it proved in the usual way(z). So proof of bills on the same house with a bill in question, importing to have been drawn by persons not known at that house will be deemed ejusdem generis with the bill in question(a). proof that the prisoner had pointed out where bills or notes ejusdem generis were hidden, is inadmissible, because until explained it raises a presumption that he had them in his possession, and had hidden them(b). So proof that the defendant had previously uttered other bills or notes ejusdem generis, is also admissible(c); and it has even been supposed, that the prisoner's subse- When subquently uttering other forged bills knowing them to have been forged, may sequent Utbe evidence of his prior criminality (d). But it has been decided, that if a tering adsubsequent uttering has been made the subject of a distinct indictment, then it cannot be given in evidence to shew a guilty knowledge in a former utter-And it should seem, that only proof of previous acts should be admitted in evidence in a criminal case, to shew quo animo the prior act was done, unless the subsequent act of uttering was in some way connected with the particular case before the \*jury, so that it could be shewn that the [ \*798] notes in each case were of the same manufacture (f). And it was in that view that Gaselee, J. was of opinion, that bills of exchange precisely similar to that passed to the prosecutor by the prisoner, might be given in evidence to shew a guilty knowledge in the prisoner, though they were not passed till about a month after the uttering in respect of which the prisoner was then under trial(g). In the cases just referred to, the bills or notes must be produced, and their being forgeries proved(h). Nor can evidence of what a prisoner has said respecting other bills be received unless such other bills are produced and proved(i). And proof that the prisoner took back such other bills or notes, and changed them with the word "forged" written upon them, is not of itself sufficient evidence of his guilt in any other transaction. ever, evidence may be given of the prisoner's conduct on other utterings, and that he passed by different names, as tending to shew a system of fraud(k). Proof that the defendant has uttered other forged bills or notes of a different kind, though formerly questioned, is now continually admitted, because though there may be considerable difference between the genuine bills of different houses, the forgeries upon many of them probably come from the same hand; and shewing that a man has uttered forged notes of different descriptions, raises a presumption that he is in the habit of procuring forged notes, and that he had the criminal knowledge imputed to him by the indictment(1). And on an indictment for uttering a forged bill of exchange, the judge will hear evidence of all the facts which form parts of one contin-

(y) How v. Hall, 14 East, 274, ante, 626, Millard, Russ. & Ry. 245; supra, note (u). note (z); 795, note (w).

(e) Rex v. Smith, 2 Car. & P. 633.

(f) Rex v. Taverner, Carrington's Supp. 195, and Carrington's Crim. Law, 3d edit. 195.
(g) Rex v. Smith, 4 Car. & P. 111.

(h) Rex v. Millard, Russ. & Ry. 245; Rex v. Forbes, 7 Car. & P. 224, ante, 797, note (z).

(i) Reg. v. Cooke, 8 Car. & P. 586. (k) Rex v. Millard, Russ. & Ry. 247.

(1) Rex v. Millard, Russ. & Ry. 247; Bayl. 5th edit. 568, note 62.

<sup>(</sup>z) Rex v. Forbes, 7 Car. & P. 224. (a) Rex v. Hough, Russ & Ry. 120; supra, note (t).

<sup>(</sup>b) Rex v. Rowley, Russ. & Ry. 110; Bayl. 5th edit. 566.

<sup>(</sup>c) Rex v. Wylie, 1 New R. 92, (Chit. j. 698); Rex v. Ball, 1 Campb. 324, (Chit. j.

<sup>(</sup>d) Rex v. Smith, 4 Car. & P. 411; Rex v.

Proof of

III. Of the ued transaction relating to the uttering of the bill, and will not put the prosecutor to elect what particular fact he means to rely upon as to the uttering, till the case for the prosecution is closed (m). Other evidence to impeach Ultering. the prisoner's conduct on other and different occasions is not admissible, because he cannot be expected to be ready to meet it(n).

Proof of Intent(o).

With respect to the defendant's intent to defraud, the jury ought, in support of a count for forging the instrument with that intent, to infer his intention to defraud the person who would primarily have to pay the instrument if it were genuine, although from the inartificial manner of committing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument if genuine, did not enter into the prisoner's contemplation (p). It is not necessary to prove that any party was actually defrauded by the forgery(q); and if from the whole circumstance the jury can presume that the defendant intended to defraud any party, and such party might have been defrauded if the forgery had succeeded, it is sufficient to convict him, although from circumstances of which he was not apprised he could not in fact defraud him(r); and this although the party to whom the forged instrument was uttered swore that he believed that the defendant did not intend to defraud him(s).

(m) Rex v. Hart, 7 Car. & P. 652. (n) Rex v. Millard, Russ. & Ry. 247; Bayl. 5th edit. 568, note 62; but see ante, 785, 797.

(o) See ante, 785. (p) Rex v. Mazagora, Russ. & Ry. 291. (q) Rex v. Crook, 2 Stra. 901; Rex v. Groat, 1 Lord Raym, 737.

(r) Rex v. Holden, Russ. & Ry. 154, (Ch. i. 798).

(s) Rex v. Shepherd, Russ. & Ry. 169; Rex v. Harvey, 2 Bar. & Cres. 261.

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### \*CHAPTER IL

### OF LARCENY, EMBEZZLEMENT, AND FALSE PRETEN-CES, RELATING TO BILLS, NOTES AND CHECKS.

| L LARCENY OF BILLS, &c.           | 799 | 4 8 Geo. 4, c. 29, s. 48           | 506 |
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### I. LARCENY OF BILLS, &c.

I. Larceny of Bille.

THE 7 & 8 Geo. 4, c. 27, repeals the 2 Geo. 2, c. 25, s. 3, and most of the prior acts relative to stealing or embezzling, or obtaining by false pretences, bills of exchange, promissory notes, and warrants and orders for the payment of money, with an exception of the statutes relating to the post office, or any branch of the public revenue, or to the naval, military, victualling, or public stores of his majesty, and any act relating to the Bank of England or South Sea Company. The 2 Geo. 2, c. 25, s. 3, relates to stealing exchequer bills and bank notes.

The 7 & 8 Geo. 4, c. 29, consolidates and amends the law of larceny Enactments of 7 and other offences connected therewith, on and from the 1st July, 1827. & 8 Geo. The 5th section enacts, that if any person shall steal any bill, note, (not 4, c. 29, as mentioning exchequer bills or bank notes,) warrant, order, or other security to Larcony of Bills, whatsoever, for money, or for payment of money, whether of this kingdom Notes, and or of any foreign state, he shall be deemed guilty of felony, of the same na. Checks. ture and in the same degree, and punishable in the same manner as if he had stolen any chattel of the like value with the money due on the security so stolen or secured thereby and remaining unsatisfied; and each of the several documents thereinbefore enumerated shall throughout that act be deemed for every purpose to be included under and denoted by the words "valuable se-

The following sections then provide against obtaining these securities by robbery, stealing from the person, menaces, burglary, or house-breaking (a). [\*800] The 46th section subjects clerks and servants stealing any \*valuable security.

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 $(\frac{1}{4})$  Res 1834, Can Mood. C.

ente, 106,

(i) Rey

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(l) Res

Leach, 91

Pearce, P.

(n) Re

(a) Id

(o) Re Ry. 181,

Leach, 95

CHAP. I

Кrс. Enactments of of Bills. Checks.

I. Larceny the property of their masters, to transportation for any term not exceeding fourteen years nor less than seven years, or to be imprisoned, &c.; and the 47th section enacts, that clerks and servants receiving any valuable security on their master's account and embezzling it, shall be deemed to have felo-7 & 8 Geo. niously stolen it, and be liable to the same punishment(b). Receivers of any 4, c. 29, as stolen or embezzled property are also particularly provided against(c). And to Larceny the 57th section enacts, that upon conviction of a felony or misdemeanor in Notes, and stealing, taking, obtaining, or converting, or in knowingly receiving any chaltel, money, or valuable security, or other property whatever, on a prosecution by or on the behalf of the owner or his executor, the prosecutor shall have restitution of the chattels, but it provides, that if it shall appear before any award of restitution or order made, that any valuable security (i. e. bill, note, or warrant, or order for payment of money,) shall have been bon i fide paid or discharged by some person or body corporate liable to the payment thereof; or being a negotiable instrument, shall have been bona fide taken or received by transfer or delivery by some person or body corporate for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as therein mentioned, in such case the court shall not award or order the restitution of such security. This enactment is substituted for one in 21 Hen. 8, c. 21, but with some very material alterations, for it is extended to receivers, and to property obtained by false pretences and other misdemeanors, and the proviso is new.

The consideration of these provisions, and the other enactments relating to public securities, and the decisions applicable to them, would involve the examination of the whole law of larceny, embezzlement, and false pretences; but we will here only examine those peculiarities which affect bills, promis-

sory notes, and checks, or orders for the payment of money.

The Instrument stolen.

With respect to the instrument stolen, it was held under the former acts (and which decisions are still applicable) that it must have been a valid instrument, or the party could not be indicted for stealing it (d). It should therefore seem, that if a bill or note be payable on a contingency, or not merely for the payment of money; the party stealing it will not be guilty of larceny(e).

So if the instrument be not impressed with the requisite stamp at the time it is obtained by the defendant, he is not indictable (f). Therefore where a draft on a banker, which ought to have been stamped, was taken from a letter by a person employed by the post office, it was holden that this was not such a security as to subject him to be indicted for larceny under the statute 7 Geo. 3, c. 50, s. 1, or the 9 Ann, c. 10, s. 41, then in force(g) So a check on a banker, written on unstamped paper, payable to D. F. J., and not made payable to bearer, is not a valuable security within the 7 & 8 [ \*801 ] Geo. 4, c. 29, s. 5, because, not \*being payable to bearer, it does not fall

(d) See cases, post, 802, 803.

(e) Ante, 773, note (l) and (m), as to forgery, &c.; see ante, 132 to 145, when or not a bill or note is valid.

(f) Rex r. Pooley, 2 Leach, 887; 3 Bos & Pul. 311; Russ. & Ry. 12, S. C.; Chitty's Stamp Acts, 55; but see Rex v. Reculist, 2 Leach, 707.

(g) Rox v. Pooley, 2 Leach, 887; 3 Bos. & Pul. 311; Russ. & Ry. 12, S. C.

<sup>(</sup>b) See this enactment, post, 804.
(c) Sect. 54, 55, 56. Those sections avoid the objection taken under the prior act, 3 Geo. 4, c. 24, in Rex v. King, 2 Car. & P. 412, where it was held, that a receiver of stolen securities for money was not punishable as an accessory to a felony under such former act, which was so inaccurate that no conviction could take place upon it.

within the exception in favour of checks so payable(h); and it has been held, I. Larcony that if a clerk, on receiving money on his master's account, give the debtor of Bills, a receipt on plain paper, when a stamp is necessary, such receipt is not evidence against the clerk on an indictment for embezzlement(i). But this strament doctrine, we have seen, does not apply to the crime of forgery(k). And stolen. an unstamped check is admissible for the purpose of identifying other property stolen in support of an indictment for the larceny of the latter (l).

So on the general ground that the instrument stolen must have been at the time valid and available, the first indictment against Aslett failed, it appearing that the instruments termed in the indictment "exchequer bills," and apparently valid, were invalid as such, because the authority of the person who had signed them had previously ceased (m); and though the prisoner was afterwards convicted on another indictment for embezzling the same as " bank effects" under the 15 Geo. 2, c. 13, s. 12, and although the majority of the judges thought that invalid exchequer bills were nevertheless such " bank effects," yet he was not executed (n). So it was holden no felony to steal "bankers' bills," which, though signed, and ready for circulation, had never been parted with, because no money could be considered as due upon them(o). But the circumstance of the payee not having indorsed a promissory note was holden not to constitute any objection to a conviction upon the act then in force(p). And where the notes of a country bank which had been paid, and therefore no longer valuable as notes, were sent into the country in return, in order to be re-issued (which they might be under the 44 Geo. 3, c. 98, and 48 Geo. 3, c. 149, s. 14.) and were stolen during the journey, it was held, that although an indictment for stealing them as notes might not be sustainable, yet an indictment might be supported for stealing the stamps and paper, which were valuable as re-issuable by the owners (q).

Upon the then existing act, which mentioned bank notes in the plural number, it was held a felony to steal a single note(r); and that if a person employed by the post office on one day secrete a letter containing half a bank note, and another letter at a different time containing the other half of it, his offence will be complete(s); and afterwards the 42 Geo. 3, c. 81, expressly declared it a capital offence to secrete, embezzle, or destroy any letter containing a part of any instrument named in the former statute; and the same point has also since been decided upon an indictment against a servant for embezzling the halves of country bank notes coming by the post to his master(t). But it may be proper in these cases to frame the indictment specially, with counts describing the pieces as "pieces of paper partly written and partly printed, bearing stamps," and specifying their value(u). If a person, though not the servant of the party who intrusts him, receive a parcel \*containing notes to take to a coach-office, and abstract the notes on [ \*802] his way there, and apply them to his own use, he is guilty of larceny (v).

(h) Rex v. Yates, cor. twelve judges, A. p. 1828, Carrington's Crim. Law, 3d edit. 273, 1 Mood. C. C. 170, (Chit. j. 1387); and see ante, 106, note (s).

(i) Rex r. Hall, 2 Stark. Rep. 67.

(k) Ante, 779, notes (a), (b), and (c)(1) Rex r. Pooley, 3 Bos. & Pul. 316; 2 Leach, 900; Russ. & Ry. 31, S. C. Rex r. Pearce, Peake's Rep. 75, 76.

(m) Rex v. Aslett, 1 New Rep. 3, 9; and 2 Leach, 958, (Chit. j. 692).

(n) Id. ibid.

(0) Rex v. Clark, 2 Leach, 1036; Russ. & Ry. 181, S. C.; infra; but see Rex v. Ransom, Russ. & Ry. 232; 2 Leach, 1090, 1098,

S. C.; and cases, post, 802, note (y).
(p) Hassell's Case, 2 East's P. C. 598. (q) Rex v. Clark, 2 Leach, 1036; Russ. & Ry. 181, S. C.; Rex v. Vyse, 1 Mood. C. C. 218, (Chit. j. 1472). See a form, Rex v. Mead, 4 Car. & P. 535.

(r) Rex r. Hassell, 1 Leach, 1.

(s) Rex v. Moore, 2 Leach, 575; 2 East's

P. C. 581, S. C.

(t) Rex v. Mead, 4 Car. & P. 535.

(u) Id. ibid.

(v) Reg. v. Jenkins, 9 Car. & P. 35; and see Rex v. Jones, 7 Car. & P. 151.

I. Larceny of Bills, & c.

The Instrament stolen.

The instrument stolen must have been the property of another person at the time it was taken, and also of value to him at that time, and therefore it was holden not to be the offence of larceny under the prior act 2 Geo. 2. c. 25, to compel, by duress, a man to write and sign a note on the paper and with the ink of the defendant (w). So since the 7 & 8 Geo. 4, c. 29, where A. in consequence of seeing an advertisement applied to B. to raise money for him, and B. said he would procure him 5000l., and produced from his pocket-book ten blank 6s. bill stamps, across each of which A. wrote "accepted payable at Messrs. P. and Co.'s, 189, Fleet Street, London," and signed his name, and B., who was present, took up the stamps, and nothing was said as to what was to be done with them, and afterwards bills of exchange for 500l. each were drawn on these stamps, and B. put them in circulation, it was held, that these stamps, with the acceptances thus written upon them, were neither "bills of exchange," "orders for the payment of money," or "securities for money," and that a charge of larceny against B. for stealing the stamps, and for stealing the paper on which the stamps were, could not be sustained, the paper and stamps being the property of B., and continuing throughout in his possession (x). But a check on a banker is the subject of larceny, even while in the drawers own hands(y).

Of the In-Statement of the Instrument.

As in the case of forgery, the indictment for larceny relating to bills and notes must state the instrument by name to have been one of those described in the statute upon which the indictment is founded; and this in general is sufficient, without setting out the instrument verbatim, for describing them in a general manner suffices (z). Under the 2 Geo. 2, c. 25, it was held, that an indictment for stealing a bank note, but describing it as "a certain note (not saying bank note or promissory note) commonly called a bank note," was insufficient(a). So if the thing stolen be described as a bank post bill, and be not set out, the court cannot take judicial notice that it is a promissory note, or that it is such an instrument as under the 2 Geo. 2, c. 25, may be the subject of larceny, though it be described as made for the payment And it is insufficient in an indictment for larceny to describe of money (b). bank notes as so many pounds sterling to which they amount in value, but they should be described as bank notes(c).

It suffices and is proper to describe bank notes as "divers, to wit, ten bank notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of fifty pounds, and of the value of fifty pounds," without even stating the amount or value of the individual note(d); and it seems it will suffice to describe them as "bank notes" generally (e); or they may be described as "promissory notes called bank notes," or as "promissory notes called bank post bills," according to

the fact (f).

(w) Rex v Phipoe, 2 Leach, 673, (a), (Chit j. 546).

(z) Rex v. Johnson, 2 Leach, 1103; Rex

v. Pedley, 1 Leach, 325; Rex v. Sheppard, 1 Leach, 226; Rex v. Craven, 2 East's P. C. 601, 777; Russ. & Ry. 14, S. C. (a) Rex v. Craven, 2 East's P. C. 601; Russ. & Ry. 14, S. C.

Russ. & Ry. 14, S. C.

(b) Rex v. Chard, Russ. & Ry. 488.

(c) Rex v. Furneaux, Russ. & Ry. 335, 403.
(d) Rex v. Johnson, 2 Leach, 1103; Rex v. Partrick, 1 Leach, 258; Rex v. Sherrington, id. 513.

(e) Rex v. Johnson, 3 M. & Sel. 547. (f) Rex v. Partrick, 1 Leach, 253; Rex v. Sherrington, id. 518.

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(g) Rex 974. See (i) Rex Partrack Leach, 110 (k) Re1 (1) 2 81 Rear & R

<sup>(</sup>x) Rex v. Hart, 6 Car. & P. 106. (y) Rex v. Metcalf, 1 Mood. C. C. 433, overruling Walsh's case, Russ. & Ry. 215; 2 Leach, 1054; 4 Taunt. 258. Though to make a thing the subject of larceny it must be of some value, and stated to be so in the indictment, yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least; Reg. v. Morris, 9 Car. & P. 847

\*A bill of exchange should be described as "a bill of exchange for the L Larcong payment of the sum of ten pounds(g)." Sometimes, unnecessarily, the bill of Bills, is fully described, though not set forth verbatim as in forgery (h), before the Of the In-2 & 3 Will. 4, c. 123, s. 3.

A promissory note may be described generally as "a promissory note for Statement the payment of five guineas," or "a promissory note for the payment of five of the In-

pounds," according to the fact.

If the indictment profess to state the purport, (that is, the very words) of the instrument, it must be set forth with great exactness, or the indictment will be bad, unless it appear upon the face of it, or by averment, that it was an instrument of the description mentioned in the statute and in the indictment(i).

A draft or check drawn in the country on a London banker, may be laid

as a warrant or as an order for the payment of money(k).

It has been usual, when the indictment is for stealing several articles, to state the value of each separately, as "one promissory note for the payment of the sum of five pounds, and of the value of five pounds, and two bank notes for the payment of the sum of one pound each, and of the value of one pound each." But it is not essential that the value should be thus separately stated(1).

The instrument as to ownership is usually described as "a bill of exchange Statement for the payment of ten pounds, and of the value of ten pounds, the property ty, &c. of A. B. then and there being found, the said sum of ten pounds secured and payable by and upon the said bill of exchange being then and there due and unsatisfied to the said A. B., feloniously did steal, take, and carry away. against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity (m)." words "of the property of A. B.," or the words "which said notes were then and there the property of A. B., and are due and unsatisfied," seem But on an indictment for stealing property which had belonged to a deceased person, who appointed executors who would not prove the will, it was held that the property must be laid in the ordinary, and not in a person who, after the commission of the offence, but before the indictment, had taken out letters of administration with the will annexed; because the rights of an administrator only commence from the date of the letters as distinguished from those of an executor, which commence not from the granting of the probate but from the death of the testator(o). Sometimes a bill of exchange or note has been described as "of the goods and chattels of A. B." but (although bills may be considered as goods and chattels for some purposes(p)) yet as the stealing them (being choses in action) was not at common law indictable as a larceny (q), those words seem untechnical.

The conclusion must be against the form of the statute(r); and although an Conclu-

(g) Rex v. Craven, 2 East's P. C. 602. (A) See a full form, 3 Chit. Crim. Law, 973,

(i) Rex v. Sherrington, 1 Leach, 513; Rex v. Partrick, 1 Leach, 253; Rex v. Johnson, 2 Leach, 1103, and notes.

(k) Rex v. Sheppard, 1 Leach, 226. (l) 2 Stark. Cr. P. C. 451; Rex v. Peel, Russ. & Ry. 407.

(m) See form, 3 Chit. Crim. Law, 974; Cro. C. C. 296; Stark. 451.

(n) Rex v. Milnes, East's P. C. 602. (o) Rex v. Smith, 7 Car. & P. 147.

(p) Per Tindal, C. J. in Cumming v. Bailey, 6 Bing. 371; 4 Moore & P. 36, (Chit. j. 1485).

(q) Calye's case, 8 Co. 33.

(r) Rex v. Pearson, 5 Car. & P. 121.

I. Larceny informal conclusion is aided after verdict by the 7 Geo. 4, c. 64, s. 20, it is still cause of demurrer(s). &c.

Accessories. [ \*804 ]

\*With respect to accessories, the 7 & 8 Geo. 4, c. 29, s. 54, enacts, that where the original offence is felony, the receivers of stolen property may be tried either as accessories after the fact, or for a substantive felony(t).

Where A. and B. were indicted jointly as principal and accessory, A. for stealing six bank notes of 100l. each, and B. for receiving the said notes, knowing them to have been stolen, and it appeared that A. stole the six 1001. notes, and got them changed into 201. notes, some of which B. received, it was held that B. could not be convicted on this indictment (u).

Evidence.

If a bank note be described generally as such, and the instrument is on the face of it a note, the maker's signature need not be proved(v). But if a bank note be unnecessarily described as signed by A. H. for the Governor and Company of the bank of England, the signature should be proved (x).

It will not, however, be necessary to prove in evidence the whole number or quantity of bank notes, bills, &c. alleged to have been stolen(y).

II. Embezzlement of Bills, &c.

# II. EMBEZZLEMENT OF BILLS, &c.

Embezzlement by Servants. 7 & 8 Geo. 4, c. 29, s. 47.

For the punishment of embezzlements committed by clerks and servants, the 7 & 8 Geo. 4, c. 29, s. 47, declares(z) and enacts, "That if any clerk Clerks and or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall by virtue of such employment receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender being convicted thereof, shall be liable at the discretion of the court to any of the punishments which the court may award as hereinbefore last mentioned(a)."

Embezzlement by

And for the punishment of embezzlements committed by agents intrust-Agents(b). ed with property, the 49th section of 7 & 8 Geo. 4, c. 29, enacts, "That

7& 8 Geo. 4, c. 29, s.

(s) Reg. v. Smith, 2 Mood. & Rob. N. P. C. 109; see ante, 794.

(t) See Reg. v. Caspar and others, 9 Car. & P. 289; and Reg. v. Pulham, id. 280. (u) Rex v. Walkeley, 4 Car. & P. 182.

(v) Rex v. Ellins, Russ. & Ry. 188. (x) Rex v. Craven, 2 East's P. C. 601; Russ. & Ry. 14, S. C.; Rex v. Ellins, Russ. & Ry.

(y) See Rex v. Ellins, Russ. & Ry. 188; Rex v. Carson, Russ. & Ry. 303; Rex v. Johnson, 3 M. & Sel. 548; post, 807, as to Embezzlement.

(z) The present enactment is similar in effect to the repealed act, 39 Geo. 3, c. 85.

(a) See sect. 46, ante, 799, 800.
(b) The fraudulent misapplication by bankers, brokers, and other agents, by pledging and misapplying bills and other negotiable securities

of their employers, not having been cognizable by the criminal law, (Walsh's case, 4 Taunt. 258, 284; 2 Leach, 1054; Russ. & Ry. C. C. 215, S. C. See also Clayton's case, 1 Meriv. 579,) the statute 52 Geo. 3, c. 63, (now repealed), was passed to prevent such embezzlement; see that act and notes, 3 Chit. Crim. Law, 2d edit. 921(a). On that act it was held, that a person gratuitously engaging to procure the discount of a bill, not being in any business within which such an employment regularly falls, could not be convicted of embezzling the bill deposited with him for the purpose of procuring such discount. Rex v. Prince, Mood. & M. 21; 2 Car. & P. 517; for, per Lord Tenterden, "It is true, that for certain purposes, a friend is an agent; but it was intended to confine the operation of the statute to persons actions in discharge of their functions? ing in discharge of their functions.

or any part such direct purpose so ney, securit der shall be liable, at th any term n such other shall award ney for the whether of eign state, be intruster for the sale pegotiate, t contrary to of attorney or in any n or the proc the stock o bereof, ev convicted t **Punishment** 

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if any money, or security for the payment of money, shall be intrusted II. Embezto any banker, merchant, broker, attorney, or other \*agent with any di-zlement of rection in writing to apply such money, or any part thereof, or the proceeds Embezzleor any part of the proceeds of such security, for any purpose specified in ment by such direction, and he shall, in violation of good faith, and contrary to the Agents.

7 & 8 Geo.

4, c. 29. s. ney, security or proceeds, or any part thereof respectively, every such offen- 49. der shall be guilty of a misdemeanor, and, being convicted therof, shall be [ \*805] liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to suffer such other pupishment by fine or imprisonment, or by both, as the court shall award; and if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall be intrusted to any banker, merchant, broker, attorney, or other agent, for the safe custody, or for any special purpose, without any authority to sell. negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

Sect. 50 enacts, "That nothing hereinbefore contained relating to agents Sect. 50. shall affect any trustee in or under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed; nor from selling, transferring, or othwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien. claim, or demand."

Sect. 52 enacts, "That nothing in this act contained, nor any proceed. Sect. 52. ing, conviction, or judgment to be had or taken thereupon, against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen, or impeach any remedy at law or in equity, which any party aggrieved by any such offence might or would have had if this act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equi-

II. Embez- ty \*in any action, suit, or proceeding which shall have been bona fide instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt."

> But these clauses in the 7 & 8 Geo. 4, c. 29, relating to embezzlement by clerks and agents, do not extend to a person gratuitously engaging to procure the discount of a bill, and converting the proceeds to his own use(c); though an occasional employment would suffice (d). And an employment as clerk, without a formal appointment under a corporate seal, suffices in the case of a corporation(e); and it is not material whether or not the master was legally entitled to the bills or notes received for his use by the  $\operatorname{clerk}(f)$ . Where A. placed valuable securities in the hands of B. with a written direction to invest the proceeds in the funds, "in case of any unexpected accident happening to A." and no accident did happen to A. and the proceeds were converted by B. to his own use, it was held he was not indictable under the now repealed act, 52 Geo. 3, c. 63, and it should seem that he would not be so under the 7 & 8 Geo. 4, c. 29, s. 49(g); and it was also holden, that an allegation in the indictment, that A. placed valuable securities in the hands of B. with an order in writing to invest the proceeds in the government funds, was not supported by proof of an order in the above terms (h)(1).

> With respect to the instrument embezzled, the observations already made in treating of the larceny of bills, &c. will in general apply (i).

Of the Indictment.

And for preventing the difficulties that have been experienced in the prosecution of clerks and servants guilty of embezzlement, the 7 & 8 Geo. 4, c. 7 & 8 Geo. 29, s. 48, enacts, "That it shall be lawful to charge in the indictment, and proceed against the offender for any number of distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts; and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him, in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly (k)." Before this statute the property embezzled, or at least some portion of it, must have been specifically described (l).

A party may be properly described as the clerk or servant of one body of persons, though appointed or elected by another body of persons: thus [ \*807 ] the clerk of a savings' bank may be described as clerk \*to the trustees, though

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(c) Rex v. Prince, Mood. & M. 2; 2 Car. & P. 517, S. C.; ante, 804, note (b).
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(d) Rex v. Spencer, Russ. & Ry. 299; Rex v. Beechey, id. 319.

(h) Id. ibid.

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CHAP. II

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(a) Rex v (a) Reg. p ne Rea r. Sc N. P. C. 345 P. C. 163. case tha Ma clerk of (0) Rez T Par. Can. (p) Rez : Car. & P. 15 1 Mood. C. (

<sup>(</sup>e) Rex v. Wellings, 1 Car. & P. 454. (f) Rex v. Bencall, 1 Car. & P. 454. (g) Rex v. White, 4 Car. & P. 46.

<sup>(</sup>i) See ante, 800 to 802.

<sup>(</sup>k) This removes the objection taken under 39 Geo. 3, c. 85; see Rex v. Ward, Gow's N. P. C. 169.

<sup>(1)</sup> Rex v. Furneaux, Russ. & Ry. 335; Rex v. Tyers, id. 402; Rex v. Flower, 5 B. & C. 786; 8 Dow. & Ry. 512, S. C.; but see Rex v. Hall, Russ. & Ry. 463.

<sup>(1)</sup> See post, 825, (73).

elected by the managers (m). So a collector of poor's rates may be de- II. Embers scribed as servant to the committee of management of the affairs of the parish, siemest of Bills, &c. though elected by the vestry (n). And the clerk or servant of several persons is the clerk or servant of each(o).

Of the Indictment.

It is not necessary in an indictment for embezzlement to state from whom the prisoner received the bills, money, &c.(p); but it must appear that the prisoner received the instrument from a third person, for the use of his master, and not from the master or another servant to be paid away by the prisoner, and if a subsequent common larceny count allege that the defendant feloniously stole, adding, "in manner and form aforesaid," referring to the first count, the defendant cannot be convicted on either (q). above statute, where the prisoner was indicted for embezzling several bank notes, he being a clerk and servant of the prosecutor, it being uncertain what were the exact amounts of the bank notes he had received, and they did not exceed 201., the indictment settled by an eminent crown lawyer, stated one note of 101. one of 51., one of 21., and three of 11., so that one or other of this amount might be paid to him, this was held proper by Le Blanc and Bayley, J. because stealing any one would complete the crime of larcey(r).

Receivers may be indicted either as accessories after the fact, or for a sub- Receivers. stantive felony' where the original offence is felony; or for a misdemeanor where the original offence is a misdemeanor(s).

It is not necessary to prove in evidence the whole number or quantity of Evidence. bank notes, bills, &c. alleged to have been stolen; and, therefore, in support of an indictment for embezzling a letter, stating that it contained several notes, it will suffice, though only one should be proved (t): and on an indictment for embezzling one pound notes and other monies, &c. describing them, though the evidence was that other property than that described was embezzled, it was held sufficient(u). Some specific sum or security must, however, be proved to have been embezzled, and the mere proof of a general deficiency in account will not suffice (v).

On the trial of a person under the 52 Geo. 3, c. 143, s. 2, for embezzling a letter containing a bill of exchange, he being at the time employed under the post office, it was held sufficient to prove that such person acted in the service of the post office, and that it was not necessary to go into proof of his appointment (x).

# III. OBTAINING BILLS, &c. UNDER FALSE PRETENCES.

WITH respect to false pretences, it was holden, that at common law the under

III. Obtaining false Pre-

- (m) Rex v. Jenson, 1 Mood. C. C. 484. (n) Reg. v. Callahan, S Car. & P. 154; and see Rex v. Squire, Russ. & Ry. 349; 2 Stark. N. P. C. 348, S. C.; Rex v. Ward, Gow's N. P. C. 168. It was also contended in the principal case that the prisoner was an officer and not a clerk or servant.
- (0) Rez v. Leech, 8 Stark. N. P. C. 70; Rex v. Carr, Russ. & Ry. 198.
- (p) Rez v. Bencall, and Rez v. Wellings, 1 Car. & P. 454.
- (q) Rex v. Murray, 5 Car. & P. 145, 146; 1 Mood. C. C. 276, S. C.
- (r) Jackson's case, 3 Chitty's Crim. Law, tences. 266, where see the form of indictment on which he was convicted and transported.
- (s) 7 & 8 Geo. 4, c. 29, ss. 54, 55. See cases referred to, ante, 804, note (1).
- (t) Rex v. Ellins, Russ. & Ry. 188; and see 7 & 8 Geo. 4, c. 29, s. 48, ante, 806.
- (u) Rex v. Carson, Russ. & Ry. 308; Rex v. Johnson, 3 M. & Sel. 548.
- (v) Reg. v. Jones, 8 Car. & P. 288; and see Rex v. Tyers, Russ. & Ry. 402, 404.
- (x) Rex r. Rees, 6 Car. & P. 606.

CHAP. II.

III. Obtaining Bills under tences.

Provisions of 7 & 8 Geo. 4, c. 29, s. 53. [ \*808]

obtaining of property by giving a check on a banker, where the party had no account, was not an indictable fraud(y); but in a subsequent \*case, when False Pre- the indictment for such a fraud was properly framed upon the repealed statute 30 Geo. 2, c. 24, s. 1, the defendant was held indictable, and was convict-And now by the 7 & 8 Geo. 4, c. 29, s. 53, after reciting that a failure of justice frequently arises from the subtle distinction between larceny and fraud; for remedy thereof, it is enacted, "That if any person shall by any false pretence obtain from any other person any chattel, money or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award: provided always, that if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor, and no such indictment shall be removed by certiorari; and no person tried for such misdemeanor shall be liable to be afterwards. prosecuted for larceny upon the same facts(a)." Obtaining credit in account Credit not from the party's own banker, by drawing a bill on a person on whom the party has no right to draw, and which has no chance of being paid, is not within the act, though the banker pays money for him in consequence thereof to an extent he would not otherwise have done(b). But obtaining, as a loan, from the drawer of a bill accepted by the prisoner and negotiated by the drawer, part of the amount, for the purpose of paying the bill, under the false pretence that the prisoner was prepared with the residue of the amount, is an offence within the act, the prisoner being shewn not to be prepared, and not intended so to apply the money (c).

within Act.

Nature of Pretences used.

If a person, procuring a tradesman to sell him goods as for ready money, direct him to send his servant with them to his lodgings, and then deliver fabricated bills in payment, retaining the goods, though he cannot be prosecuted for felony in stealing them, he may be found guilty of obtaining them by false pretences (d). And it seems that obtaining money from the county treasurer by a forged order, purporting to be signed by a magistrate, for payment of expences of conveying vagrants, is an offence within the act(e). But a mere pretence that the party would do an act which he did not mean to do (as a pretence to pay for goods on delivery (f), or that he would get a bill discounted (g), is not a false pretence within the act(h). And the pretence must be for the purpose only of obtaining the property; and it has been held, that a pretence to a parish officer, as an excuse for not working, that the party had not clothes, when he really had, though it induced the offcer to give him clothes, was not obtaining goods by false pretences within There may, however, be a sufficient false pretence within the the act(i). statute by the acts and conduct of the party, without any verbal misrepresentation; and therefore it has been held, that where the prisoner obtained money from the keeper of a post-office, by assuming to be the person men-

Assumption of False Character.

> (y) Rex v. Lara, 6 T. R. 565, (Chit. j. 562). (z) Rex r. Jackson, 3 Campb. 370, (Chit. j.

(b) Rex v. Wavell, 1 Mood. C. C. 224.

571).

(e) Chit. Burn's Just. 28th edit. 645; Rex r. Rushworth, Russ. & Ry. C. C. 317; 1 Stark. 896, S. C.

(f) Rex v. Goodhall, Russ. & Ry. C. C. 461; The King v. Clifford, K. B. 1824, S. C.

(g) Rex v. Clifford, supra.

(h) Supra, note (f).
 (i) Rex v. Wakeling, Russ. & Ry. C. C. 504.

tioned in made no 1 a false pre uttering a tion that tence that in reality 1 But when bank that the prisone peared tha that the th The ob: or embezzi under false parable to ed for obta

The ind prisoner of statute 7 | pretences. allege the i be sufficier sequent inc in that sect 53, stated ed 10 A. and that a a rajuable leady obta tain, &c., oot appear that he ki that respec dictment 1 error(s).

> Receive demeanor. conviction

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( Rex , (l) Rez r Lawrence, J (a) 3 Ch the indictions reled (a) Rex (o) See 0

P) Rex

<sup>885).</sup> (a) Sec Reg. v. Norton, 8 Car. & P. 196; post, 809, note (r).

<sup>(</sup>c) Rex v. Crossley, 2 Mood. & Rob. 17. (d) Rex v. Parkes, 2 Leach, 614, (Chit. j.

tioned in a money order which he presented for \*payment, though he III. Obmade no false declaration or assertion in order to obtain the money, it was Bills under a false pretence within the act(k): and it has been also held, that the fact of False Prouttering a counterfeit note as a genuine one, is tantamount to a representation that it was so(l). So if a party obtain goods under the false pretence that he is recommended by a partner, and that a bill of exchange, in reality worthless, is a good one, he may be convicted and punished (m). But where upon an indictment for false pretences in passing a note of a bank that had stopped payment as a good note, though it appeared that the prisoner knew that the bank had stopped payment, yet as it further appeared that two only of the partners in the bank had become bankrupts, and that the third had not, it was held that the prisoner must be acquitted(n).

The observations already made as to the nature of the instrument stolen or embezzled, will be applicable to the case of money or securities obtained under false pretences(0). And, therefore, if a party obtain a check not made payable to bearer, and, consequently, requiring a stamp, he cannot be indicted for obtaining a valuable security within the act(p).

The indictment must specify what the false pretences were by which the Of the Inprisoner obtained the money or security (q). And an indictment under the dictment statute 7 & 8 Geo. 4, c. 29, s. 53, is bad, unless, in addition to the false pretences, it contain the requisites of a count for larceny; and if it do not allege the money, &c. obtained to be the property of any person, it will not be sufficient, inasmuch as it could not in that state be pleaded in bar to a subsequent indictment for larceny, which it is made by the proviso contained in that section(r). And where an indictment on 7 & 8 Geo. 4, c. 29, s. 53, stated that the prisoner, contriving, &c. to cheat A. B., falsely pretended to A. B. that he was a captain in the East India Company's service, and that a certain promissory note, which he then delivered to A. B., was a valuable security for 211., by means of which false pretences he fraudulently obtained from A. B. 81. 15s., whereas the prisoner was not a captain, &c., and the note was not a valuable security; it was held, as it did not appear but that the note was the prisoner's own promissory note, or that he knew it to be worthless, there was no sufficient false pretence in that respect; and as the two pretences were to be taken together, that the indictment was bad, and judgment given upon it was reversed on a writ of error(s).

Receivers of property obtained under false pretences are guilty of a mis- Receivers. demeanor, and may be indicted and convicted thereof without the previous conviction of the person guilty of the principal misdemeanor (t).

The general nature of the evidence to be adduced in support of an indict- Evidence. ment for obtaining money or valuable securities under false pretences may be collected from the previous remarks. Where the false pretence is contained in a letter, which is lost before trial, the prisoner may be convicted on parol evidence of its contents(u).

(q) Rex v. Mason, 2 T. R. 581; 1 Chit.

Burn's Just, 28th edit. 647.

- (r) Reg. v. Norton, 8 Car. & P. 196. (s) Wickham v. The Queen, 2 Perry & Dav. 333.
- (t) 7 & 8 Geo. 4, c. 29, s. 55. See cases referred to, ante, 804, note (t).
  (u) Rex r. Chadwick, 6 Car. & P. 181.
- (n) Rex v. Spencer, 3 Car. & P. 420.

(k) Rex v. Storey, Russ. & Ry. C. C. 81.

(1) Rex v. Freeth, Russ & Ry. C. C. 127,

(m) 3 Chitty's Crim. Law, 1007, where see the indictment on which the party was con-

(o) See anie, 800 to 802.

Lawrence, J. dissentiente.

victed.

(p) Rex v. Yates, 1 Mood C. C. 170.

C(

For

ADMISSIO Wal 4, 1834,

# APPENDIX.

### FORMS

### CONTAINED IN THE BODY OF THE WORK.

FORM OF A FOREIGN BILL, 146. AN INLAND BILL, id. A BILL UNDER 51. id. A CHECK, 147.

A PROMISSORY NOTE, 147, 516. A COUNTRY BANKER'S NOTE, 147.

Indorsements, several Forms of, 224, 225. Notice that a Bill has been obtained by Fraud, 97, n. (k), 253, n. (n).

LOST, &c. 258, note (m). AN ACCEPTANCE IN GENERAL, 291, 294. PAYABLE AT A PARTICULAR PLACE, 293, 294. CONDITIONAL ACCEPTANCE, 801. PARTIAL OR VARYING, 308.

SUPRA PROTEST, 846. A PROTEST FOR Non-Acceptance, 832, note (c), 462. Non-Payment of a Foreign Bill, 462. AN INLAND BILL, 465.

NOTICE OF NON-PAYMENT, 471, in note. DECLARATION, 551 to 557. PLEA OF PAYMENT OF MONEY INTO COURT, 597.

#### GENERAL RULES AND ORDERS.

ADMISSION OF HANDWRITING .- Rules H. T. 2 Will. 4, 1882, reg. vii.; H. T. 4 Appendix. Will. 4. 1834, s. 20, ante, 635.

BAIL .- Rule II. T. 2 Will. 4, 1832, sc. 19, 21, ante, 548, 549.

#### BANKRUPTCY.

Court of Review, February 2, 1832.

It is ordered, That each official assignee shall present for acceptance all unaccepted bills of Duty of exchange as soon as he shall receive the same, and before he deposits them in the Bank of Eng- Official land as herein after directed.

Assignee with re-

That each official assignee shall deposit in the Bank of England, to the credit of the Accountspect to General of the High Court of Chancery, all bills, notes, and other negotiable instruments, ex-Bills of cept unaccepted bills of exchange, as soon as he shall receive the same; and shall deposit in like Exchange.

Appendix.

Deposit in Bank of England.

manner all unaccepted bills of exchange, as soon as the same shall have been accepted or refused acceptance; and shall, at the time of such deposit, leave a statement in writing with the cashier of the Bank of England, specifying the dates and contents of the instruments so deposited, the name of the official assignee making the deposit, the name and description of the bankrupt or bankrupts, and the particular estate to which the same respectively belongs; and that such instruments respectively are to be deposited to the credit of the said accountant-general, and of such particular estate; and shall also take a receipt for the same from the cashier of the bank, and carry it to the office of the said accountant-general, who will give a proper voucher, to be produced when called for by the commissioners.

Duty of Rank. Presentment for Payment. [ \*812 ]

That when and as soon as any bill, note, or other negotiable instrument, deposited as aforesaid in the Bank of England in the name of the accountant-general, in pursuance of the statute 1 & 2 Will. 4, c. 56, or of any order of the Lord Chancellor or the said court, shall become due, the Governor and Company of the Bank of England shall, \*without any direction from the accountant-general, deliver all such bills, notes, or other negotiable instruments, to one of the cashiers of the bank, who is to present the sume for payment, and receive the sums of more due thereon respectively, and forthwith to pay the sums or received (if any) into the Bank of England, to be there placed to the credit of the said accountant-general, and to the credit of the respective estates to which the said bills, notes, or other negotiable instruments were placed at the time of delivering the same to the cashier.

Noting and

And in case the said bills, notes, or other negotiable instruments, or any of them, shall not be Protesting. paid, the said Governor and Company of the Bank of England shall cause such bills, notes, and other negotiable instruments, as are by law required to be noted and protested, to be delivered to a notary for that purpose, and to be noted and protested accordingly; and shall, after the same shall have been so noted or protested, as the case may be, again deposit the same in the Bank of England to the credit of the said accountant-general, and to the credit of the respective estates to which the same were placed at the time of delivering the same to the said cashier.

Expenses of Noting and Protesting.

And the said Governor and Company shall debit the account of each estate with such sums of money as shall be paid by them for the expenses of noting and protesting such bills, notes, or other negotiable instruments respectively as shall have been placed to the credit of such estate.

And the Governor and Company of the Bank of England are forthwith, after every such receipt of money or deposit of any note, bill, or other negotiable security, to certify to the said secountant-general the sum of money received (if any) on each such bill, note, or any such negotiable security, and placed to the credit of each such estate as aforesaid, or that such bill, note, or other negotiable instrument has been dishonoured, and been again deposited to the credit of such estate, as the case may be, and the sum with which each such estate has been debited as aforesaid.

T. ERSKINE, C. J. ALBERT PELL, J. G. Rose, J. J. CROSS, J. Approved, BROUGHAM, C.

February 3, 1832.

Court of Review, February 15, 1832.

Duty of Official Assignee. Notice of Dishonour.

It is further ordered, That as often as any bill, note, or other negotiable instrument that shall have come to the hands of any official assignee shall be dishonoured, such official assignee shall forthwith give such notice thereof as is by law required from the holder of such bill, note, or other negotiable security respectively.

(Signed and approved as last.)

Lord Chancellor. In the matter of bankruptcy.

14th day of May, 1836.

Whereas it was ordered on the 31st day of October, 1835, by the lords commissioners for the custody of the great seal, that no dividend should be paid to any creditor holding any security for his debt until such security shall be produced, without the special directions of a commissioner in that behalf: And whereas the mode of proceeding in such cases has been attended with doubt and difficulty, I do order, that from henceforth, upon the statement by a creditor that he is unable to produce his security, and that the same has not been parted with for any valuable consideration, nor assigned to any person, he shall be examined on oath before a commissioner as to the cause of such inability, and his examination shall be filed with the proceedings; and the commissioner shall adjudge whether in his opinion the creditor is or is not able to produce the security; and if the commissioner is of opinion that the security cannot for a sufficient cause be produced, the creditor shall give a sufficient indemnity to the official assignee, to be approved by a commissioner; and upon such indemnity being given, the official assignee shall pay the dividend to the creditor(a).

COTTENHAM, C.

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<sup>(</sup>a) See Ex parte Wallas, 2 Mont. & Ayr. 586; 1 Dea. 964, S. C.; ante, 683.

COSTS .- See PLEADING.

Appendix.

COSTS ON STAYING PROCEEDINGS IN AN ACTION ON A BILL OR NOTE.-Rule T. T. 1 Viet. 1838, ante, page 586.

COSTS OF PROVING HANDWRITING OF PARTY TO A BILL OR NOTE—Rule

H. T. 2 Will. 4, 1932, reg. vii., and H. T. 4 Will. 4, 1834, a. 20, unte, page 685.

\*DECLARATION .- See PLEADING. EVIDENCE-PROOF OF HANDWRITING.-See COSTS. [ \*813 ]

PARTICULARS OF DEMAND.—Rules T. T. 1 Will. 4, 1831, s. 6, and H. T. 2 Will. 4, 1832, s. 47, ante, 558; see also Rule T. T. 1 Vict. 1838, ante, 598.

PAYMENT OF MONEY INTO COURT.—Rule T. T. 1 Vict. 1838, ante, 597, 598.

PLEAS .- See PLEADING.

PLEADING.

FORMS OF DECLARATIONS ON BILLS AND NOTES.—Rule T. T. 1 Will. 4, 1831.

ante, page 551.
TITLE OF DECLARATION.—Rule M. T. 8 Will. 4, 1882, s. 15, ante, 549.

VENUE —Rule H. T. 4 Will. 4, 1934, reg. ii., s. 8, ante, 551.
SEVERAL COUNTS.—Rule H. T. 4 Will. 4, 1884, reg. ii., ss. 5, 6, 7, ante, 557, 558. PARTICULARS OF DEMAND.—Rules T. T. 1 Will. 4, 1831, a. 6, and H. T. 2 Will. 4.

1882, s. 47, ante, page 558.

PLEAS.—Rules H. T. 4 Will. 4, 1834, reg. ii ; T. T. 1 Vict. 1838, ante, 594 to 599.

STAYING PROCEEDINGS .- See COSTS.

### NOTARY'S FEES OF OFFICE.

AS SETTLED THE FIRST OF JULY, 1797.

AT a meeting of several Notaries of the city of London, held at the George and Vulture Tavern, in London aforesaid, on the 1st July, A. D. 1797, the following resolutions were unanimously agreed to, and since approved and confirmed by the Governor and Company of the Bank of England.

First .- That from and after the fifth day of the present month of July, the noting for all bills drawn upon or addressed at the house of any person or persons residing within the ancient walls of the said city of London, shall be charged one shilling and sixpence; and without the said walls, and not exceeding the limits hereunder specified, the sum of two shillings and sixpence.

Second.—For all bills drawn upon or addressed at the house of any person or persons residing beyond Old or New Bond Street, Wimpole Street, New Cavendish Street, Upper Maryle-bone Street, Howland Street, Lower Gower Street, lower end of Grays-in-lane (and not off the pavement), Clerkenwell church, Old Street, Shoreditch church, Brick Lane, St. George's in the East, Execution Dock, Wapping, Dock Head, upper end of Bermondsey Street (as far as the church), end of Blackman Street, end of Great Surrey Street, Blackfrians Road (as far as the circus), Cuper's Bridge, Bridge Street, Westminster, Arlington Street, Piccadilly, and the like distances, three shillings and sixpence; and off the pavement, one shilling and sixpence per mile additional.

Third.—For protesting a bill drawn upon or addressed at the house of any person or persons residing within the ancient walls of the said city (including the stamp duty of four shillings, and exclusive of the charge of noting), the sum of six shillings and sixpence; and without the ancient walls of the said city, including the like stamp duty, and exclusive of the said charge of

noting, the sum of eight shillings, agreeably to the second article.

Fourth.—That all acts of honour within the ancient walls of the said city of London, shall be charged the said sum of one shilling and sixpence upon each bill; and for all acts of honour without the ancient walls of the said city, to be regulated agreeably to the charge of noting bills out of the city; and the like charge for any additional demand that may be made upon the said bill, or when the same is mentioned and inscrted in the answer in the protest.

Fifth.-For every post demand and act thereof, within the ancient walls of the said city, the sum of two shillings and sixpence; and without the walls of the said city, the \*sum of three [ \*814 ] shillings and sixpence (provided the same be only registered in the notary's books), and so in proportion, according to the distance, to be regulated agreeably to the charge of noting bills.

Sixth .- For every copy of bill paid in part, and a receipt at foot of such copy, shall be charged two shillings, and so in proportion for every additional bill so copied (exclusive of the receipt stamp).

Appendix.

Seventh .- For every duplicate protest of one bill, (including four shillings for the duty), shall be charged the sum of seven shillings and sixpence; and so in like proportion of three shillings and sixpence (exclusive of the duty) for every additional bill.

Eighth .- For every folio of ninety words translated from the French, Dutch, or Flemish, into English, shall be charged one shilling and sixpence; and from English into French, Dutch, or Flemish, two shillings for each such folio; and from Italian, Spanish, Portuguese, German, Danish, and Swedish, one shilling and ninepence per folio of ninety words; and from Latin, two shillings and sixpence per folio; and for attesting the same to be a true translation, if necessary, seven shillings and sixpence, exclusive of fees and stamps.

Ninth.—That all attestations to letters of attorney, affidavits, 4c. at the request of any gentlemen in the law, shall be charged seven shillings and sixpence, exclusive of fees, stamps, and

Tenth.—For every city seal shall be charged one guinea for one deponent, exclusive of attendance and exemplification; and if more than one deponent, ten shillings and sixpence for each additional affidavit.

Eleventh .- For all notarial copies shall be charged sixpence per folio of seventy-two words, exclusive of attestation, stamps, &c.

### NOTICE TO PRODUCE.

In the -

Between A. B. Plaintiff, and C. D. Defendant.

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Letters &c , stating the Dates and Particulars, as far as practicable(a). Particular Documents enu-

merated.

Notice to

produce Bills,

Notes, Checks, Books.

You are hereby requested diligently to search and inquire for, and to produce to the court and jury on the trial of this cause, all bills of exchange drawn by the plaintiff upon and accepted by the said defendant, and also all bills of exchange drawn by the said defendant upon and accepted by the said plaintiff, and all bills of exchange indorsed by the said plaintiff or by the said defendant, and all promissory notes made or indorsed by the said defendant and payable to or indorsed to the said plaintiff, and all checks drawn by the said plaintiff or the said defendant upon certain bankers, in or bearing date in the month of \_\_\_\_\_, A. D. \_\_\_\_\_, or at any time since, and also all day books, waste books, bankers' books, bill books, ledgers, and all and singular other the book and books of account of the said defendant, papers, and documents what-soever, wherein are entered or contained any entry of any transaction or dealing or fact relating to the said bills of exchange, promissory notes, and checks, and all letters, notices, papers and documents containing any notice of the non-acceptance, non-payment, or dishonour of the said bills of exchange, promissory notes, and checks, or either of them, or otherwise relating thereto. And in Particular a certain bill of exchange dated the --- day of ---, A. D. -drawn by the said plaintiff upon and accepted by the said defendant for the sum of £---, payable to the order of the said plaintiff, at - after the date thereof (here particularize the date and description of every written instrument required to be produced), and also a certain letter addressed to the said defendant, and dated, &c., and purporting to contain notice of the non-payment of a certain bill of exchange for the sum of £——, dated the —— day of ——, and drawn (or "indorsed") by the said defendant, and which became due on, & a, and also all other books, papers, and writings whatsoever, containing any entry, memorandum, or minutes in any-wise relating to the premises, or to the matters in question in this cause. Dated this —— day of , A. D. 1840.

---, the above-named defendant, To Mr. and to Mr. ---, his attorney.

Your's, &c. -, plaintiff's attorney.

<sup>(</sup>a) See ante, 666, France v. Lucy, Ryan & Moo. C. N. P. 341. Service of notice, when too late, Holt r. Miers, 9 Car. & P. 191; post, Addenda to page 666.

# INTEREST TABLE.\*

|     |            |            | 1           |            |            |            |
|-----|------------|------------|-------------|------------|------------|------------|
|     | 1 DAY      | 2 DAYS     | 3 DAYS      | 4 DAYS     | 5 DAYS     | 6 DATS     |
| £   | £ 1. d. f. | £ s. d. f. | £ 1. d. f.  | £ s. d. f. | £ s. d. f. | £ s. d. f. |
| 1   | 0 0 0 0    | 0 0 0 0    | 0 0 0 0     | 0 0 0 0    | 0 0 0 0    | 0 0 0 0    |
| 2   | 0 0 0 0    | 0 0 0 0    | 0 0 0 0 0   | 0 0 0 0    | 0 0 0 0    | 0 0 0 1    |
| 3   | 0 0 0 0    | 0 0 0 0    | 0 0 0 1     | 0 0 0 1    | 0 0 0 1    | 0 0 0 2    |
| 4   | 0 0 00     | 0 0 0 1    | 0 0 0 1     | 0 0 0 2    | 0 0 0 2    | 0 0 0 3    |
| 5   | 0 0 0 0    | 0 0 0 1    | 0 0 0 1     | 0 0 0 2    | 0 0 0 3    | 0 0 0 3    |
| 6   | 0 0 0 0    | 0 0 0 1    | 0 0 0 2     | 0 0 0 3    | 0 0 0 3    | 0 0 1 0    |
| 7   | 0 0 00     | 0 0 0 1    | 0 0 0 2     | 0 0 0 3    | 0 0 10     | 0 0 1 1    |
| 9   | 0 0 0 1    | 0 0 0 2    | 0 0 0 3     | 0 0 1 0    | 0 0 1 1    | 0 0 1 2    |
| 9   | 0 0 0 1    | 0 0 0 2    | 0 0 0 3     | 0 0 10     | 0 0 11     | 0 0 1 3    |
| 10  | 0 0 0 1    | 0 0 0 2    | 0 0 0 3     | 0 0 1 1    | 0 0 1 2    | 0 0 1 3    |
| 20  | 0 0 0 2    | 0 0 1 1    | 0 0 13      | 0 0 2 2    | 0 0 3 1    | 0 0 3 3    |
| 30  | 0 0 0 3    | 0 0 13     | 0 0 2 3     | 0 0 3 3    | 0 0 4 3    | 0 0 5 3    |
| 40  | 0 0 1 1    | 0 0 2 2    | 0 0 3 3     | 0 0 5 1    | 0 0 6 2    | 0 0 7 3    |
| 50  | 0 0 1 2    | 0 0 3 1    | 0 0 4 3     | 0 0 6 2    | 0 0 8 0    | 0 0 9 3    |
| 60  | 0 0 13     | 0 0 3 3    | 0 0 5 3     | 0 0 7 3    | 0 0 9 3    | 0 0 11 2   |
| 70  | 0 0 2 1    | 0 0 4 2    | 0 0 6 3     | 0 0 9 0    | 0 0 11 2   | 0 1 1 3    |
| 80  | 0 0 2 2    | 0 0 5 1    | 0 0 7 3     | 0 0 10 2   | 0 1 10     | 0 1 3 3    |
| 90  | 0 0 2 3    | 0 0 5 3    | 0 0 8 3     | 0 0 11 3   | 0 1 2 3    | 0 1 5 3    |
| 100 | 0 0 3 1    | 0 0 6 2    | 0 0 9 3     | 0 1 10     | 0 1 4 1    | 0 1 7 2    |
| 200 | 0 0 6 2    | 0 1 10     | 0 1 7 2     | 0 2 2 1    | 0 2 8 3    | 0 3 3 1    |
| 300 | 0 0 9 3    | 0 1 7 2    | 0 2 5 2     | 0 3 3 1    | 0 4 1 1    | 0 4 11 0   |
| 400 | 0 1 10     | 0 2 2 1    | 0 3 3 1     | 0 4 4 2    | 0 5 5 3    | 0 6 6 3    |
| 500 | 0 1 4 1    | 0 2 8 3    | 0 4 1 1     | 0 5 5 3    | 0 6 10 0   | 0 8 2 2    |
|     | 1 2 1 1 1  | 10 6 30    | , , , , , , |            | 0 0 10 0 1 |            |

<sup>\*</sup> The interest on a bill or note (except when it carries interest by the terms of it from the date) is to be calculated from the time it fell due, until the day when final judgment will be signed. The calculation may be at the rate of one penny for each pound per month, but the above Table affords the more precise mode of calculating. It will be seen that the present calculation is made at the rate of £5 per cent, and although since the recent alteration in the usury laws a party may legally stipulate for a greater rate of interest, yet in the absence of any such stipulation the former rate of interest only will be allowed.

|     |   |    |    |    |     |     |    |    |     |     |    |    |     |     |       |    | <del></del> |     |     |    | -   |     |      | <u> </u> |
|-----|---|----|----|----|-----|-----|----|----|-----|-----|----|----|-----|-----|-------|----|-------------|-----|-----|----|-----|-----|------|----------|
|     | 7 | D  | AY | 8  |     | 8 D | AY |    | ;   | 9 D | AY | s  | 1   | 0 I | Y A C | 8  | 1           | 1 I | DAT | 78 | 1   | 2 I | )AYı | ı        |
| £   | £ | ٤. | d. | f. | £   | 8.  | d. | ſ. | £   | 8.  | d. | ſ. | £   | 8.  | d.    | f. | £           | 8.  | d.  | f. | £   | ŧ.  | d. j | ſ.       |
| 1   | 0 | 0  | 0  | 0  | 0   | 0   | 0  | 1  | 0   | 0   | 0  | ľ  | 0   | 0   | 0     | 1  | 0           | 0   |     |    | 0   | 0   | 0    | 1        |
| 2   | 0 | 0  | 0  | 1  | 0   | 0   | 0  | 2  | 0   | 0   | 0  | 2  | 0   | 0   | 0     | 2  | 0           | 0   | 0   | 2  | 0   | 0   | 0 :  | 8        |
| 8   | 0 | 0  | 0  | 2  | 0   | 0   | 0  | 8  | 0   | 0   | 0  | 3  | 0   | 0   | 0     | 8  | 0           | 0   | 1   | 0  | 0   | 0   | 1 (  | 0        |
| 4   | 0 | 0  | 0  | 3  | 0   | 0   | 1  | 0  | 10  | 0   | 1  | 0  | 0   | 0   | 1     | 1  | 0           | 0   | 1   | 1  | 0   | 0   | 1 :  | 2        |
| 5   | 0 | 0  | 1  | 0  | 0   | 0   | 1  | 1  | 0   | 0   | 1  | 1  | 0   | 0   | 1     | 2  | 0           | 0   | 1   | 8  | 0   | 0   | 1 3  | 3        |
| 6   | 0 | 0  | 1  | 1  | 0   | 0   | 1  | 2  | 0   | 0   | 1  | 8  | 0   | 0   | 1     | 8  | 0           | 6   | 2   | 0  | 0   | 0   | 2    | 1        |
| 7   | 0 | 0  | 1  | 2  | 0   | 0   | 1  | 3  | 0   | 0   | 2  | 0  | 0   | 0   | 2     | 1  | 0           | 0   | 2   | 2  | 0   | 0   | 2    | 3        |
| 8   | 0 | 0  | 1  | 8  | i 0 | 0   | 2  | 0  | ; o | 0   | 2  | 1  | 0   | 0   | 2     | 2  | 0           | 0   | 2   | 3  | 0   | 0   | 3    | 0        |
| 9   | 0 | 0  | 2  | 0  | ; 0 | 0   | 2  | 1  | 0   | 0   | 2  | 2  | 0   | 0   | 2     | 3  | 0           | 0   | 3   | 1  | 0   | 0   | 3    | 2        |
| 10  | 0 | 0  | 2  | 1  | 0   | 0   | 2  | 2  | 0   | 0   | 2  | 8  | 0   | 0   | 3     | 1  | 0           | 0   | 3   | 2  | 0   | 0   | 3    | 3        |
| 20  | 0 | 0  | 4  | 2  | 0   | 0   | 5  | 1  | 0   | 0   | 5  | 3  | 0   | 0   | 6     | 2  | 0           | 0   | 7   | 0  | 0   | 0   | 7    | 3        |
| 30  | 0 | 0  | 6  | 8  | 0   | 0   | 7  | 3  | 0   | 0   | 8  | 3  | 0   | 0   | 9     | 3  | 0           | 0   | 10  | 3  | 0   | 0   | 11 3 | 8        |
| 40  | 0 | 0  | 9  | 0  | 0   | 0   | 10 | 2  | 0   | 0   | 11 | 3  | 0   | 1   | 1     | 0  | 0           | 1   | 2   | 1  | 0   | 1   | 3    | 3        |
| 50  | 0 | 0  | 11 | 2  | 0   | 1   | 1  | 0  | 0   | 1   | 2  | 3  | 0   | 1   | 4     | 1  | 0           | 1   | 6   | 0  | 0   | 1   | 7    | 2        |
| 60  | 0 | 1  | 1  | 3  | 0   | 1   | 3  | 3  | 0   | 1   | 5  | 3  | 0   | 1   | 7     | 2  | 0           | 1   | 9   | 2  | 0   | 1   | 11 3 | 2        |
| 70  | 0 | 1  | 4  | 0  | 0   | 1   | 6  | 1  | 0   | 1   | 8  | 2  | 0   | 1   | 11    | 0  | 0           | 2   | 1   | 1  | 0   | 2   | 3    | 2        |
| 80  | 0 | 1  | 6  | 1  | 0   | 1   | 9  | 0  | 10  | 1   | 11 | 2  | 0   | 2   | 2     | 1  | 0           | 2   | 4   | 8  | 0   | 2   | 7    | 2        |
| 90  | 0 | 1  | 8  | 2  | 0   | 1   | 11 | 2  | 0   | 2   | 2  | 2  | 0   | 2   | 5     | 2  | 0           | 2   | 8   | 2  | 0   | 2   | 11   | 2        |
| 100 | 0 | 1  | 11 | 0  | į O | 2   | 2  | 1  | 0   | 2   | 5  | 2  | j 0 | 2   | 8     | 3  | 0           | 3   | 0   | 0  | į 0 | 3   | 3    | 1        |
| 200 | 0 | 3  | 10 | 0  | 0   | 4   | 4  | 2  | 0   | 4   | 11 | 0  | 0   | 5   | 5     | 3  | 0           | 6   | 0   | 1  | 0   | 6   | 6    | 3        |
| 300 | 0 | 5  | 9  | 0  | 0   | 6   | 6  | 8  | 0   | 7   | 4  | 3  | 0   | 8   | 2     | 2  | 0           | 9   | 0   | 1  | 0   | 9   | 10   | ı        |
| 400 | 0 | 7  | 8  | 0  | 0   | 8   | 9  | 0  | 0   | 9   | 10 | 1  | 0   | 10  | 11    | 2  | 0           | 12  | 0   | 2  | 0   | 13  | 1    | 1        |
| 500 | 0 | 9  | 7  | 0  | 0   | 10  | 11 | 2  | 0   | 12  | 3  | 3  | 0   | 13  | 8     | 1  | 0           | 15  | 0   | 3  | 0   | 16  | 5    | l        |

|     |   |     |    |    |   |     |    |    |     |     |         |    | ī | _   |       |    | ī   |     | _   |    | ī   |      |      |    |
|-----|---|-----|----|----|---|-----|----|----|-----|-----|---------|----|---|-----|-------|----|-----|-----|-----|----|-----|------|------|----|
|     | 1 | 8 D | AY | •  | 1 | 4 I | AY | 8  | 1   | 5 I | ) A Y E | 3  | 1 | 6 I | ) A I | 78 |     | 17] | DAY | 8  |     | 18 ] | DAYS | ŀ  |
| £   | £ | 8.  | d. | f. | £ | s.  | d. | ſ. | £   | 8.  | d. j    | ſ. | £ | 8.  | d     | f. | £   | 8.  | d.  | f. | £   | s.   | d. f | ۲. |
| 1   | 0 | 0   | 0  | 1  | 0 | 0   | 0  | 1  | 0   | 0   |         | 1  | 0 | 0   | 0     | 2  | 0   | 0   | 0   |    | 0   | 0    | 0 2  | 2  |
| 2   | 0 | 0   | 0  | 3  | 0 | 0   | 0  | 3  | 0   | 0   | 0 :     | 3  | 0 | 0   | 1     | 0  | 0   | 0   | 1   | 0  | 0   | 0    | 1 (  | 0  |
| 3   | 0 | 0   | 1  | 1  | 0 | 0   | L  | 1  | 0   | 0   | 1       | 1  | 0 | 0   | 1     | 2  | 0   | 0   | 1   | 2  | 0   | 0    | 1 8  | В  |
| 4   | 0 | 0   | 1  | 2  | 0 | 0   | 1  | 3  | , ο | 0   | 1 3     | 8  | 0 | 0   | 2     | 0  | 0   | 0   | 2   | 0  | ' 0 | 0    | 2 1  | 1  |
| 5   | 0 | 0   | 2  | 0  | 0 | 0   | 2  | 1  | 0   | 0   | 2       | 1  | 0 | 0   | 2     | 2  | 0   | 0   | 2   | 3  | 0   | 0    | 2 3  | 3  |
| 6   | 0 | 0   | 2  | 2  | 0 | 0   | 2  | 3  | 0   | 0   | 2       | 3  | 0 | 0   | 3     | 0  | 0   | 0   | 3   | 1  | 0   | 0    | 3 2  | 2  |
| 7   | 0 | 0   | 2  | 3  | 0 | 0   | 3  | 0  | 0   | 0   | 3       | 1  | 0 | 0   | 3     | 2  | 0   | 0   | 3   | 3  | 0   | 0    | 4 (  | )  |
| 8   | 0 | 0   | 3  | 1  | 0 | 0   | 3  | 2  | 0   | 0   | 3       | 3  | 0 | 0   | 4     | 0  | 0   | 0   | 4   | 1  | 0   | 0    | 4 2  | 2  |
| 9   | 0 | 0   | 3  | 3  | 0 | 0   | 4  | 0  | 0   | 0   | 4       | 1  | 0 | 0   | 4     | 2  | 0   | 0   | 5   | 0  | 0   | 0    | 5 1  | ı  |
| 10  | 0 | 0   | 4  | 1  | 0 | 0   | 4  | 2  | 0   | 0   | 4       | 3  | 0 | 0   | 5     | 1  | 0   | 0   | 5   | 2  | . 0 | 0    | 5 3  | 3  |
| 20  | 0 | 0   | 8  | 2  | 0 | 0   | 9  | 0  | 0   | 0   | 9       | 3  | 0 | 0   | 10    | 2  | 0   | 0   | 11  | 0  | 0   | 0    | 11 8 | 3  |
| 30  | 0 | 1   | 0  | 3  | 0 | 1   | 1  | 3  | 0   | 1   | 2       | 3  | 0 | 1   | 3     | 3  | 0   | 1   | 4   | 2  | 0   | 1    | 5 3  | 3  |
| 40  | 0 | 1   | 5  | 0  | 0 | 1   | 6  | 1  | 0   | 1   | 7 :     | 2  | 0 | 1   | 9     | 0  | j 0 | 1   | 10  | 1  | 0   | 1    | 11 2 | 2  |
| 50  | 0 | 1   | 9  | l  | 0 | 1   | 11 | 0  | 0   | 2   | 0 :     | 2  | 0 | 2   | 2     | 1  | 0   | 2   | 3   | 3  | 0   | 2    | 5 2  | }  |
| 60  | 0 | 2   | 1  | 2  | 0 | 2   | 3  | 2  | 0   | 2   | 5 3     | 2  | 0 | 2   | 7     | 2  | 0   | 2   | 9   | 2  | 0   | 2    | 11 2 | 2  |
| 70  | 0 | 2   | 5  | 3  | 0 | 2   | 8  | 0  | 0   | 2   | 10 :    | 2  | 0 | 8   | 0     | 3  | 0   | 3   | 3   | 0  | 0   | 3    | 5 1  |    |
| 80  | 0 | 2   | 10 | 0  | 0 | 3   | 0  | 3  | 0   | 3   | 3       | 1  | 0 | 8   | 6     | 0  | 0   | 3   | 8   | 2  | 0   | 3    | 11 0 | )  |
| 90  | 0 | 3   | 2  | 1  | 0 | 3   | 5  | l  | 0   | 3   | 8       | 1  | 0 | 3   | 11    | 1  | 0   | 4   | 2   | 1  | 0   | 4    | 5 1  |    |
| 100 | 0 | 3   | 6  | 2  | 0 | 3   | 10 | 0  | 0   | 4   | 1 1     | 1  | 0 | 4   | 4     | 2  | 0   | 4   | 7   | 3  | 0   | 4    | 11 1 |    |
| 200 | 0 | 7   | 1  | 1  | 0 | 7   | 8  | 0  | 0   | S   | 2 :     | 2  | 0 | 8   | 9     | 0  | 0   | 9   | 3   | 3  | 0   | 9    | 10 1 |    |
| 300 | 0 | 10  | 8  | 0  | 0 | 11  | 6  | 0  | 0   | 12  | 3 :     | 3  | 0 | 13  | 1     | 3  | 0   | 13  | 11  | 2  | 0   | 14   | 9 2  | !  |
| 400 | 0 | 14  | 2  | 3  | 0 | 15  | 4  | 0  | 0   | 16  | 5       | 1  | 0 | 17  | 6     | 1  | 0   | 18  | 7   | 2  | 0   | 19   | 8 2  | !  |
| 500 | 0 | 17  | 9  | 2  | 0 | 19  | 2  | 0  | 1   | 0   | 6 3     | 2  | ı | 1   | 11    | 0  | 1   | 3   | 3   | 1  | 1   | 4    | 7 3  | 1  |

|     | -<br>  1 | 19 D | AY | ··· | - | 2 | :0 I | ) A 1 | •  | 1   | 21 [ | DAI | 78 | :   | 22 I       | ) <u>a</u> 1 | r •          |     | 23 ] | DAY | r = | 1  | 24 I | D <sub>A</sub> | r o |
|-----|----------|------|----|-----|---|---|------|-------|----|-----|------|-----|----|-----|------------|--------------|--------------|-----|------|-----|-----|----|------|----------------|-----|
| £   | £        | 8.   | d. | ſ.  | 1 | £ | 8.   | d.    | ſ. | £   | s.   | d.  | f. | £   | <b>. .</b> | d            | . <b>f</b> . | 1   |      | d   | ſ.  | £  | 8.   | d              | f.  |
| 1   | 0        | 0    | 0  | 2   | ١ | 0 | 0    | 0     | 2  | 0   | 0    | 0   | 1  | 0   | 0          | 0            | 2            | 0   | 0    | 0   | 8   | 0  | 0    | 0              | 8   |
| 2   | 0        | 0    | 1  | 0   | ١ | 0 | 0    | 1     | 1  | 0   | 0    | 1   | 1  | 10  | 0          | 1            | 1            | 10  | 0    | 1   | 2   | 0  | 0    | 1              | 2   |
| 8   | 0        | 0    | 1  | 8   | 1 | 0 | 0    | 1     | 3  | 0   | 0    | 2   | 0  | 10  | 0          | 2            | 0            | 0   | 0    | 2   | 1   | 10 | 0    | 2              | 1   |
| 4   | 10       | 0    | 2  | 1   | ! | 0 | 0    | 2     | 2  | ' 0 | 0    | 2   | 8  | ; 0 | 0          | 2            | 8            | ; 0 | 0    | 8   | 0   | 10 | 0    | 8              | •   |
| 5   | 0        | 0    | 8  | 0   | 1 | 0 | 0    | 3     | 1  | 0   | 0    | 3   | I  | 0   | 0          | 3            | 2            | 0   | 0    | 8   | 8   | 0  | 0    | 3              | 8   |
| 6   | 0        | 0    | 3  | 2   | 1 | 0 | 0    | 3     | 8  | 0   | 0    | 4   | 0  | 0   | 0          | 4            | 1            | 0   | 0    | 4   | 2   | 0  | 0    | 4              | 2   |
| 7   | 0        | 0    | 4  | 1   | ١ | 0 | 0    | 4     | 2  | 0   | 0    | 4   | 8  | 0   | 0          | 5            | 0            | 0   | 0    | 5   | 1   | 0  | 0    | 5              | 2   |
| 8   | 0        | 0    | 4  | 3   | ١ | 0 | 0    | 5     | 1  | 0   | 0    | 5   | 2  | 0   | 0          | 5            | 8            | 10  | 0    | 6   | 0   | 0  | 0    | •              | 1   |
| 9   | 0        | 0    | 5  | 1   | ١ | 0 | 0    | 5     | 8  | 0   | 0    | 6   | 0  | 10  | 0          | 6            | 3            | 10  | 0    | 6   | 8   | 0  | 0    | 7              | 0   |
| 10  | ìo       | 0    | 6  | 0   | ; | 0 | 0    | 6     | 2  | ; 0 | 0    | 6   | 8  | ; 0 | 0          | 7            | 0            | ; 0 | 0    | 7   | 2   | 0  | 0    | 7              | 8   |
| 20  | 0        | 1    | 0  | 1   | 1 | 0 | 1    | 1     | 0  | 0   | 1    | 1   | 8  | 0   | 1          | 2            | 1            | 0   | 1    | 3   | 0   | 0  | 1    | 8              | 3   |
| 30  | 10       | 1    | 6  | 2   | 1 | ŋ | 1    | 7     | 2  | 0   | 1    | 8   | 2  | 0   | 1          | 9            | 2            | 0   | 1    | 10  | 2   | 0  | 1    | 11             | 2   |
| 40  | . 0      | 2    | 0  | 3   | 1 | 0 | 2    | 2     | ı  | 10  | 2    | 3   | 2  | 1 0 | 2          | 4            | 8            | 0   | 2    | 6   | 0   | 0  | 2    | 7              | 2   |
| 50  | , 0      | 2    | 7  | 0   | ì | 0 | 2    | 8     | 8  | 0   | 2    | 10  | 2  | 0   | 8          | 0            | 0            | 0   | 3    | 1   | 8   | 0  | 3    | 3              | 1   |
| 60  | . 0      | 3    | 1  | l   | 1 | 0 | 8    | 8     | 1  | 10  | 3    | 5   | 1  | 0   | 8          | 7            | 1            | 0   | 8    | 9   | 1   | 0  | 8    | 11             | 1   |
| 70  | 0        | 8    | 7  | 2   | ١ | 0 | 3    | 10    | 0  | 0   | 4    | 0   | 1  | 10  | 4          | 2            | 2            | 10  | 4    | 4   | 8   | 0  | 4    | 7              | 0   |
| 90  | , O      | 4    | 1  | 3   | ı | 0 | 4    | 4     | 2  | 0   | 4    | 7   | 0  | 0   | 4          | 9            | 8            | 0   | 5    | 0   | 1   | 0  | 5    | 8              | 0   |
| 90  | 0        | 4    | 8  | 0   | 1 | 0 | 4    | 11    | 0  | 0   | 5    | 2   | 0  | 0   | 5          | 5            | 0            | 0   | 5    | 8   | 0   | 0  | 5    | 11             | 0   |
| 100 | 0        | 5    | 2  | 1   | i | 0 | 5    | 5     | 8  | 0   | 5    | 9   | 0  | 10  | 6          | 0            | l            | 0   | 6    | 3   | 2   | 0  | 6    | 6              | 8   |
| 200 | 0        | 10   | 4  | 3   | ١ | 0 | 10   | 11    | 2  | 0   | 11   | 6   | 0  | 0   | 12         | 0            | 2            | 0   | 12   | 7   | 0   | 0  | 18   | 1              | 8   |
| 300 | 0        | 15   | 7  | ı   | ١ | 0 | 16   | 5     | 1  | 0   | 17   | 3   | 0  | 0   | 19         | 0            | 3            | 0   | 18   | 10  | 8   | 0  | 19   | 8              | 2   |
| 400 | 1        | 0    | 9  | 8   | Ţ | 1 | 1    | 11    | 0  | 1   | 3    | 0   | 0  | 1   | 4          | ı            | l            | 1   | 5    | 2   | 1   | 1  | 6    | 3              | 3   |
| 500 | 1        | 6    | 0  | 1   | ı | 1 | 7    | 4     | 3  | 1   | 8    | 9   | 0  | 1   | 10         | 1            | 2            | 1   | 11   | 6   | 0   | 1  | 12   | 10             | 2   |

|             | 2 |    |    |    |     | 26 DAYS |    |    |    | :   | 17 I | DA. | Y 8          | 2          | 18 I | DA | <b>7</b> 8 |     | <b>29</b> ] | Da <sup>,</sup> | Y s          | 1  | <b>30</b> ] | DA   | r. |
|-------------|---|----|----|----|-----|---------|----|----|----|-----|------|-----|--------------|------------|------|----|------------|-----|-------------|-----------------|--------------|----|-------------|------|----|
| £           | £ | 8. | d. | f. | Ì.  | £       | 8. | d. | ſ. | £   |      | d   | . <b>f</b> . | £          | 8.   | d  | ſ.         | 1   |             | . d             | . <b>f</b> . | £  |             | . d. | f. |
| 1           | 0 | 0  | 0  | 8  |     | 0       | 0  | 0  | 3  | 0   | 0    |     |              | 0          | 0    | 0  | 3          | 0   | 0           |                 |              | 0  | 0           |      |    |
| 2           | 0 | 0  | 1  | 2  |     | 0       | 0  | 1  | 2  | 0   | 0    | 1   | . 3          | 0          | 0    | 1  | 8          | 0   | 0           | 1               | 3            | 0  | 0           | 1    | 3  |
| 3           | 0 | 0  | 2  | 1  | ì   | 0       | 0  | 2  | 2  | 10  | 0    | 2   | 2            | <u>'</u> 0 | 0    | 2  | 8          | į 0 | 0           | 2               | 3            | 10 | 0           | 2    | 3  |
| 4           | 0 | 0  | 3  | 1  | ;   | 0       | 0  | 8  | 1  | 10  | 0    | 8   | 2            | 0          | 0    | 8  | 2          | 0   | 0           | 3               | 3            | 0  | 0           | 8    | 3  |
| 5           | 0 | 0  | 4  | 0  |     | 0       | 0  | 4  | 1  | 0   | 0    | -4  | 1            | 0          | 0    | 4  | 2          | 0   | 0           | 4               | 8            | 0  | 0           | 4    | 3  |
| •           | 0 | 0  | 4  | 3  | 1   | 0       | 0  | 5  | 0  | 0   | 0    | 5   |              | 0          | 0    | 5  | 2          | 0   | 0           | 5               | 2            | 0  | 0           | 5    | 3  |
| 7           | 0 | 0  | 5  | 3  | 1   | 0       | 0  | 5  | 8  | 10  | 0    | 6   | 0            | 0          | 0    | 6  | 1          | 0   | 0           | 6               | 2            | 0  | 0           | 6    | 8  |
| 8           | 0 | 0  | 6  | 2  | i   | 0       | 0  | 6  | 8  | 0   | 0    | 7   | 0            | 0          | 0    | 7  | 0          | i o | 0           | 7               | 2            | 0  | 0           | 7    | 3  |
| 9           | 0 | 0  | 7  | l  | 1   | 0       | 0  | 7  | 2  | 0   | 0    | 7   | 8            | 0          | 0    | 8  | 3          | 0   | 0           | 8               | 2            | 0  | 0           | 8    | 3  |
| 10          | 0 | 0  | 8  | 0  | ŀ   | 0       | 0  | 8  | 2  | 0   | 0    | 8   | 8            | 0          | 0    | 6  | 8          | 0   | 0           | 9               | 2            | 0  | 0           | 9    | 3  |
| 20          | 0 | 1  | 4  | 1  | )   | 0       | 1  | 5  | 0  | 0   | 1    | 5   | 8            | 0          | 1    | 9  | 8          | 0   | 1           | 7               | 0            | 0  | 1           | 7    | 2  |
| 80          | 0 | 2  | 0  | 2  | 1   | 0       | 2  | 1  | 2  | 0   | 2    | 2   | 2            | 0          | 2    | 3  | 2          | 0   | 2           | 4               | 2            | 0  | 2           | 5    | 2  |
| 40          | 0 | 2  | 8  | 3  | 1   | 0       | 2  | 10 | 0  | 0   | 2    | 11  | 2            | 0          | 3    | 0  | 3          | 0   | 3           | 2               | 0            | 0  | 8           | 3    | 1  |
| 50          | 0 | 8  | 5  | 0  | i.  | 0       | 3  | 6  | 2  | ¦ 0 | 3    | 8   | 1            | 0          | 3    | 10 | 0          | 0   | 3           | 11              | 2            | 0  | 4           | t    | 1  |
| 60          | 0 | 4  | 1  | 1  | ) . | 0       | 4  | 3  | 1  | 0   | 4    | 5   | 1            | 0          | 4    | 7  | 0          | 0   | 4           | 9               | 0            | 0  | 4           | 11   | 0  |
| 70          | 0 | 4  | 9  | 2  | 1   | 0       | 4  | 11 | 3  | 0   | 5    | 2   | 0            | 0          | 5    | 4  | 1          | 0   | 5           | 6               | 2            | 0  | 5           | 9    | 0  |
| 80          | 0 | 5  | 5  | 3  | i i | n       | 5  | 8  | ı  | 10  | 5    | 11  | 0            | 0          | 6    | 1  | 2          | 0   | 6           | 4               | 1            | 0  | 6           | 6    | 3  |
| 90          | 0 | 6  | 1  | 3  |     | 0       | 6  | 4  | 3  | 0   | 6    | 7   | 3            | 0          | 6    | 10 | 3          | 0   | 7           | 1               | 3            | 0  | 7           | 4    | 3  |
| 100         | 0 | 6  | 10 | 0  | 1   | 0       | 7  | 1  | l  | 0   | 7    | 4   | 8            | 0          | 7    | -8 | 0          | 0   | 7           | 11              | 1            | 0  | 8           | 2    | 2  |
| 200         | 0 | 13 | 8  | 1  | 1   | 0       | 14 | 2  | 3  | 0   | 14   | 9   | 2            | 0          | 15   | 4  | 0          | 0   | 15          | 10              | 2            | 0  | 16          | 5    | 1  |
| <b>30</b> 0 | 1 | 0  | 6  | 2  | ŧ   | ı       | 1  | 4  | 1  | 1   | 2    | 2   | 1            | 1          | 3    | 0  | 0          | 1   | 3           | 10              | 0            | 1  | 4           | 7    | 3  |
| 400         | 1 | 7  | 4  | 3  | i   | 1       | 9  | 5  | 3  | 1   | 9    | 6   | 3            | 1          | 10   | 8  | 0          | 1   | 11          | 9               | 1            | 1  | 12          | 10   | 2  |
| 500         | 1 | 14 | 2  | 3  | 1   | l       | 15 | 7  | 1  | 1   | 16   | 11  | 3            | 1          | 18   | 4  | 1          | 1   | 19          | 8               | 2            | 2  | 1           | 1    | 0  |

|     |   | <u></u>    |    |    |    |    |      | <del>-</del> - |   |    |     |     |     |     |     |    |     | <del></del> |    |    |     |     |            |    |    |
|-----|---|------------|----|----|----|----|------|----------------|---|----|-----|-----|-----|-----|-----|----|-----|-------------|----|----|-----|-----|------------|----|----|
|     | 1 | Мо         | NT | н  | 2  | Mo | NTH  | 8              | 3 | Mo | N T | H S | 4   | ı N | Mo: | T) | H S | 5           | Mo | NT | H S | 6   | Mor        | TH | is |
| £   | £ | <b>s</b> . | d. | f. | £  | 8. | d. f | :              | £ | 8. | d.  | ſ.  | 1   | ε   | 8.  | d. | ſ.  | £           | 8. | d. | f.  | £   | <b>8</b> . | ď  | f. |
| 1   | 0 | 0          | 1  | 0  | 0  | 0  | 2 (  |                | 0 | 0  | 3   | 0   | 10  | 0   | 0   | 4  | 0   | 0           | 0  | 5  | 0   | 0   | 0          |    | 0  |
| 2   | 0 | 0          | 2  | 0  | 0  | 0  | 4 (  | Ì              | 0 | 0  | 6   | 0   | 10  | 0   | 0   | 8  | 0   | 0           | 0  | 10 | 0   | 0   | 1          | 0  | θ  |
| 3   | 0 | 0          | 3  | 0  | 0  | 0  | 6 (  | ) ]            | 0 | 0  | 9   | 0   | 10  | 0   | 1   | 0  | 0   | 0           | 1  | 3  | 0   | 0   | 1          | 6  | 0  |
| 4   | 0 | 0          | 4  | 0  | 0  | 0  | 8 (  | ١,             | 0 | 1  | 0   | 0   | 10  | 0   | 1   | 4  | 0   | 0           | 1  | 8  | 0   | 0   | 2          | 0  | 0  |
| 5   | 0 | 0          | 5  | C  | 0  | 0  | 10 ( |                | 0 | 1  | 3   | 0   | 10  | 0   | 1   | 8  | 0   | 0           | 2  | 1  | 0   | 0   | 2          | 6  | 0  |
| 6   | 0 | 0          | 6  | 0  | 0  | 1  | 0 (  | )              | 0 | 1  | 6   | 0   | 10  | 0   | 2   | 0  | 0   | 0           | 2  | 6  | 0   | 0   | 3          | 0  | 0  |
| 7   | 0 | 0          | 7  | 0  | 0  | 1  | 2 (  | 1              | 0 | 1  | 9   | 0   | 10  | 0   | 2   | 4  | 0   | 0           | 2  | 11 | 0   | 0   | 3          | 6  | 0  |
| 8   | 0 | 0          | 8  | 0  | 0  | 1  | 4 (  | )              | 0 | 2  | 0   | 0   | 10  | )   | 2   | 8  | 0   | 0           | 3  | 4  | 0   | 0   | 4          | 0  | 0  |
| 9   | 0 | 0          | 9  | 0  | 0  | 1  | 6 (  | )              | 0 | 2  | 3   | 0   | i ( | 0   | 3   | 0  | 0   | 0           | 3  | 9  | 0   | 0   | 4          | 6  | 0  |
| 10  | 0 | 0          | 10 | 0  | 0  | 1  | 8 (  | ۱,             | 0 | 2  | 6   | 0   | 1   | )   | 3   | 4  | 0   | 0           | 4  | 2  | 0   | 0   | 5          | 0  | 0  |
| 20  | 0 | 1          | 8  | 0  | 0  | 3  | 4 (  | )              | 0 | 5  | 0   | 0   |     | )   | 6   | 8  | 0   | 10          | 8  | 4  | 0   | 0   | 10         | 0  | θ  |
| 30  | 0 | 2          | 6  | 0  | 0  | 5  | 0 (  | )              | 0 | 7  | 6   | 0   | 10  | )   | 10  | 0  | 0   | 0           | 12 | 6  | 0   | 0   | 15         | 0  | 0  |
| 40  | 0 | 3          | 4  | 0  | 0  | 6  | 8 (  | ij             | 0 | 10 | 0   | 0   | 10  | )   | 13  | 4  | 0   | 0           | 16 | 8  | 0   | 1   | 0          | 0  | 0  |
| 50  | 0 | 4          | 2  | 0  | 0  | 8  | 4 (  |                | 0 | 12 | 6   | 0   |     | )   | 16  | 8  | 0   | 1           | 0  | 10 | 0   | 1   | 5          | 0  | 0  |
| 60  | 0 | 5          | 0  | 0  | 10 | 10 | 0 (  | )              | 0 | 15 | 0   | 0   |     | i   | 0   | 0  | 0   | 1           | 5  | 0  | 0   | 1   | 10         | 0  | 0  |
| 70  | 0 | 5          | 10 | 0  | 0  | 11 | 8 (  | )              | 0 | 17 | 6   | 0   | 1   | l   | 3   | 4  | 0   | 1           | 9  | 2  | 0   | 1   | 15         | 0  | 0  |
| 80  | 0 | 6          | 8  | 0  | Ιo | 13 | 4 (  |                | 1 | 0  | 0   | 0   |     | l   | 6   | 8  | 0   | 1           | 13 | 4  | 0   | 2   | 0          | 0  | 0  |
| 90  | 0 | 7          | 6  | 0  | 0  | 15 | 0 (  | )              | 1 | 2  | 6   | 0   | 1 1 | l   | 10  | 0  | 0   | 1           | 17 | 6  | 0   | 2   | 5          | 0  | 0  |
| 100 | 0 | 8          | 4  | 0  | 10 | 16 | 8 (  | )              | 1 | 5  | 0   | 0   |     | l   | 13  | 4  | 0   | 2           | ı  | 8  | 0   | 2   | 10         | 0  | 0  |
| 200 | 0 | 16         | 8  | 0  | 1  | 13 | 4 (  | ì              | 2 | 10 | 0   | 0   |     | 3   | 6   | 8  | 0   | 4           | 3  | 4  | 0   | 5   | 0          | 0  | 0  |
| 300 | 1 | 5          | 0  | 0  | 2  | 10 | 0 (  | )              | 3 | 15 | 0   | 0   | !   | 5   | 0   | 0  | 0   | , 6         | 5  | 0  | 0   | 7   | 10         | 0  | 0  |
| 400 | 1 | 13         | 4  | 0  | 3  | 6  | 8 (  | •              | 5 | 0  | 0   | 0   | , ( | 6   | 13  | 4  | 0   | 8           | 6  | 8  | 0   | 10  | 0          | 0  | 0  |
| 500 | 2 | 1          | 8  | 0  | 4  | 3  | 4 (  |                | 6 | 5  | 0   | 0   | ! 8 | 3   | 6   | 0  | 0   | 10          | 8  | 4  | 0   | 112 | 10         | 0  | 0  |

|             | 7 Months   | 8 Монтна   | 9 Монтна   | 10 Months | 11 Months       | 12 Months        |
|-------------|------------|------------|------------|-----------|-----------------|------------------|
| £           | £ s. d. f. | £ s. d. f. | £ s. d. f. | £ s. d.f. | £ s. d. f.      | £ a. d. f.       |
| i           | 0 0 7 0    | 0 0 8 0    | 0 0 9 0    | 0 0 10 0  | 0 0 11 0        | 0 1 0 0          |
| 2           | 0 1 2 0    | 0 1 4 0    | 0 1 60     | 0 1 80    | 0 1 10 0        | 0 2 0 0          |
| 3           | 0 1 9 0    | 0 2 00     | 0 2 3 0    | 0 2 6 0   | 0 2 9 0         | 0 3 00           |
| 4           | 0 2 4 0    | 0 2 8 0    | 0 3 00     | 0 3 4 0   | 0 3 8 0         | 0 4 00           |
| 5           | 0 2 11 0   | 0 3 4 0    | 0 3 9 0    | 0 4 2 0   | 0 4 7 0         | 0 5 0 0          |
| 6           | 0 3 6 0    | 0 4 0 0    | 0 4 6 0    | 0 5 00    | 0 5 60          | 0 6 0 0          |
| 7           | 0 4 1 0    | 0 4 8 0    | 0 5 3 0    | 0 5 10 0  | 0 6 5 0         | 0700             |
| 8           | 0 4 8 0    | 0 5 4 0    | 0 6 0 0    | 0 6 8 0   | 0 7 40          | 0800             |
| 9           | 0 5 3 0    | 0 6 0 0    | 0 6 9 0    | 0 7 60    | 0 8 3 0         | 0 9 00           |
| 10          | 0 5 10 0   | 0 6 8 0    | 0 7 60     | 0 8 4 0   | 0 9 2 0         | 0 10 00          |
| <b>2</b> 0  | 0 11 8 0   | 0 13 4 0   | 0 15 0 0   | 0 16 8 0  | 0 18 4 0        | 1000             |
| <b>3</b> 0  | 0 17 60    | 1 0 0 0    | 1 2 6 0    | 0 5 00    | 1760            | 1 10 00          |
| 40          | 1 3 4 0    | 1 6 8 0    | 1 10 0 0   | 1 18 4 0  | 1 16 8 0        | 2000             |
| 50          | 1920       | 1 13 4 0   | 1 17 6 0   | 2 1 8 0   | 2 5 10 0        | 2 10 0 0         |
| 60          | 1 15 0 0   | 2 0 0 0    | 2 5 00     | 2 10 0 0  | <b>2 15</b> 0 0 | 3 0 00           |
| <b>7</b> 0  | 2 0 10 0   | 2 6 8 0    | 2 12 6 0°  | 2 18 4 0  | 3 4 2 0         | <b>3 1</b> 0 0 0 |
| 80          | 2 6 8 0    | 2 13 4 0   | 3 0 0 0    | 8 6 8 0   | 3 13 4 0        | 4000             |
| 90          | 2 12 6 0   | 3 0 0 0    | 3 7 6 0    | 8 15 0 0  | 4 2 6 0         | 4 10 0 0         |
| 100         | 2 18 4 0   | 3 6 8 0    | 3 15 0 0   | 4840      | 4 11 8 0        | <b>5</b> 0 0 0   |
| 200         | 5 16 8 0   | 6 13 4 0   | 7 10 0 0   | 8 6 8 0   | 9 3 4 0         | 10 0 00          |
| <b>3</b> 00 | 8 15 0 0   | 10 0 0 0   | 11 5 0 0   | 12 10 00  | 13 15 0 0       | <b>15</b> 0 0 0  |
| 400         | 11 13 4 0  | 13 6 8 0   | 15 0 0 0 I | 16 13 4 0 | 18 6 8 0        | 20 0 00          |
| 500         | 14 11 8 0  | 16 13 4 0  | 18 15 0 0  | 20 16 8 0 | 22 18 4 0       | 25 0 0 0         |

Page (1.1 20, last ,2 22, not ,3.1 23, F)

i

29, note 34, line (1) 54, note (6) 64, line

(î.) **65,** lœe 81 €

72. cot (£) 77, cot (\$), \$2, 500

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93, nin 41.) 1.2. Lie

 $\begin{array}{c} (12) \ 112, \, n_0 \\ (13) \ 124, \, n_0 \\ 125, \, n_0 \\ 14, \, 129, \, n_0 \end{array}$ 

115.1 142. u

.15.) 149. n .17.) 150, 1 .17.) 152. 1

(18.) 153, 1 (19.) 171, 173, 1

(8) <sub>174,</sub>

# ADDENDA ET CORRIGENDA.

Page (1.) 20, last line, for "charge" read "subject."

(2.) 22, note (1), add " see Goldstone v. Tovey, 6 Bing. N. C. 58; post, 626, note (g).
(3.) 23, Feme Covert. "Where a promissory note is given to a married woman during coverture, and the husband does not do any act during his life to reduce it into possession, the right to the note survives to the wife; Gaters v. Madely, E. T. 1840, Exch. 4 Jurist, 724." note (s), last line, for note (a) read " note (u).

(4.) 29, note (o), add "see Sykes v. Gilen, 5 M. & W. 645." 34, line 12 from bottom, for "was" read "is."

(5.) 54, note (n), add " see Anderson v. Weston, 6 Bing. N. C. 206; post, 643, note (u)."

(6.) 64, line 5 from top, dele "to;" and at end of paragraph add as note, " but see 3 & 4 Will. 4, e. 98,

s. 3; Bank of England v. Booth, 2 Keen, 466; ante, 62, 63, note (f).

'7 Geo. 4, c. 46, ss. 12, 13. The proper mode by which the authority of the court is to be sought for issuing an execution against a person who was a member of the co-partnership at the time either of the contract entered into or of the judgment obtained, in pusuance of this statute, and of intimating to such person the intention of fixing him with the responsibility to which he is thereby subjected, is by scire facias, and not by suggestion on the record;" Bosanquet v. Ransford, Public Officer, &c.; Paulett r. Nuttall, Public Officer, &c. H. T. 1840, Q. B. 4 Jurist, 457; 3 Per. & Dav. 298, S. C.; and see Cross r. Law Public

Officer, & c. 6 Mee. & W. 217, S. P. (7.) 65, line 8 from top, for "1 & 2 Vict. c. 98," read "1 & 2 Vict. c. 116."

at end of note (m), add "Further continued until 31st August, 1842, by 3 & 4 Vict. c. 111, the second section of which act subjects members of joint stock banking companies to punishment for embezzling the notes of the company in the same manner as if not members;" see post, 825, Addendum to page 806.

72, note, (x), for "6 M. & R." read "2 Cr., M. & Ros."

(8.) 77, note (h). See Addenda to page 605.

(9.) \$3, note (y), add "Contracts in restraint of trade, though limited as to time, are void if general, and

without restriction as to place;" Ward v. Bryne, 5 M. & W. 548; 3 Jurist, 1175, S. C. (10.) 88, line 18 from top, after 2 & 3 Vict. c. 37, add as note "Continued until 1st January, 1843, by \$. & 4 Vict. c. 83." note (d), for "ante, 62," read "ante, 63."

93, ninth line from top, for "are declared," read " is declared."

(11.) 102, last line, add, "By the 1 & 2 Vict. c. 85, (post, 531), stamps denoting duties payable in one part of the United Kingdom, may be used for instruments liable to stamp duties payable in any other part."

(12.) 112, note (r), add "See 1 & 2 Vict. c. 85, post, 531."

- (13.) 124, note (1), add "See Keable r. Payne, 3 N. & P. 531; 8 Ad. & El. 555." 125, note (y), for " Mood. & R." read " Man. & R."
- (14.) 129, note (c). What amounts to a Bill or Note. "An instrument in the following form:—' Memorandum, August 25, 1837. I, Benjamin Payne, had 5l. 5s. for one month, of my mother, Annually, August 25, 1837. ne Shrivel, from this date to be paid to her by me, Benjamin Payne,' is a promissory note, and requires a stamp to be admissible in evidence;" Shrivel v. Payne, E. T. 1840, Q. B. 4 Jurist, 485.
- (15.) 142. "In an action on a promissory note the defendant pleaded that the note was given under a parol agreement that the defendant should renew it when due, by paying discount and giving another note, and that he offered to do so; the plaintiff took issue on this plea: the judge at the trial would not prevent the defendant from going into evidence in support of this plea, although it was suggested that the plea was bad, as setting up a parol agreement to vary a written in-

strument, because the plaintiff had taken issue on the plea; Holt r. Miers, 9 Car. & P. 191."

(16.) 149, note (m), add "See post, 563; Owen r. Waters, 2 M. & W. 91, 93, et seq.; 5 Dowl. 324, S. C. 150, lines 5 and 9 from the bottom, after "payable" insert "to bearer."

(17.) 152, note (a), add "But semble, that an allegation in the declaration of a presentment generally, will be sufficient after verdict;" Lyon v. Holt, 5 M. & W. 250; post, 364, 576.
153, note (h), for "34" read "341," and add "7 Dowl. 551, S. C.; nom. Higgins v. Nichola."
(18.) 171, add "see Novelli v. Rossi, 2 B. & Ad. 757; post, 309, note (t)."

(19.) 173, add "When delivery of bill to auctioneer for purchase-money no payment to principal;" Sykes v. Giles, 5 M. & W. 645.

(20.) 174, line 15 from bottom, for "may sue," read "may be sued."

(39.)

(40.)

Page Page (29.) 174, note (f). "A plea that the defendant accepted a bill of exchange for 60l. in satisfaction of the plaintiff's demand, is not sustained by evidence that the defendant remitted to the plaintiff a 362. 367. stamp having upon it 601. in figures in the margin, and an acceptance across; the bill appearing to have been altered in the figures and filled up as a bill for 46l., before the name of the plaintiff as drawer was attached to it;" Baker v. Jubber, 1 Scott's N. R. 26. (21.) 178, note (m), add "See Tarleton v. Alhusen, 2 B. & Ad. 32; post, 401, note (b)." (22.) 184, note (e), add "Byron v. Thompson, 2 P. & Dav. 71; post, 531, note (r)."
186, sixth line from top, dele "therefore." (23.) 191, note (y), add "but see Knight v. Clements, S Ad. & E. 215; 3 Nev. & P. 375, S. C.; post, (41) 375. 624, note (f)."

(24.) 192, note (f), dele top line of first column and insert at end of note (l). (43.) 387. 194, lines 10 and 18 from top, for "drawee" read "drawer." (25.) 196, note (d), add "but now settled that it is, see same case 2 B. & Ad. 385; post, 519, note (r)." (41.) 423. 201, note (m), last line, after ante, add "108, note (e)."

(26.) 206, Transfer by Bankrupt. "The protection given by the statute 2 & 3 Vict. c. 29, s. 1, to contracts with bankrupts and executions against their property bond fide executed or levied before the date and issuing of the fiat of bankruptcy, is not receivable in evidence in an action of trover by the assignee against an execution-creditor, either under the plea of not guilty, or a plea that the plaintiffs were not lawfully possessed of the goods as assignees at the time of the alleged conversion. Semble, also, that the latter plea does not render it necessary for the plaintiffs to prove the petitioning creditor's debt;" Byers and others, assignees, v. Southwell, 9 (45.) 467. Car. & P. 820. (27.) 208, Notice of Act of Bankruptcy. Add "see Sowerby v. Brooks, 4 B. & Ald. 523; post, 396, note (f)." (28.) 218, note (0), third and fourth lines, for "Littledale v. Brown and Turner," read "Brown t. (46.) 468, 1 Turner.' (29.) 228, note (g), add "See Faith v. Richmond, 3 P. & D. 187; post, 531, note (n)." 239, line 6 from top, dele " if." (30.) 242, note (i). "A promissory note was indorsed by the plaintiff as follows:—'I hereby assign this draft, and all benefit of the note secured thereby, to J. G. of, &c. and order the within named T. F. H. (the maker of the note) to pay him the amount thereof, and all interest in respect thereof, (signed) H. O. R.: held, that this indorsement did not require a stamp, being is fact nothing more than a common indorsement; Richards v. Frankum, 9 Car. & P. 221.

(31.) 247, note (z), add "See Tarleton v. Alhusen, 2 B. & Ad. 32; post, 401, note (b)."

(32.) 248, Guarantees in lieu of Indorsement. "A guarantee in the following terms:—" In consideration." tion of your supplying my nephew V. with china and earthenware, I hereby guarantee the payment of any bills you may draw on him on account thereof to the amount of 2001. was held a continuing guarantee;" Mayer v. Isaac, T. T. 1840, Exch. 4 Jurist, 437.

"Quære, whether the doctrine laid down by the court in Nicholson v. Paget, 1 Cr. & M. (47.) 511, no 522, fi 525, p 48; 3 Tyrw. 164; 5 Car. & P. 395, that a guarantee is to be construed liberally in favorrof the party who gives it, be law; '' id. ibid. And see Batson v. Spearman, 3 P. & D. 77, as to (43.) 526, 1. what is a continuing security. (33.) 251, note (r), add "See as to separate actions by different plaintiffs in respect of same conversion, Knight v. Leigh, 6 Law J. 128, C. P.; 1 M. & P. 528; 4 Bing. 589, S. C.; post, 524, note (a)." (34.) 257, note (n), add "See Uther v. Rich, 2 P. &D. 579, 585; post, 604, note (z)." 263, note (k), for "Part II." read "Part III." 274, Who to present for acceptance. See order in bankruptcy, Appendix, 811. 235, note (x), for "3 Camph." read "4 Campb." (35.) 286, line 17 from top, add "But if A. sign his name upon blank paper stamped with a note stamp, and transmit it to B., with a parol authority to draw a note not exceeding a certain amount, an indorsee cannot without proof of consideration recover upon the note, if B. has drawn it for a larger sum, though there is no proof that the message conveying the parol authority was delivered to B. :" Rowlands v. Evans, Q. B. Faster Term, 1840; 4 Jurist, 460. See Addendum to page 174, note (f). note (a), add "5 M. & P. 275; 7 Bing. 428, S. C." 536, 1 517, 1 (86.) note (a), and a bit & 1 210, a bing 420, 5. C.

291, note (s), for "post, 292, note (v)," read "post, 294, note (l)," and dele rest of note.

299, note (o), and "See Neale v. Reid, 1 B. & C. 659; 3 D. & R. 158, S. C.

305, note (u), for "Ex parte Marshall," read "Ex parte Prescott."

309, at end of note (x), for "note (a)," read "note (d)." ., , ecc 552, *I* (37.) 552, L 317, line 12 from bottom, instead of "but also" read "as against." (38.) 335, note (n), for "9 & 10 Will. 3, c. 17," read "3 & 4 Anne, c. 9."

346, note (k), for "ante, 311," read "ante, 383, note (i)."

(39.) note (m). "In practice, however, the personal attendance of the acceptor supra protest is said.

to be unnecessary, and that an acceptance supra protest may be made by a clerk or agent the same as in ordinary cases." See Brooke's Office of Notary, p. 88, note. note (r). "The acceptor supra protest should also obtain from the notary a certificate of his

having so accepted the bill, which certificate is termed an act of honour. See as to the neces-

sity and utility of this, Brooke's Office of Notary, pp. 86 to 88.

362, line 9 from top, dele the words "and copies of such protest." 360, note (y), line 7, for "since," read "see."

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362, line 4 from top, for " 2 & 8 Will. 4," read " 3 & 4 Will. 4."

367, note (d), for " 4 Bur. & Ald." rend " 4 Bar. & Adol." "The holder of a bill of exchange sent a person on the day of its maturity to present it at the place to which it was addressed. The party so employed was informed by a woman whom

he saw coming out of the house, (and who, as appeared from evidence subsequently given, was a lodger there), that the acceptor had formerly lived there, but had recently quitted: it was held that this was evidence to go to the jury of a presentment to the acceptor, so as to charge the indorser;" Buckstone c. Jones, 1 Scott's N. R. 19; 1 Man. & Granger, 83, S. C. (42.) 375, line 5 from top, dele "Rio de Janeiro, Bahia," and insert in margin. (43.) 397, note (m), add "But such presentment is not sufficient to render banker liable to an action at suit of customer for not paying the bill." Whitaker r. Bank of England, 1 C. M. & R. 744,

post, 513, note (o).

(44.) 423, Of the receipt for Payment. "By a promissory note E. H., W. D., and J. H. jointly and severally promised to pay to J. E. 3001. with interest; W. D. having afterwards paid J. E. 2801. on account of the note, J. F. mude the following indorsement upon it:- 'Received of W. D. the sum of 2801. on account of the within note, the 3001. having been originally advanced to E. H.' In an action brought by W. D., who had paid the whole amount due against J. H., to recover contribution from him 'as a co-surety:' it was held that the indorsement was admissible in evidence, to prove not only the payment of the 280%, but also that the money was originally advanced to E. H. as principal;" Davies v. Humphreys, 6 Mee. & Wels. 153.

(45.) 467, Notice of dishonour, what not sufficient. "In an action by an indorsee against an indorser of

a promissory note, the following was held not to be a sufficient notice of dishonour:- 'This is to inform you, that the bill I took of you 151. 2s. 61. is not took up, and 4s. 6d. expense; and

the money I must pay immediately. My son will be in London on Friday morning; "Messenger v. Southey, I Scott's N. R. 180; I Man. & Granger, 77, S. C.

(46.) 468, Notice of dishonour, what sufficient. "A notice of dishonour of a bill of exchange in these words—'(Sir, I beg to inform you that Mr. D's acceptance of 2001. drawn and indorsed by you, due July 31st, has been presented for payment and returned, and now remains unpaid,' is a sufficient notice;'' Cook v. French, E. T. 1840, Q. B. 4 Jurist, 433.

"The indorsee of a bill of exchange, which had been presented for payment to the acceptor and dishonoured, sent on the next day the following letter to the next immediate indorser: 6, Bernard St., Russell Square-Sir, the bill for 2501., drawn by S. R., accepted by C. R., and bearing your indorsement, has been presented for payment and returned dishonoured, and now lies over-due and unpaid with me as above, of which I hereby give your notice,' held sufficient;" Lewis r. Goinpertz, Exch. E. T. 1840, 4 Jurist, 393; 6 M. & W. 399.

(47.) 511, note (e), for "55 Geo. 3, c. 104," read "55 Geo. 3, c. 184."

note (h), add "See Keable r. Payne, 3 N. & P. 531; 8 Ad. & El. 555, S. C." 522, line 17 from top, after "payable" insert "to bearer."

525, note (b). See Addendum to page 129, note (c).
(48.) 526, I. O. U. "A., an attorney, caused B. to be subprensed as a witness in a cause in which A. was attorney, and B., before he went to the assizes, asked A. who was to pay him, and A. said he would do so. After the assizes, at which B. attended and was examined, A.'s clerk, by the direction of A, gave B. an I. O. U. for the amount of B.'s expenses and loss of time, which amount A. received from the opposite party, after the costs in the cause had been taxed: held, that B. might recover the amount from A on a declaration containing counts for money had and received, and on an account stated;" Evans v. Philpots, 9 Car. & P. 270.

"An I. O. U. which contains special terms that the sum to be paid shall be reduced in a certain event, and that the part of the sum shall be disposed of in a particular manner, will require an agreement stamp, unless it relate to an amount under 201.;" id. ibid.

"The plaintiff produced at the trial an I. O. U. signed by the defendant, but not addressed; and there was no explanation given as to how it came into the plaintiff's hands: held, that its mere production by the plaintiff was prim's facie evidence that it was given to him by the defendant, in support of an account stated;" Curtis r. Rickards, 1 Scott's N. R. 155; I Man. & Gr 46; 4 Jurist, 508, S. O.

536, line 12 from top, dele "and arrest."

537, line 12 from top, for "party" read "part."
530, note (c), after "Bing." add "N. C."
532, Declaration—Form of. See Addendum to 598, 599.
553, note (y). "The omission of the word 'whereas' in a declaration in debt is no ground of detnurrer; for the allegation of debt need not be by way of recital; and though this word be found in the forms referred to in the new rules, yet it may be omitted, as such omission does not render the allegation of debt less clear;" Shepherd v. Gosden, Bail Court, E. T. 1840, 4 Jurist, 579.

536, Declaration-General Conclusion. "A declaration in assumpsit alleged, that on a certain day before the commencement of the suit, the defendant drew a certain bill of exchange, directed to D. and Co., which was subsequently indorsed to the plaintiff; that the bill was protested for non-acceptance, and, afterwards, also for non-payment; of all which the defendant had notice; that also, at a certain time before the commencement of the action, the defendant was indebted to the plaintiff in a certain sum on an account stated; that the defendant in consideration of the premises respectively, then, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the said several monies respectively, on request; and stating

(58.) 610, (59.) note (60.) 613,

Page as a breach that the defendant had disregarded his promise, and not paid any of the said monies, or any part thereof; to which declaration the defendant demurred specially, as being double and uncertain: held, that the declaration was not demurrable on either of these grounds, whether it was to be considered as containing only one count, or as divisible into two;" Galway v. Rose, H. T. 1840, Exch. 4 Jurist, 320; 6 Mee. & Wels. 291, S. C.

(51.) 590, Rule to compute. Service of Rule. "A rule to compute was served, by giving it to a servant of the party at his usual place of business: held insufficient service;" Ibbertson v. Phillips, T. T. 1840, Ěxch. 4 Jurist, 467.

Motion to set aside Judgment. "An affidavit in support of a rule to set aside an interlocutory judgment, must state in express terms that judgment has been signed: and it was held not to be sufficient to state that a rule to compute had been served on the defendant;" Classey r. Drayton, 6 Mee. and Wels. 17.

595, first line, for "r. 3," read "r. 2."
(53.) 597, Plea of Payment of Money into Court. "To a declaration in debt containing a count upon a bill of exchange for 33l. 3s. 9d. with counts for goods sold, and upon an account stated, each in the sum of 70l., and demanding in the usual form the sum of 173l. 3s. 9d. the defendants pleaded, except as to 20l. parcel of the sum of 173l. 3s. 9d. in the declaration demanded, and for the payment of which said sum of 201, the plaintiff has given the defendant credit in his particulars of demand, actionem non, because the defendants now bring into court the sum of 13/. 12s. ready to be paid to the plaintiff; and they further say, that they were never indebted to the plaintiff to a greater amount than the said sum of 13/. 12s in the introductory part of this plea mentioned: it was held that the plea was bad on special demurrer, that it ought to have shewn some answer as to part, and pleaded payment into court as to the residue;" Arm-

field v. Burgin, 6 Mec. & Wels 281.
ote (r). Plea of non Detinet. "In an action of detinue to recover a promissory note it is (54.) 597, note (r). not competent for the defendant under the plea of non definet, to shew that he held the note for a party to whom it had previously been indersed by the plaintiff;" Richards r. Franckem,

4 Jurist, 682, Easter Term, 1840, Exch.
(55.) 598, 599, Non-assumpsil. "In an action by the indorsee against the maker of a promissory note, the first count alleged that the defendant made the note payable on a certain day, that he delivered the note to the payee, and promised to pay the same according to the tenor and effect thereof, that default was made in payment of the note when it became due, whereby the defendant became liable to pay the amount. The second count was upon an account stated, and alleged that on, &c. (a day long subsequent to the note becoming due) the defendant became and was indebted to the plaintiff in, &c. on an account then stated between them, and the defendant afterwards to wit, on the day and year aforesaid, in consideration of the premises, promised the plaintiff to pay him the said several sums of money on request: held that this was an action on a promissory note within the meaning of the new rules, and that the plea of non-

assumpsit was inadmissible;" Donaldson v. Thompson, 6 Mee. & Wels 316.

(56) 602, Sham and Frivolous Pleas, &c. "In an action by the holder of a banker's check, the defendant, who was under terms of pleading issuably, pleaded that the sole consideration for the check in question was money won from him (by a party to whom the check was originally given) at play in a certain common gambling house, at an unlawful game called hazard: held not an issuable plea;" Humphreys v. Waldegrave, T. T. 1840, Exch. 4 Jurist, 466.

"When a party is under terms to plead issuably, it is no excuse for pleading a non-issuable plea, that it was pleaded by leave of a judge subsequently obtained on the usual summons to

plead several matters;" id. ibid.

"Where the acceptor of a bill of exchange in an action by the indorsee against him demnis, because it does not appear on the face of the declaration to whose order the bill has been drawn, such demurrer will not be set aside as frivolous;" Hart v. Proudfoot, 4 Jurist, 579, E. T. 1840, Q. B. Bail Court.

(57) 605, Pleas-Failure of Consideration. "Plea to an action of debt by the payee against the maker of a promissory note payable on demand, that the note was given as and for the purchase money to be paid to the plaintiff for land agreed to be sold by the plaintiff to the defendant, and that no memoraudum or note of the contract in writing was signed by the defendant of any person lawfully authorized by him, and that there was not any consideration or value for the making or payment of the note, except as aforesaid: was held bad on special demurrer, as it did not allege that the plaintiff had refused to execute a conveyance, and therefore did not shew a total failure of consideration;" Jones v. Jones, 6 Mee. & Wels. 84.

"The plaintiff replied that after the making of the contract the defendant paid part of the purchase money and was let into possession, and that the plaintiff had always been ready and

willing to execute a conveyance. Quære, whether this replication was bad for multifariousness; id. ibid.

Plea to an action by the drawer against the acceptor of a bill of exchange for 201. 8s. 6d. that before the drawing and acceptance of the bill it was agreed between the plaintiff and defendant that the plaintiff should do certain carpenters' work for the defendant for 631.; that the defendant paid the plaintiff 431. in part payment of the 631., and afterwards accepted the bill of exchange on account of the residue of the 631; that the plaintiff did not perform by

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614, 1 (61.) 616.

(62) 622.

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168.) 666,

Page agreement, but neglected to perform some work, and performed in an unworkmanlike manner other work necessary to be done under the agreement, and that the 431. was more than the whole work done was worth: held bad, on motion for judgment non obstante veredicto, as disclosing, not a total failure of consideration for the bill, but only a partial failure of the consideration to which the money payment and the bill were alike applicable;" Trickey v. Larne, 6 Mee. & Wels. 278.

Accord and Satisfaction. See Addendum to page 114, note (f).

(58.) 610, note (l), add "6 M & W. 351, S.C. Judgment affirmed on error in the Exchequer Chamber."

(59.) note (n). add " 6 M. & W. 153, S. C."

(60.) 613, 614, Statute of Limitations-Acknowledgment. "The acknowledgment in writing, to take a case out of the statute of limitations, must either amount to a distinct promise to pay or to a distinct acknowledgment that the sum is due. Semble, that there is some doubt whether it is a question for the judge or for the jury to determine whether a letter written by the defendant be or be not a sufficient acknowledgment for this purpose; and till that point is settled the learned judge will, to save the parties expense, express his own opinion with respect to the document, and also leave it to the jury;" Bucket v. Church, 9 Car. & P. 209.

"The following letter, which was proved to have been delivered to an agent of the plaintiff, was held a sufficient promise, under stat. 9 Geo. 4, c. 14, s. 5, though it expressed neither date nor sum, and though it was not addressed to the plaintiff or his agent by name, 'Sir, —I am sorry to give you so much trouble in calling, but I am not prepared for you; but will, without neglect, remit you in a short time. Your's respectfully, F. W.;" 'I lartley v. Wharton, E. T. 1840, Q. B. 4 Jurist, 576.

614, note (o), for "2 Mood. & Mal." read "1 Mood. & Rob."

(61.) 616, Payment of Interest. "In an action upon a joint and several promissory note, evidence of one maker having drawn another promissory note for pryment of interest due upon the first debt, will take the case out of the statute of limitations as against the other. So also evidence of payment of a dividend under a deed of assignment of the property of the one maker who had become insolvent and suffered judgment by default," Read v. Wrout, 4 Jurist, 577, E. T. 1840, Q. B

(62.) 622, Similiter. "An ordinary similiter added by the party delivering the issue for himself, is not a pleading within the rule H. T. 4 Will. 4, r. 1, and, therefore, does not require to be dated;" Edden v. Ward, T. T. 1840, Q. B. 4 Jurist, 719.

(63.) 633, Evidence—Handwriting. At end of first paragraph, add "and in a very late case it was held, that where the handwriting of A. B. is in issue, a paper purporting to be written by A. B., but not relative to the issue in the cause, cannot be put into the hands of witnesses in ordar to test their veracity, by asking them whether it is in his handwriting; and that the rule is the same whether there be direct evidence of the paper having been written by A. B. or not;" Griffits r. Ivory, 3 Per. & Day. 178.

(64.) Subscribing Witness. "On the trial of an action of detinue for a promissory note, the note was called for by the plaintiff's counsel, and produced by the defendant's counsel, and had on the back this memorandum :— 'This draft was signed in my presence on the date within named (signed) N. D.;' it was held, that the plaintiff must call N. D. to prove the making of

the note;" Richards r. Frankum, 9 Car. & P. 221.

(65.) 634, note (c), add "sed ride Cronk v. Frith, 9 Car. & P. 197."

686, note (y), second column, line 5 from bottom, for "defendant" read "debt," and for "priority" read "privity."

(66.) 662, Evidence—Consideration. "If A. sign his name upon blank paper stamped with a note stamp, and transmit it to B. with a parol authority to draw a note not exceeding a certain amount, an indorsee cannot, without proof of consideration, recover upon the note if B. has drawn it for a larger sum, though there is no proof that the message conveying the parol authority was delivered to B;" Rowlands v. Evans, E. T. 1840, Q. B. 4 Jurist, 460.

"A declaration on a check on a banker stated that the defendant drew his check on W. and Co., and delivered it to B. L. who transferred it to the plaintiff. The defendant pleaded, 1st, that the check was given to B. L. as the nominal value of counters to play at an unlawful game, as B. L. well knew, and that before the plaintiff took the check he had notice of the premises; and 2dly, a similar plea, in which, instead of an averment of notice, it was averred that the plaintiff gave no value for the check. Replication, denying the notice, and stating that the plaintiff gave a good consideration for the check: held, that on these pleadings the de-

fendant must begin;" Bingham r. Stanley, 9 Car. & P. 374.

(67.) 665, note (f), "Where a defendant pleaded that a promissory note, on which the plaintiff sued as payee, was given to the plaintiff as trustee for W., and that W. had made a bargain for its renewal on certain terms stated in the plea, and the plaintiff took issue on the plea; it was held, that evidence of the actual bargain made by an agent of the defendant might be given in evidence, but that evidence of any thing that W. said at any other time was not receivable;" Holt v. Miers, 9 Car. & P. 191.

(68.) 666, note (m), dele third line and add "post, Appendix;" and at end of note add "A notice to produce a letter from the defendant to the plaintiff was served on the plaintiff's attorney at a quarter before nine on the night before the trial. It was a letter on the subject of the promissory note on which the action was brought, and was an answer to a letter from the plaintiff to the defendant on the same subject: held, that the notice to produce was served too late;" Holt v. Miers, 9 Car. & P. 191.

(69) 667, Right to Begin. "In an action on a bill of exchange by indorsee against acceptor the defendant plended pleas denying the acceptance and the indorsement; and also two pleas of pay-ment, upon all which issue was joined. The defendant's counsel at the trial offered to admit the acceptance and indorsement, and wished to begin: held, that this admission of all the facts, the proof of which was on the plaintiff, did not entitle the defendant to begin;" Pontifex s. Jolly, 9 Car. & P. 202.

(70.) 670, Compelency of Witness. "In an action against one of the three makers of a joint and several promissory note, another of the makers was called as a witness, who stated, on the voir dire, that he had signed the note only as a surety for the defendant; it was held, that he was a competent witness to prove the making of the note by the latter;" Page v. Thomas, E. T. Exch.

4 Jurist, 724.

note (v), add "See also Harnett r. Johnson, 9 Car. & P. 206, S. P."

680, note (d), for "Manhall v. Poole, 13, East 91," read "Marshall v. Poole, 13 East, 98."

716, note (k), for "Ex parte Marshall," read "Ex parte Wallon."

(71.) 724, note (f), add "Ex parte Buckingham, Court of Review, T. T. 1840, June 16th, 4 Jurist, 612." 733, note (a), add "And if A. and B, partners, are jointly indebted to C., and A. becomes bankrupt, and C. proves his debt under the fiat and receives a dividend, C. cannot bring a joint action against A. and B. for the same debt, without indemnifying the bankrupt against all the expenses of the action to whatever point it may be carried, and must pay the costs of a petition to the court for such indemnity; Ex parte Stanton, T. T. 1840, C. R.; 4 Jurist, 684.

(78.) 806, Embezzlement by Members of Banking Companies. "3 & 4 Vict. c. 111, s. 2. And where-

as it is expedient to extend the provisions of the said act (1 & 2 Vict. c. 96) hereby continued in manner hereinaster stated, be it enacted. That if any person or persons being a member or members of any banking co-partnership within the meaning of the said act, or of any other banking co-partnership consisting of more than six persons formed under or in pursuance of an act passed in the 3d & 4th years of the reign of King William the Fourth, intituled 'An Act for giving to the Corporation of the Governor and Company of the Bank of England certain Privileges for a limited period under certain Conditions,' shall steal or embezzle any money, goods, effects, bills, notes, securities, or other property of or belonging to any such co-partnership, or shall commit any fraud, forgery, crime or offence against or with intent to injure or defraud any such co-partnership, such member or members shall be liable to indictment, information, prosecution, or other proceedings in the name of any of the officers for the time being of any such co-partnership, in whose name any action or suit might be lawfully brought again any member or members of any such co-partnership for every such fraud, forgery, crime, or offence, and may thereupon be lawfully convicted, as if such person or persons had not been or was or were not a member or members of such co-partnerships, any law, usage, or custom to the contrary notwithstanding."

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| c. 97, s. 16, stamps, 102. c. 98, banking companies, 16, 17, 62, 88.  4 & 5 Will. 4, c. 15, s. 1, presentment of government bills, &c. 388.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | c, 83,                  | banking companies, 63.                                |
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| c. 40, savings' banks, friendly societies, 727, 728.  5 & 6 Will. 4, c. 29, bankrupts, &c. 692.  c. 41, usury, &c. 90, 82, 88, 93, 95, 703.  6 & 7 Will. 4, c. 27, bankrupts, 692.  c. 58, presentment of bills accepted for honour, &c. 351, 165, 370, 378, 478, 508.  7 Will. 4 & 1 Vict. c. 73, trading companies, 66, 60.  c. 80, usury, 88.  c. 84, forgery, &c. 765.  1 & 2 Vict. c. 10, co-partnerships, clergy, 14, 65.  c. 59, stamps, 531.  c. 96, banking companies, 65, 17, 60.  1 & 2 Vict. c. 110, arrest, insolvent, execution, &c. 544, 546, 591, 695, 5, 212, 393, 513, 523, 526, 641, 757, 760.  2 & 3 Vict. c. 11, s. 12, bankrupts, 206.  c. 29, bankrupts, 206, 55, 202, 208, 213, 392, 396, 514.  c. 37, usury, 88, 87.  c. 68, banking companies, 60.  3 & 4 Vict. c. 83, usury, Addenda, 819.  c. 111, banking companies, Addenda,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                         | government bills, &c.                                 |
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| c. 41, usury, &c. 90, 82, 88, 93, 95, 703.  6 & 7 Will. 4, c. 27, bankrupts, 692.  c. 58, presentment of bills accepted for honour, &c. 351, 165, 370, 378, 478, 508.  7 Will. 4 & 1 Vict. c. 73, trading companies, 66, 60.  c. 80, usury, 88. c. 84, forgery, &c. 765.  1 & 2 Vict. c. 10, co-partnerships, clergy, 14, 65. c. 96, banking companies, 65, 17, 60.  1 & 2 Vict. c. 110, arrest, insolvent, execution, &c. 544, 546, 591, 695, 5, 212, 393, 513, 523, 526, 641, 757, 760.  2 & 3 Vict. c. 11, s. 12, bankrupts, 206.  c. 29, bankrupts, 206, 55, 202, 208, 213, 392, 396, 514.  c. 37, usury, 88, 87.  c. 68, banking companies, 60.  3 & 4 Vict. c. 83, usury, Addenda, 819.  c. 111, banking companies, Addenda,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                         | societies, 727, 728.                                  |
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| c. 58, presentment of bills accepted for honour, &c. 351, 165, 370, 378, 478, 508.  7 Will. 4 & 1 Vict. c. 73, trading companies, 66, 60.  ———————————————————————————————————                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                         | <b>93, 95, 7</b> 03.                                  |
| cepted for honour, &c. 351, 165, 370, 378, 478, 508.  7 Will. 4 & 1 Vict. c. 73, trading companies, 66, 60.  ———————————————————————————————————                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                         |                                                       |
| 351, 165, 370, 378, 478, 508.  7 Will. 4 & 1 Vict. c. 73, trading companies, 66, 60.  ———————————————————————————————————                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | c. 55,                  | cepted for honour. &c.                                |
| 7 Will. 4 & 1 Vict. c. 73, trading companies, 66, 60.  ———————————————————————————————————                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                         | 351, 165, 370, 378, 478,                              |
| 66, 60.  ———————————————————————————————————                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 7 Will. 4 & 1 Vict. o   |                                                       |
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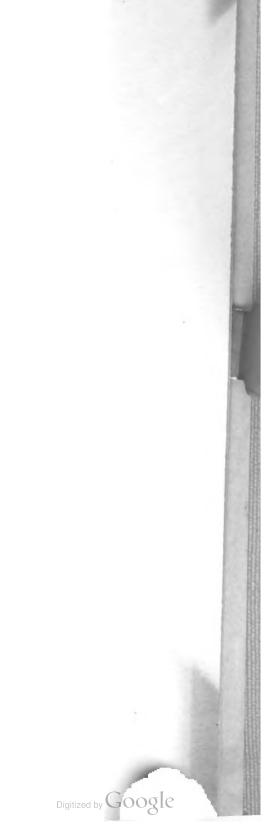
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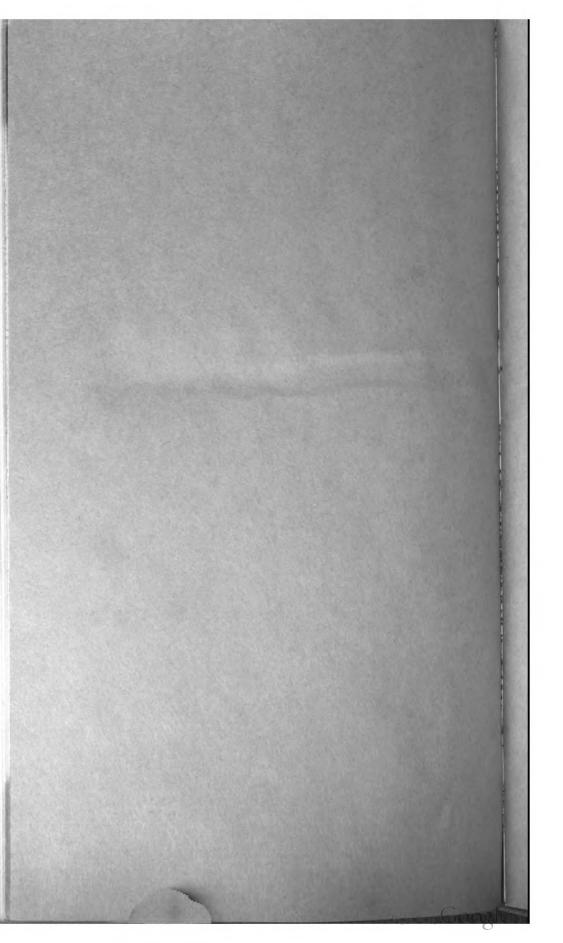
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